CLAIM SUMMARY / DETERMINATION FORM

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| Date | : | 4/27/2010 |
| Claim Number | : | P05005-158 |
| Claimant | : | Sunoco, Inc. |
| Type of Claimant | : | Corporate (US) |
| Type of Claim | : | Loss of Profits and Earning Capacity |
| Claim Manager | : | [redacted] |
| Amount Requested | : | $19,427.00 |

***FACTS:***

***A. Oil Pollution Incident:***

On 26 November 2004, the Cypriot-flagged tank vessel ATHOS I struck a submerged anchor as it approached the CITGO Asphalt Refining Company terminal in Paulsboro, New Jersey. The anchor punctured the hull and caused the release of Venezuelan crude oil into the Delaware River. The Federal On Scene Coordinator (FOSC) issued a Notice of Federal Interest (NOFI) designating the vessel's owner, Frescati Shipping Company Limited, as the Responsible Party (RP). After it paid for costs exceeding its limit of liability, the RP denied all claims under the Oil Pollution Act of 1990 (OPA). The RP acknowledged the claim submitted by Sunoco via an email dated November 1, 2007 and deemed the claim denied. It is important to note that when the Sunoco claim first arrived at the NPFC, the NPFC identified it as claim # P05005-140 but later decided to divide the Sunoco claim into two separate claims identified as # P05005-140 claim for Sunoco refinery loss of profits and earnings claim and # P05005-157 claim for Sunoco's vessel delay loss of profits and earnings. After the NPFC completed the initial adjudication of the claimant's first two claims, it became evident that the NPFC did not include the increased expense portion of Sunoco's claim in either of the preceding claims therefore the NPFC opened a new claim # P05005-158 in order to capture the increased expenses originally submitted with the initial Sunoco claim submission.

***B. Claim Detail:***

Claimant, Sun International Ltd. (Sunoco) presents this claim to the National Pollution Funds Center (NPFC) for reimbursement from the Oil Spill Liability Trust Fund (OSTLF) for loss of profits and earning capacity associated with increased expenses as a direct result of the Athos I oil-spill. Claimant seeks $19,427.00 in reimbursement for increased expenses for work performed by Blank Rome in order to obtain a Jones Act waiver of the coastwise laws pursuant to the Act of December 27, 1950, so that certain foreign-flag vessels, including the Greek-flag North Star, may transport crude oil from the Big Stone Anchorage in the Delaware Bay to Sunoco's Philadelphia, Marcus Hook, and Eagle Point Refineries. The request stemmed from the Athos I oil-spill in the Delaware Bay on November 27, 2004, which has significantly delayed vessel traffic up and down the Delaware River such that the available capacity of coastwise-qualified vessels was not sufficient to keep the oil-refineries in the Delaware Valley area adequately supplied with crude oil.

***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 or 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)

***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 Delaware 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 $19,427.00 in loss of profits, as a consequence of Sunoco's additional costs.
6. The claimant asserts that if not for the oil spill the claimant would not have incurred additional expenses.
7. Presentment of costs to the RP was made by the NPFC for which the RP responded denying responsibility for 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 Athos I oil-spill did in fact release significant amounts of oil into and causing damage and injury to the Delaware River, a natural resource of the United States. The resulting damage, injury and removal response disrupted shipping in and out of the Delaware River.[1] At the time of the spill, there were many large vessels in the area that were oiled due to the Athos I oil-spill.

[1] The FOSC ordered the river closed; POLREPs and FOSC documentation clearly show Sunoco's facilities within the impacted area.

## C. *Analysis:*

As discussed previously, this claim arises from the Athos I oil-spill incident on the Delaware River that occurred on November 26, 2004, which increased Sunoco's expenses due to shipping delays resulting from the slowed or stopped marine traffic on the Delaware River and as a result of activities performed in order to obtain a Jones Act waiver. The Sunoco Refineries in the region are highly dependent on river traffic, primarily for crude oil deliveries; typically 22 crude cargoes are required each month to maintain operations and cargoes are often discharged at multiple docks as shipments are shared between the Sunoco refineries. A typical crude oil cargo of one million barrels provides enough feedstock for the local refineries to operate for only 1½ days. The oil spill specifically impacted four vessels that were chartered by Sunoco, increasing transit times in aggregate by approximately 6.79583 days in November and December 2004. The financial impacts of this delay were increased expenses and lost profits resulting from the additional charter hires and lightering services required to make the crude oil deliveries to Sunoco's refineries.[2]

To receive payment from the Fund for lost profits, a claimant must prove that it lost profits and that those profits resulted from the oil-spill. For example, decreased revenue and/or increased expenses caused by the oil spill that reduce the profits the claimant would have otherwise earned would be compensable as lost profit damages by the Fund. In this instance, the Delaware Bay is deemed a natural resource that has been injured by the Athos I oil-spill therefore decreased revenue and/or increased expense(s) experienced by Sunoco that reduced their profits which would otherwise have been earned are deemed compensable under OPA.

In Sunoco's claim submissions, it is important to note that Sunoco's increased expenses continued throughout the Athos I oil spill for the time period between November 2004 and December 2004 without offsetting Sunoco's revenues. While a loss of profits claim in and of itself does not necessarily equate to increased expenses, the financial data provided by the claimant demonstrates that Sunoco could not pass the increased cost on to others because this type of increased expense would have no impact on pricing revenues since the pricing for refinery product is determined by the market.[3] As the claimant demonstrates, it was unable to offset the additional expenses. This claim deals with contracts where the revenue is fixed and the profit was directly affected by the expenses the claimant incurred in the process of fulfilling contractual commitments. Because the claimant could not increase prices and continued to incur expenses (i.e. mitigation costs associated with requesting a Jones Act waiver), the claimant effectively lost profit that it would have earned, had the vessels not been delayed by the oil spill.

Moreover in this case, the significant reduction of oil supplies to Sunoco's three refineries in the Delaware Valley area would jeopardize the continued availability of energy supplies to the east coast of the United States, at least in the short term and possibly in the long term. Thus, consistent with the opinion of Department of Energy[4], it was in the best interest of the national defense to ensure that there were no significant shortfalls to energy supplies provided by these three refineries, particularly as winter approached. As noted in Sunoco's

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[2] See, Claim Supporting Documentation found in Volume 1 of 3; page 14 under the Narrative Section of the claim submission for claim # P05005-157.

[3] See, Weekly United States Spot Price FOB Weighted by Estimated Import Volume (Dollars per Barrel) which demonstrates that the price of oil the months of November and December 2004 decreased and were not passed on to Sunoco's customers

[4] See, Claim Supporting Documentation email from [redacted] of DOE to [redacted] of Sunoco dated December 5, 2004.

initial claim submission and in addition to the Stena Vision, which was at anchor at the time of the incident and with Sunoco expecting four more tankers the weekend following the oil-spill, Sunoco requested a waiver of the coastwise laws and authorization to use the foreign-flag vessel North Star, or other foreign-flag vessels as necessary, for a period of 10 days or until the Delaware River opened to unrestricted vessel traffic, whichever was longer.

**D.** ***Determination:***

The NPFC hereby determines that the OSLTF will pay **$19,427.00** as full compensation for the damage costs incurred by the Claimant and submitted to the NPFC under claim # P05005-158. 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.

***AMOUNT: $19,427.00***

Claim Supervisor: [redacted]

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: