

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 7/07/2010
Claim Number	: N08057-077
Claimant	: Wisla Shipping, Ltd.
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [REDACTED]
Amount Requested	: \$23,362.20

### **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 oil<sup>1</sup> 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.P., Inc. (Chaffe) has submitted a claim into the National Pollution Funds Center (NPFC) for their client, Wisla Shipping, Ltd (Wisla) (which is managed by Polska Zegluga Morska). At the time of the collision, the M/V Wisla was under a North American Grain (Norgrain) form charter party by GAP SA Grains & Products, Ltd. (GAP).<sup>2</sup> The M/V Wisla arrived at Southwest Pass at 1900 hours on August 6, 2008, proceeding on to General Anchorage (approximately at Mississippi Mile Marker (MM) 90.1). Here it awaited berth at the ADM Destrehan Elevator (MM 120.5), where it was granted berth and commenced loading grain cargo until 0350 hours on August 9, 2008. By 0510 hours, the M/V Wisla had a river pilot onboard and was ready to commence its trip downriver.<sup>3</sup>

At 0600 hours, due to continuing release of oil from the DM 932, the USCG ordered the river closed in the city of New Orleans so that the sunken barge could be raised. Because it could not leave until the river was reopened, the M/V Wisla departed the ADM Destrehan Elevator (in order to mitigate costs) at 0605 hours and sat idle at Bonnet Carre Anchorage (MM 127.5) until 2045 hours, when it was allowed to recommence sailing. Wisla is claiming a delay of 14 hours, 40 minutes, or 0.611 days.

Because the M/V Wisla was sitting idle during this delay period, and in order to determine the estimated loss of profits, Wisla has applied the demurrage rate of \$21,000.00 as owed them under the Norgrain charter.<sup>4</sup> Applying this rate to the 0.611 days, Wisla calculates a direct

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

<sup>2</sup> See Norgrain Charter Party between Wisla and GAP, dated 7/08/2008, submitted with the claim by Chaffe for Wisla on 3/17/2010.

<sup>3</sup> See Port Logs, submitted with the claim by Chaffe for Wisla on 3/17/2010.

<sup>4</sup> See Line 181 of the Norgrain Charter between GAP and Wisla, submitted with the claim by Chaffe for Wisla on 3/17/2010.

income loss of \$13,055.00 for this time period. However, the claims manager calculates this claimed loss, based on the documentation provided, to instead be \$12,831.00, and, therefore, this amount will be used when considering the claim. Additionally, during these 0.611 days, Wisla claims an additional 2.5 metric tons (mt) of IFO fuel and 0.20 mt of MDO fuel, increasing costs by \$1737.50, as well as \$8,533.70 in additional pilot and tug expenses. When the projected income loss, increased bunkers and additional pilots and tugs are combined, Wisla's claim totals \$23,102.20.

#### **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 or 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 \$23,102.20 in loss of profits, as a consequence of the M/V Wisla’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 Wisla, 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.<sup>5</sup> 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 Wisla had to stay in port upriver from the dirty zone awaiting USCG clearance to depart, which was granted on July 28, 2008.<sup>6</sup>

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.<sup>7</sup> 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:**

Wisla is claiming that the oil spill directly caused them loss of profits because the M/V Wisla was sitting idle during the raising of the Barge DM 932, increasing its voyage by 0.611 days. The M/V Wisla was delayed as follows:

From 8/09/2008 @ 06:05 hours until 8/09/2008 @ 20:45 hours

The total stoppage time: 14 hours, 40 minutes, or approximately 0.611 days.<sup>8</sup>

Per the terms of the Norgrain charter party agreement between GAP and Wisla<sup>9</sup>, demurrage was set at a rate of \$21,000.00 a day for the 0.611 days they were detained due to the oil spill. Multiplying the \$21,000.00 daily rate by 0.611 days of delay equals approximately **\$12,831.00** in loss of revenue due to the oil spill and non-payment by GAP (who ultimately owed this demurrage<sup>10</sup>).

**D. Increased Bunkers**

Wisla claims the delay resulted in an increase in the consumption of bunkers. In their claim submission, Wisla shows the breakdown of the amount of bunkers consumed during the idle period:<sup>11</sup>

<u>Fuel Type</u>	<u>Amount</u>	<u>Cost per mt</u>	<u>Total Cost</u>
MDO	2.5 mts	\$599.00	\$1497.50
IFO	0.2 mts	\$1200.00	\$240.00
<b>Total Additional Fuel Costs:</b>			<b>\$1737.50</b>

<sup>5</sup> Polreps 1-18; documenting river closures and traffic management through 8 August 2008.

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

<sup>7</sup> See Claim submission forms, submitted by Chaffe McCall, L.L.C. to the NPFC on 3/17/2010.

<sup>8</sup> See Port Logs, submitted with the claim by Chaffe McCall, L.L.C. to the NPFC on 3/17/2010.

<sup>9</sup> See Lines 181-185 of the Norgrain Charter between GAP and Wisla, submitted with the claim by Chaffe for Wisla on 3/17/2010.

<sup>10</sup> See Line 182 of the Norgrain Charter between GAP and Wisla, submitted with the claim by Chaffe for Wisla on 3/17/2010.

<sup>11</sup> See Vessel Logs and John W. Stone Oil Invoice #BK53042-IN, submitted via email by Chaffe for Wisla on 6/25/2010.

**E. Additional Costs**

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

**Pilots:**

Increased pilotage fees can be broken down in the following ways:

<b><u>Description</u></b>	<b><u>Cost</u></b>
Mileage from Mississippi River MM 120.60 to MM 128.00	\$116.18 <sup>12</sup>
Pilotage Fee for turning out of Bonne Carre Anchorage	\$407.73 <sup>13</sup>
Transportation of pilot from Bonne Carre to shore	\$166.28 <sup>14</sup>
Draft charges for shift from Bonne Carre Anchorage	\$1932.99 <sup>15</sup>
Shifting back downriver from Miss. MM 128.00 to MM 90.50 (Minus the \$116.18 paid in Invoice # 0099433)	\$472.57 <sup>16</sup>
Transportation of pilot to Bonne Carre to assist in turning	\$166.28 <sup>17</sup>
Pilot's communication expenses	\$5.57 <sup>18</sup>
VTS surcharge for shift	\$55.08 <sup>19</sup>
Pension surcharge for shift	\$170.75 <sup>20</sup>
Launch boat service for pilot, ticket # 63PFA199	\$600.00 <sup>21</sup>
Launch boat service for pilot, ticket #63PNAN54	\$600.00 <sup>22</sup>
<b>Total Additional Pilotage Costs:</b>	<b>\$4,693.43</b>

**Tugs:**

Increased tug fees can be broken down into the following categories:<sup>23</sup>

Assistance fees, 2 @ \$3600.00	\$3600.00
Gross Registered Tons fees:	\$260.00
Fuel Surcharge:	\$1389.60
Discount for early payment:	\$(1408.90)
	_____
<b>Total Additional Tug Fees:</b>	<b>\$3840.70</b>

<sup>12</sup> See New Orleans-Baton Rouge Steamship Pilots Association Invoice # 0099433, submitted with the claim by Chaffe for Wisla on 3/17/2010.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> See New Orleans-Baton Rouge Steamship Pilots Association Invoice # 0099435, submitted with the claim by Chaffe for Wisla on 3/17/2010.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> Belle Chasse Marine Transportation, Inc. Invoice # 116923, submitted with the claim by Chaffe for Wisla on 3/17/2010.

<sup>22</sup> *Ibid.*

<sup>23</sup> See Crescent Towing and Salvage Co. Inc. invoice, submitted with the claim by Chaffe for Wisla on 3/17/2010.

Total increased expenses due to oil spill and resulting USCG relocation and delay of the vessel: **\$8,534.13.**

**F. Analysis:**

Chaffe submitted a claim for their client, Wisla, in which they were able to demonstrate that the M/V Wisla 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 Wisla was off-hire, Wisla has not met their burden of proof that the delay of 0.611 days affected their revenue or income for 2008 as Wisla owns the M/V Wisla—regardless if it is chartered or not. Wisla claims that, because of the delay, they incurred a reduction in charter hire in the amount of \$21,000.00 per day (pro rata). They reason that, if the charterer had caused the delay, Wisla would have been able to collect demurrage to offset the additional costs and expenses.<sup>24</sup> Wisla 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.

Wisla's claim is flawed in that they are trying to apply these same arguments to the delay caused by the DM 932 oil spill. Polsteam Shipping Co. Ltd. (Polsteam (Owners of the M/V Wisla)) entered into a Norgrain form charter by which Polsteam was to receive a lump sum freight of \$850,000.00 from GAP S.A. for the voyage.<sup>25</sup> Wisla 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, does not equal lost revenue.

The claimant quotes the views of Mr. Robert L. Dunn in *Recovery of Damages for Lost Profits* (6<sup>th</sup> ed. 2005).<sup>26</sup> 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 Wisla has shown (in providing its Time Sheets for the M/V Wisla<sup>27</sup>) that they were extremely busy during FY 2008, they have not shown where profit was lost. No voyages were canceled as a direct result of this oil spill and, as Wisla was under a Norgrain charter for these voyages, the preponderance of the evidence has not shown that income was lost, either.

Wisla does prove, through documentation provided the NPFC, that they did incur damages in the amount of **\$11,296.66** for increased bunkers, 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 **\$10,271.20** as full compensation for the damage costs incurred by the Claimant and submitted to the NPFC under claim # N08057-077. 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: \$10,271.20**

<sup>24</sup> See Tadros letter to Ms. [REDACTED], NPFC, sent via email and dated 6/25/2010.

<sup>25</sup> See Line 66n of the Norgrain Charter between GAP and Wisla, submitted with the claim by Chaffe for Wisla on 3/17/2010.

<sup>26</sup> See Tadros letter to Ms. [REDACTED], NPFC, sent via email and dated 6/25/2010.

<sup>27</sup> See Time Sheets, sent via email by Chaffe for Wisla on 6/25/2010.

Claim Supervisor: [REDACTED]

Date of Supervisor's review:

Supervisor Action:

Supervisor Comments: