

CLAIM SUMMARY / DETERMINATION FORM

Date	: 7/06/2010
Claim Number	: N08057-076
Claimant	: Warta Shipping, Ltd.
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: <u>Alyssa Lombardi</u>
Amount Requested	: \$89,811.80

I. Facts

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision and discharged oil into the Mississippi River, a navigable waterway of the United States. Approximately 282,828 gallons oil¹ were released into the Mississippi River and the resulting spill response, coordinated by the FOSC Unified Command, initially closed the river to vessel traffic and later, when reopened, managed traffic.

II. Responsible Party

American Commercial Lines LLC (ACL), the Responsible Party (RP), owned the barge at the time of the incident and is a responsible party under the Oil Pollution Act.

III. The Claimant and the Claim

Chaffe McCall, L.L.C., Inc. (Chaffe) has submitted a claim into the National Pollution Funds Center (NPFC) for their client, Warta Shipping, Ltd (Warta) (which is managed by Polska Zegluga Morska). At the time of the collision, the M/V Warta was under a Euromed form charter party to Cargill Americas, Inc. (Cargill).² The M/V Warta arrived at General Anchorage (Mississippi Mile Marker (MM) 90.1) and tendered a Notice of Readiness at 1239 hours to commence operations at the Cargill Westwego Elevator (MM 103.5). However, before it was granted berth, the Mississippi River was closed by the USCG due to the DM 932 oil spill.

After sitting idle at General Anchorage (GA), it was discovered that the M/V Warta had oil on its hull. Therefore, at 1635 hours on July 26, 2008, and per USCG orders, the vessel departed GA for the USCG decontamination area. As it was too dark upon arrival (at 1830 hours) to perform the inspection, the vessel was sent back to GA until it was re-called to the decontamination area, with hull cleaning completed by 1230 hours on July 27, 2008. By 1250 hours, the M/V Warta continued on its intended voyage. Warta is claiming a total delay of movement of 4 days, 8 hours and 32 minutes, or 4.36 days.

Because the M/V Warta's movement was restricted during this delay period, and in order to determine the estimated loss of profits, Warta has applied the demurrage rate of \$17,500.00 as owed them under the Norgrain charter.³ Applying this rate to the 4.36 days, Warta calculates a direct income loss of \$76,358.00 for this time period. Additionally, during these 4.36 days, Warta claims an additional 8.4 metric tons (mt) of IFO fuel and 1.0 mt of MDO fuel, increasing

¹ See House Subcommittee Hearing on DM 932 Oil Spill, dated 9/15/2008

² See Euromed Charter Party between Warta and Cargill, dated 5/02/2008, submitted with the claim by Chaffe for Warta on 3/17/2010

³ See Demurrage Rate, under the Main Terms addendum of the Norgrain Charter between Cargill and Warta, submitted with the claim by Chaffe for Warta on 3/17/2010

costs by \$5,641.00, as well as \$7,812.80 in additional pilot and tug expenses. When the projected income loss, increased bunkers and additional pilots and tugs are combined, Warta's claim totals \$89,811.80.

IV. APPLICABLE LAW

In general, claims for the removal costs or damages must first be presented to the RP per 33 USC 2713(a). If the RP denies the claim or does not settle the claim within ninety days, the claimant may commence an action in court against the RP or present the claim to the Fund. 33 USC 2713(c)

The uses of the OSTLF are described at 33 USC 2712(a). It provides in relevant part that:

“The Fund shall be available to the President for the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to consistent with the National Contingency Plan or uncompensated damages.”

Damages include damages for loss of profits or earnings capacity as a result of loss or destruction of real or personal property or natural resources. 33 USC 2702(b)(E) Damages are further defined to include the costs of assessing the damages. 33 USC 2701(5)

Damage claims must be presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care. 33 USC 2717 (h)(2)

In any case in which the president has paid an amount from the Fund for any removal costs or damages specified under subsection (a), no other claim may be paid from the Fund for the same removal costs or damages. 33 USC 2712 (i)

Congress directed the President to promulgate regulations “for the presentation, filing, processing, settlement, and adjudication of claims...” 33 USC 2713 (e) Those regulations are found at 33 CFR part 136.

Under 33 CFR 136.105(a) & 136.105(e)(6), the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. Further, a claim presented to the Fund should include, as applicable:

“the reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney's fees or other administrative costs associated with the preparation of the claim.” 33 CFR 136.105(e)(8).”

With regard to claims for loss profits and impairment of earning capacity, the NPFC must independently determine that the proof criteria in OPA and the implementing regulations, at 33 CFR part 136 are met, including the general provisions of 33 CFR 136.105, and the specific requirements for loss of profits and earning capacity claims in Subpart C, 33 CFR 136.231, *et seq.*

Pursuant to the provisions of 33 CFR 136.231, claims for the loss of profits or impairment of earning capacity due to injury to, destruction or, or loss of real or personal property or natural resources may be presented to the Fund by the claimant sustaining the loss or impairment.

“In addition to the requirements of subparts A & B or this part, a claimant must establish the following-

- (a) That real or personal property or natural resources have been injured, destroyed, or lost.
- (b) That the claimant’s income was reduced as a consequence or injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.
- (c) The amount of the claimant’s profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparable figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant receives as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.” 33 CFR 136.233(a-d)

If a third party claimant or RP is able to establish an entitlement to lost profits, then compensation may be provided from the OSLTF, but the compensable amount is limited to the actual net reduction or loss of earnings and profits suffered. Calculations for the net reductions or losses must clearly reflect adjustments for the following: all income resulting from the incident, all income from alternative employment or business undertaken, potential income from alternative employment or business not undertaken but reasonably available, and saved overhead or normal business expenses not incurred as a result of the incident, and state, local, and federal tax savings. 33 CFR 136.235(a-e)

V. DETERMINATION OF LOSS:

A. Overview:

1. The incident involved the discharge and continuing substantial threat of discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters.
2. Real or personal property or natural resources have been injured, destroyed, or lost; specifically oil was released into and injured the Mississippi River, a natural resource of the United States.
3. In accordance with 33 CFR § 136.105(e)(12), the claimant has certified no suit has been filed in court for the claimed uncompensated removal costs.
4. The claim was submitted on time.
5. The claimant seeks \$89,811.80 in loss of profits, as a consequence of the M/V Warta’s additional time, fuel, and costs.
6. The claimant asserts that if not for the oil spill the voyage would not have resulted in additional time and fuel.
7. Presentment of costs to the RP was made by Chaffe, representatives for Warta, prior to the submission of the claim. The NPFC also made presentment of costs to the RP for which the RP responded denying these costs.
8. In the process of adjudicating this claim, the NPFC Claims Manager collected additional information from the claimant to document what took place at the time of the incident.

B. Causation:

The Barge DM 932 oil spill did in fact release significant amounts of oil into and causing damage and injury to the Mississippi River, a natural resource of the United States. The

resulting damage, injury and removal response disrupted shipping in and out of the Mississippi River.⁴ At the time of the spill, there were many large vessels in the area that were oiled due to the DM 932 oil spill. The M/V Warta had to stay in port just downriver from the dirty zone awaiting USCG clearance to depart, which was granted on July 27, 2008.

The Claimant provided a record of the incident by submitting Port Logs/Statement of Facts, which clearly demonstrate that the Mississippi River had closed and vessel traffic was redirected during the oil removal efforts.⁵ Additionally, the USCG provided POLREPS to substantiate that the Mississippi River was either closed to vessel traffic or open to limited traffic during the response period.

C. Vessel Delay Time:

Warta is claiming that the oil spill directly caused them loss of profits because the M/V Warta was sitting idle during the river closure and while it waited to be decontaminated, increasing its voyage by 4.356 days. The M/V Warta was delayed as follows:

From 7/23/2008 @ 0407 hours until 7/27/2008 @ 1250 hours

The total stoppage time was 4 days, 8 hours and 32 minutes, or approximately 4.356 days.⁶

Per the terms of the Norgrain charter party agreement between Cargill and Warta,⁷ demurrage was set at a rate of \$17,500.00 a day for the 4.356 days they were detained due to the oil spill. Multiplying the \$17,500.00 daily rate by 4.356 days of delay equals approximately **\$76,358.00** in loss of revenue due to the demurrage.

D. Increased Bunkers

Warta claims that the delay resulted in an increase in the consumption of bunkers. Warta shows the approximate breakdown of the amount of bunkers consumed during the idle periods:⁸

<u>Date</u>	<u>Time</u>	<u>IFO</u>	<u>MDO</u>
7/23/2008	0000 Hours	299.7	33.6
	2400 Hours	-298.3	-33.6
		-----	-----
		1.4 mt	0.0 mt
7/24/2008	0000 Hours	298.3	33.6
	2400 Hours	-296.9	-33.6
		-----	-----
		1.4 mt	0.0 mt
7/25/2008	0000 Hours	296.9	33.6
	2400 Hours	-295.5	-33.6
		-----	-----

⁴ Polreps 1-18; documenting river closures and traffic management through 8 August 2008.

