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National Pollution Funds Center
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Arlington VA 20598-7100
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5890
November 19, 2012

Via e-mail: [REDACTED]@mrsnola.com
Murphy, Rogers, Sloss & Gambel
One Shell Square
701 Poydras Street, Suite 400
New Orleans, LA 70139
Attn: Charles Whited

Re: Claim Number N08057-0091

Dear Mr. Whited:

The National Pollution Funds Center (NPFC) in accordance with the Oil Pollution Act (OPA) (33 U.S.C. 2701 et seq.), has determined that \$1,693.11 is compensable for OPA claim number N08057-0091. This reconsideration determination is based on an analysis of information submitted. All costs that are not determined as compensable are considered denied. Disposition of this reconsideration constitutes final agency action.

If you accept this determination, please sign the enclosed Acceptance / Release Agreement where indicated and return to:

Director
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100

If we do not receive the signed original Acceptance / Release Agreement within 60 days of the date of this letter, the determination is void. If the determination is accepted, an original signature and a valid tax identification number (EIN or SSN) are required for payment. If you are a Claimant that has submitted other claims to the National Pollution Funds Center, you are required to have a valid Contractor Registration record prior to payment. If you do not, you may register free of charge at www.SAM.gov. If the determination is accepted, your payment will be mailed within 30 days of receipt of the Release Agreement.

If you have any questions or would like to discuss the matter, you may contact me at the above address or by phone at [REDACTED]

Sincerely,
[REDACTED]

THOMAS D. MORRISON
Chief, Claims Adjudication Division

Enclosures: Claim Summary / Determination
Acceptance / Release Agreement

CLAIM SUMMARY / DETERMINATION

Claim Number: N08057-0091
Claimant: DOWA Line American Co, Ltd
Type of Claimant: Corporate (US)
Type of Claim: Loss of Profits and Earnings
Claim Manager: Gina Strange [REDACTED]
Amount Requested: \$28,082.91 [REDACTED]

I. Facts

On the morning of July 23, 2008 at approximately 0130 the tank barge DM 932, an unmanned, non-self propelled, double hull, steel tank barge, bearing official number 546058, sank as a result of a collision with M/T TINTOMARA and discharged approximately 282,828 gallons of oil into the Mississippi River, a navigable waterway of the United States. The Federal On-Scene Coordinator (FOSC) immediately closed the River to vessel traffic and later managed traffic when the River re-opened, on or about August 11, 2008, for the duration of the response.

II. Responsible Party

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

III. The Claim and the Claimant

On or about 17 August 2010 Murphy, Rogers, Sloss & Gambel presented a claim to the Oil Spill Liability Trust Fund (OSLTF) via the National Pollution Funds Center (NPFC) on behalf of its client, DOWA Line America Company, Incorporated, owner of the M/V ANTILLES V (Antilles/Vessel). DOWA (the Claimant) asserts that it incurred loss of profits and earning capacity and incurred additional bunkering expenses totaling \$28,082.91 due to the discharge of oil into the Mississippi River on July 23, 2008 and the subsequent closure of the River. The Vessel was delayed for 1.35 days and Claimant calculates its loss of profits based on a daily revenue rate of \$19,548.00 per day for which it is claiming a loss of income in the amount of \$26,389.80 and incurred additional bunkering expenses in the amount of \$1,693.11 resulting from the delay.¹

The vessel was owned by DOWA Lines and was chartered to Riceland for one safe berth Port Au Prince, Haiti and one safe berth, on the Mississippi, River, "not above but including Baton Rouge."² The Charter Party was signed on or about 21 May 2008 at Stuttgart, Arkansas. That agreement called for the charterer to transport a load of rice from a berth on the Mississippi River to a berth at Port Au Prince.³ At the time of the discharge, July 23, 2008, the vessel had departed Port Au Prince, Haiti and was at sea transiting toward Southwest Pass. The Agreement did not reference any subsequent voyages. According to the

¹ Claimant's Cover Letter to NPFC dated 8/16/2010

² Charter Party, page 1

³ Charter Party

Charter Base/Freight Base document provided by the Claimant in support of its claim before the Fund, it received its Freight Rate for the voyage.⁴

The NPFC issued its decision letter to the claimant on or about 19 July 2012, which offered a total of \$1,693.11 as compensation for the additional expenses it incurred due to the closure of the River. The remainder of those costs claimed, \$26,389.90, for alleged loss of profits, were denied on the grounds that Claimant did not establish that it suffered a loss of profits. The initial claim determination is hereby incorporated by reference.

IV. Applicable Law

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC all the evidence, information and documentation deemed necessary by the Director, the NPFC, to support the claim.

Under 33 CFR 136.233 "Proof" in addition to the requirements of Subparts A and B of 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 to, 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 of impairment was suffered as established by income tax returns, financial statements and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside 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 received as a result of the incident must be clearly indicated and saved overhead and other normal expenses not incurred as a result of the incident must be established.

Under 33 CFR 136.235 "Compensation Allowable"

The amount of compensation allowable is limited to the actual net reduction or loss of earnings of profits suffered. Calculations for net reductions of losses must clearly reflect adjustments for profits suffered. Calculations for net reductions of losses must clearly reflect adjustments for profits suffered. Calculations for net reductions of losses must clearly reflect adjustments for

- (a) All income resulting from the incident;
- (b) All income from alternative employment or business undertaken;
- (c) Potential income from alternative employment or business not undertaken, but reasonably available;
- (d) Any saved overhead or normal expenses not incurred as a result of the incident; and
- (e) State, local and Federal taxes

The Director, NPFC, upon written request of the claimant, reconsiders any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing additional support for the claim. 33 CFR 136.115(d).

⁴ Charter Base/Freight Base, Voyage 83

V. Claimant's Argument Supporting Reconsideration

Claimant requested reconsideration on September 17, 2012 of the NPFC's initial determination and argued that the NPFC's request for comparable data for other voyages was erroneous, and that such comparison was not legitimate; that the NPFC erroneously applied a land-based calculation of lost profits to a business operation on the water; and that it had submitted sufficient documentation to support its claim of lost profits. Each of these arguments will be addressed below.

VI. NPFC's Analysis of the Reconsideration:

The NPFC reviewed the claim *de novo*, including all information submitted with the original claim, and information and arguments submitted in support of Claimant's request for reconsideration. The Claimant bears the burden of proving all elements of its claim.⁵ The NPFC interpreted the Claimant's argument regarding "land-based" argument as being that the NPFC should have applied Maritime Law to the facts of this claim, and by not doing so, was in err. The NPFC will address this below.

1. Claim: Loss of Income

A. Amount of Loss Claimed: \$26,389.80

According to the terms of the Charter Base/Freight Base for Voyage 83, the voyage at issue, the vessel loaded 11,456.335 metric tons of rice at a rate of \$75.50 per metric tons at Burnside Anchorage, Louisiana.⁶ The gross income generated from the freight was \$864,953. Claimant deducted the voyage's total expenses (\$273,223) from the gross income and dividing that by the voyage's duration (30.27 days). Thus, the net daily revenue for Voyage 83 was \$19,548. Multiplying this by the 1.35-day delay, Claimant asserts that its loss of profits for the 1.35 days is \$26,389.80.

The NPFC initially denied the loss of profits portion of the claim on the grounds that Claimant did not establish that the vessel suffered a loss of profits but only quantified a loss based solely on the net daily revenue for Voyage 83 and multiplying that by its 1.35-day delay. In its initial submission, the Claimant's only evidence to support its claim alleging its loss of profits was documentation for Voyage 83, the affected voyage. However, upon a request for additional information by the NPFC the Claimant provided Charter Base/Freight Base documentation for Voyages 66, 67 & 68 for July-August of 2007. While providing this information, the Claimant discounted its value for calculating a loss in its claim before the Fund.⁷ The NPFC denied its claim because the "claimant did not provide any independent evidence that would allow the NPFC to use a methodology to properly evaluate the claim and make a determination regarding whether a loss was suffered."⁸

⁵ 33 CFR 136.105(a)

⁶ Charter Base/Freight Base, Voyage 83, Exhibit C, 23 July 2008

⁷ "references to Charter Parties entered into prior to, and/or after the subject voyage (July 2008) would not provide useful information regarding Dow's losses for the July 2008 voyage as those Charter Parties would contain freight rates or charter hire, whichever is applicable for the dates those Charter Parties were entered into, and subject to market conditions on those particular dates/at those times." The claimant continued as follows: "the fact that Dow made or lost money on any subsequent voyages, would be of no moment in determining Dow's losses for the subject (July/August 2008) voyage. The measure of Dow's losses in respect of the July/August 2008 voyage is the difference between what Dow earned and what it could have earned had there been no closure." E-mail from Claimant's counsel to NPFC Claims Manager on 31 May 2012

⁸ NPFC's initial determination dated 19 July 2012

On reconsideration Claimant provided the Charter Party/Freight Rate sheet for Voyage 82 and argued that comparison of Voyages 83 and 82 was not legitimate and the NPFC attempts to do so were erroneous.

Then the Claimant goes on to argue that the NPFC erroneously applied a land-based calculation of lost profits to business operation on water or an ocean-going vessel. As stated earlier, the NPFC has interpreted this to mean that it should apply admiralty/maritime protocols regarding loss of profits to vessel delay claims.

In fact OPA and the NPFC claims regulations comport with maritime case law on calculating lost profits for vessels due to detention⁹ and maritime torts; the NPFC is guided by maritime case law when adjudicating claims for a vessel's loss of profits due to delays caused by oil spills.

Maritime case law provides that the burden of establishing that profits were lost is upon the ship owner. The Nicolaou Maria, 143 F. 2d 406 (5 Cir. 1944) *See also* Atlas Copco Tools, Inc. v Air Power Tool and Hoist, Inc., 131 S.W. 3d 203 (Tex. 2004) (A party seeking to recover a loss of profits must prove the loss through competent evidence with reasonable certainty.). The claims regulations provide that a claimant has the burden of establishing that it suffered a loss of profits and then quantifying those losses. 33 CFR 136.105(a) and 33 CFR 136.235. The test to establish that profits have been lost is flexible but at a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the lost profits may be ascertained. Atlas Copco Tools, Inc., 131 S.W. 3d at 206. Similarly the Claims Regulations provide that a loss of profits may be established by objective means, i.e., income tax returns, financial statements, comparable figures for profits or earnings for the same or similar activities outside of the area affected by the incident. 33 CFR 136.233(a)-(d).

In an e-mail dated May 2, 2012, the NPFC requested additional information from the Claimant to support its alleged loss of profits, including income tax returns, financial statements and similar documents that would provide comparative figures for profits or earnings for the same or similar activities outside the area affected by the incident. In a response e-mail dated May 12, 2012, Claimant stated that while the vessel made similar voyages between Mississippi River and Haitian ports in the past, comparing the vessel's income on one voyage to its income on another voyage is not an indication of the vessel's profit or loss on a particular voyage because the freight rate for a voyage is based on market conditions. Thus, the freight rate or charter hire varies for each voyage. Claimant argued that the better test for a loss on a particular voyage is what the vessel *expected to earn or would have earned* based on that voyage's freight rate. Thus, Claimant relies solely on the freight rate for Voyage 83.

Damages must be determined with reasonable certainty. Atlas Copco Tools, Inc., 131 S.W. 3d at 206. (Reasonable certainty is not demonstrated when the profits claimed to be lost is largely speculative or a mere hope for success, as from an activity dependent on uncertain or changing market conditions, on chancy business opportunities.) In this case Claimant's alleged loss of profits is based on what was expected to earn, or speculation, and acknowledged changing market conditions.

In its reconsideration argument Claimant argued that comparing the Voyage 83 net daily revenue with the Voyage 82 data is not a legitimate comparison and argued, as stated above, that the better test for a loss on a particular voyage is the freight rate for the impacted voyage. Claimant did not provide any information or objective data on reconsideration that would establish that the vessel suffered a loss of profits due to the 1.35-day delay. Claimant relies solely on the daily net revenue calculation for Voyage 83 but a review of the Freight Base reflects that other time factors were considered when calculating the net daily rate. For instance, the voyage was also delayed for 1.85 days due to the Storm Eduoard and the

⁹ Damages for lost profits arising from the loss of the use of a vessel for repairs after a collision or other maritime tort has traditionally been called detention. Bolivar County Gravel Co. v. Thomas Marine Company, 585 F. 2d 1306, 1308 fn. 2 (C.A. Miss. 1978)

vessel spent 15.5 days in Port au Prince for unstated reasons. Further, the voyage was shortened by 29.5 days because the loading and discharging of the cargo took less time and the Claimant paid despatch in the amount of \$26,550.00. Calculating the voyage days as 30.27 days without the delay on the Mississippi River is flawed because it considered other factors that were unrelated to the discharge of oil. Thus, even if Claimant had established that it had suffered a loss of profits in fact quantifying such loss using the net daily revenue of \$19,548 would not determine its damage with reasonable certainty. Because the claimant did not provide any evidence to establish that the vessel in fact suffered a loss of profits claim for the loss of profits portion of the claim, \$26,389.80, is denied.

2. Bunker Expenses: \$1,693.11

The Claimant has also presented a loss of income in the amount of \$1,693.11 for the time the vessel had to sit at anchorage due to the oil pollution incident and during the time the river was closed as a result of the incident.

The NPFC made the Claimant an initial offer of \$1,693.11. That offer is once again offered as part of this reconsideration package based on the same rationale articulated in its initial determination.

Summary:

The NPFC denies DOWA's claim for loss of income in the amount of \$26,389.80 because the Claimant has failed to provide evidence to support a loss of profits. The NPFC approves payment of the loss of bunkers in the amount of \$1,693.11.

DETERMINED AMOUNT: \$1,693.11

Claim Supervisor: 

Date of Supervisor's Review: 11/19/12

Supervisor Action: Offer Allowed

Supervisor's Comments:

ACCEPTANCE / RELEASE AGREEMENT

Claim Number: N08057-0091	Claimant Name: DOWA Line American Co, Ltd
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I, the undersigned, ACCEPT this settlement offer of \$1,693.11 as full and final compensation for damages arising from the specific claim number identified above. With my signature, I also acknowledge that I accept as final agency action all costs submitted with subject claim that were denied in the determination and for which I received no compensation.

This settlement represents full and final release and satisfaction of the amounts paid from the Oil Spill Liability Trust Fund under the Oil Pollution Act of 1990 for this claim. I hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action, that I may have against any party, person, firm or corporation that may be liable for the amounts paid for which I have been compensated under this claim. I authorize the United States to sue, compromise or settle in my name and the United States fully substituted for me and subrogated to all of my rights arising from and associated with those amounts paid for which I am compensated for with this settlement offer. I warrant that no legal action has been brought regarding this matter and no settlement has been or will be made by me or any person on my behalf with any other party for amounts paid which is the subject of this claim against the Oil Spill Liability Trust Fund (Fund).

This settlement is not an admission of liability by any party.

With my signature, I acknowledge that I accept as final agency action all amounts paid for this claim and amounts denied in the determination for which I received no compensation.

I, the undersigned, agree that, upon acceptance of any compensation from the Fund, I will cooperate fully with the United States in any claim and/or action by the United States against any person or party to recover the compensation. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for those amounts paid for which the Fund has provided compensation, by providing any documentation, evidence, testimony, and other support, as may be necessary for the United States to recover from any other person or party.

I, the undersigned, certify that to the best of my knowledge and belief the information contained in this claim represents all material facts and is true. I understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. §§ 287 and 1001).

_____ Title of Person Signing	_____ Date of Signature
_____ Printed Name of Claimant or Authorized Representative	_____ Signature

_____ Title of Witness	_____ Date of Signature
_____ Printed Name of Witness	_____ Signature

_____ *DUNS/EIN/SSN *Required for Payment	_____ Bank Routing Number	_____ Bank Account Number
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