⁵ See Claim submission forms, submitted by Chaffe McCall, L.L.C. to the NPFC on 3/17/2010

⁶ See Port Logs, submitted with the claim by Chaffe McCall, L.L.C. to the NPFC on 3/17/2010

⁷ See Lines 181-185 of the Norgrain Charter between Cargill and Warta, submitted with the claim by Chaffe for Warta on 3/17/2010

⁸ See Voyage Logs, submitted with the claim by TBS Adjusting to the NPFC on 7/01/2009

		1.4 mt	0.0 mt
7/26/2008	0000 Hours	295.8	33.6
	2400 Hours	-292.8	-33.2
		-----	-----
		2.7 mt	0.4 mt
7/27/2008	0000 Hours	292.8	33.2
	2400 Hours	-290.2	-32.5
		-----	-----
		2.6 mt	0.7 mt
	Total:	9.5 mt	1.1 mt

The top number represents the amount of oil (in tons) that were read at 0000 hours each day, subtracting the amount of oil read at 2400 hours that same day to find the difference.

The M/V Warta was delayed for the entirety of July 24 through July 26, 2008. Thus, 5.5 mt (1.4 mt + 1.4 mt + 2.7 mt = 5.5 mt) of IFO is attributable to fuel burned on days in which the vessel was delayed a full 24-hour period.

The M/V Warta was not delayed for the entirety of July 23 and July 27, 2008. As the crew of this vessel recorded fuel measurements at midnight each night, some estimation is required for these two days. Warta was delayed approximately 20 of the 24 hours on July 23, 2008. With an average fuel consumption of 0.058 mt/hour (1.4 mt/ 24 hours = 0.058 mt/hr), the approximate amount of IFO bunkers consumed would be 1.16 mt (0.058 mt/hr X 20 hours = 1.16 mt). Additionally, the M/V Warta was delayed approximately 12 of the 24 hours on July 27, 2008. With an average fuel consumption of 0.108 mt/hour (2.6 mt/24 hours = 0.108 mt/hr), the approximate amount of IFO bunkers consumed would be 1.296 mt (0.108 mt/hr X 12 hours = 1.296 mt). When combining the three totals (1.16 mt + 5.5 mt + 1.296 mt), the amount of additional IFO consumed approximates to 7.96 mt. While Warta estimates a total of 8.4 mt of IFO, the NPFC will only consider 7.96 mt as compensable.

At a cost of \$550.00/mt, the additional IFO consumed amounts to **\$4,378.00** (\$550.00/mt X 7.96 mt = \$4,378.00).⁹

The M/V Warta was delayed for the entirety of July 25, 2008. Thus, the 0.4 mt MDO is attributable to fuel burned on this day in which the vessel was delayed a full 24-hour period. As it was not delayed for the entirety of July 27, 2008, the same approximation calculation as used above to find IFO is applied here in finding the MDO consumed. The M/V Warta was delayed approximately 12 of the 24 hours on July 27, 2008. With an average fuel consumption of 0.029 mt/hour (0.7 mt/24 hours = 0.029 mt/hr), the approximate amount of MDO bunkers consumed would be 0.348 mt (0.029 mt/hr X 12 hours = 0.348 mt). When combining the totals (0.4 mt + 0.348 mt), the amount of additional MDO consumed approximates to 0.748 mt. While Warta estimates a total of 1.0 mt of MDO, the NPFC will only consider 0.748 mt as compensable costs.

At a cost of \$1005.00/mt, the additional MDO consumed amounts to **\$751.74** (\$1005.00/mt X .748 mt = \$751.74).

⁹ See Hess Corporation Fuel Invoice, submitted to the NPFC by Mr. Allen Davis, Chaffe-McCall, via email on 6/25/2010

The total amount of additional bunkers (IFO and MDO) consumed as a direct result of the oil spill equals approximately **\$5,129.74**.

E. Additional Costs

Warta is claiming additional costs due to increased pilot and tug fees.

Pilots:

Increased pilotage fees can be broken down in the following way:¹⁰

7/26/2008:

Gen. Anchor. to City Dock:	\$462.57
Zone Charge (2):	\$106.56
Transportation:	\$43.00
Less Than 3 hr Notice:	\$249.00

Total: \$861.13

7/26/2008:

City Dock to Gen. Anchor.:	\$462.57
Zone Charge (2):	\$106.56
Transportation:	\$43.00

Total: \$612.13

7/27/2008:

Gen. Anchor. to City Dock:	\$462.57
Zone Charge (2):	\$106.56
Transportation:	\$43.00

Total: \$612.13

7/27/2008:

City Dock to City Dock:	\$462.57
Zone Charge (1):	\$53.28
Transportation:	\$48.41
Standby (6):	\$1031.04

Total: \$1595.30

Total Claimed Loss in Additional Pilots: \$3680.00*

¹⁰ See Crescent Towing and Salvage Co. Inc. invoices, submitted with the claim by Chaffe for Warta on 3/17/2010

The actual calculated loss, according to the invoices provided, actually totals \$3680.69; however, the NPFC accepts Warta's claim of \$3680.00 as it stands.

Tugs:

Increased tug fees can be broken down into the following categories:¹¹

Service	Quantity/Hours	Unit Price	Total
Anchoring	1 hour	\$3100.00	\$3100.00
Gross Registered Tons	10,000	\$26.00	\$260.00
Fuel Surcharge	3360	\$0.43	\$1444.80
		Total:	\$4804.80
		Discount:	(\$672.00)
		Total Additional Tugs Expenses:	\$4132.80

F. Analysis:

Chaffe submitted a claim for their client, Warta, in which they were able to demonstrate that the M/V Warta was indeed negatively impacted and delayed by the DM 932 oil spill. However, simply because a vessel is delayed does not always translate into a loss of profit claim under OPA, as is the case here.

While it is clear the M/V Warta was off-hire, Warta has not met their burden of proof that these 3.486 days affected their revenue or income for 2008 as Warta owns the M/V Warta—regardless if it is chartered or not. Warta claims that, because of the delay, they incurred a reduction in charter hire in the amount of \$17,500.00 per day (pro rata). They reason that, if the charterer had caused the delay, Warta would have been able to collect demurrage to offset the additional costs and expenses.¹² Warta also states that, if the delay was caused by a third-party vessel's negligence, then they would have had adequate remedy at law to recover costs.

Warta's claim is flawed in that they are trying to apply these same arguments to their delay caused by the DM 932 oil spill. Polsteam Shipping Co. Ltd. (Polsteam (Owners of the M/V Warta)) entered into a Euromed voyage charter by which Polsteam was to receive a lump sum freight of \$458,800.00 from Cargill Americas S.A. for the voyage.¹³ Warta received the original agreed-upon payment for this charter—the delay did not affect it. Any demurrage or compensation for additional time that would have been earned would be considered extra income but for the oil spill. No demurrage, then, is not lost revenue.

The claimant quotes the views of Mr. **Robert L. Dunn** in *Recovery of Damages for Lost Profits* (6th ed. 2005).¹⁴ While both Mr. **Dunn** and the claimant are correct in stating that a “reasonable certainty” that profits were lost is necessary. What is not understood here is that the claimant still has the obligation under OPA to show that profits were, in fact, lost. While Warta has shown (in providing its Time Sheets for the M/V Warta¹⁵) that they were extremely busy during FY 2008, they have not shown where profit was lost. No voyages were canceled as a direct

¹¹ See Crescent Towing and Salvage Co. Inc. invoice, submitted with the claim by Chaffe for Warta on 3/17/2010

¹² See **Tadros** letter to Ms. **Alyssa Lombardi**, NPFC, sent via email and dated 6/25/2010

¹³ See Lines 181-185 of the Norgrain Charter between Cargill and Warta, submitted with the claim by Chaffe for Warta on 3/17/2010

¹⁴ See **Tadros** letter to Ms. **Alyssa Lombardi**, NPFC, sent via email and dated 6/25/2010

¹⁵ See Time Sheets, sent via email by Chaffe for Warta on 6/25/2010

result of this oil spill and, as Warta was under Euromed charters for these voyages, the preponderance of the evidence has not shown that income was lost, either.

Warta does prove, through documentation provided the NPFC, that they did incur damages in the amount of \$5,129.74 in additional bunkers and \$7,812.80 for pilots and tugs as a direct result of the oil spill. These added costs (as explained in sub-points D and E above) are valid and compensable.

G. Determination:

The NPFC hereby determines that the OSLTF will pay **\$12,942.54** as full compensation for the damage costs incurred by the Claimant and submitted to the NPFC under claim # N08057-076. All costs claimed are for charges paid for by the Claimant for damages as that term is defined in OPA and, are compensable damages, payable by the OSLTF as presented by the Claimant.

VI. DETERMINED AMOUNT: \$12,942.54

Claim Supervisor: **Thomas S. Morrison**

Date of Supervisor's review:

Supervisor Action:

Supervisor Comments: