

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 4/21/2010
Claim Number	: N08057-069
Claimant	: Zito Fleeting, LLC
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: Alyssa Lombardi
Amount Requested	: \$76,173.05

### **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 of oil<sup>1</sup> were released into the Mississippi River and the resulting spill response, coordinated by the Federal On-Scene Coordinator (FOSC) and the Unified Command, resulted in a closure of the river to vessel traffic initially. As the clean-up progressed, the FOSC had the river reopened, but traffic had to be managed around ongoing response efforts for a period of time.

### **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**

Zito Fleeting, LLC (Zito) has submitted a claim into the National Pollution Funds Center (NPFC) for economic damages (loss of profits) sustained as a result of the DM 932 oil spill. Zito is in the business of storing and staging barges and barge tows for others at their three fleeting areas on the Mississippi river. Zito earns income in storing the barges and in using its tugboats to move assemble and break-up larger barge tows. The facilities are located at; Mile Marker (MM) 105,; at MM 103; and at MM 95. Each fleet serves mostly local docks and waterways. MM 95 is the Algiers Barge Fleeting area, and it serves the East/West canals and the lower Mississippi docks, while the other locations service the upper docks. Because the Algiers Fleet was in such close proximity to the DM 932 oil spill (MM 98.9), when it occurred, all revenue generating activity was stopped at this fleeting area. Zito claims that this drop in activity did not result in an increase in in later or delayed business; rather, the vessel traffic was lost and never regained.<sup>2</sup> Most barge owners who would normally use Zito's services at the Algiers Barge Fleeting area held their barges at their own facilities and found alternative means to transport their goods.<sup>3</sup>

As a direct result of the oil spill, Zito is claiming a loss of fleeting revenue in the amount of \$11,649.00, a loss of boat revenue for the tug, M/V Connie Z, in the amount of \$58,894.80 and

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

<sup>2</sup> See Daily Barge Counts for 7/23 through 8/13 for MM105 for 2005, 2006 and 2007, submitted to the NPFC via email by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito, dated 3/30/2010 and See Daily Barge Counts for 7/23 through 8/13 for MM103 for 2005, 2006 and 2007, submitted to the NPFC via email by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito, dated 3/31/2010

<sup>3</sup> See Conference Call Recap, as edited by Mr. C. Gordon Starling, counsel for Zito, submitted to the NPFC via email by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito, dated 3/15/2010

additional expenses for use of the assist boat, M/V Shane C, in the amount of \$5,629.25. Zito's total combined claim amounts to \$76,173.03.<sup>4</sup>

#### **IV. APPLICABLE LAW**

Claims may be presented first to the Fund if the President or his delegated representative has advertised or notified claimants that the Fund is accepting claims resulting from an oil discharge. 33 U.S.C. §2713(b)(1)(A).

The uses of the OSLTF are described at 33 U.S.C. §2712. It provides in relevant part that:

“(a) Uses generally

The Fund shall be available to the President for –

(4) [T]he payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages; . . .

(b) Defense to liability for Fund

The Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of the claimant.”

Damages include damages for injury to natural resources, injury to or economic losses from the destruction of real or personal property, loss of subsistence use of natural resources, Government loss of revenues, loss of profits or earning capacity as a result of loss or destruction of real or personal property or natural resources, and costs of increased public services. 33 U.S.C. §2702(b). Damages are further defined in OPA to include the costs of assessing the damages. 33 U.S.C. §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 U.S.C. §2712(h)(2).

In any case in which the President has paid an amount from the OSLTF for any removal costs or damages specified under 33 U.S.C. §2712(a), no other claim may be paid from the Fund for the same removal costs or damages. 33 U.S.C. §2712(i).

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

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

“[T]he 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 preparation of the claim.” 33 CFR 136.105(e)(8).

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<sup>4</sup> According to Zito's published rate schedule, this claimed total could amount to \$222,134.65. However, while the Algiers Fleet is open to the public, Ingram Barges accounts for the majority of Zito's business. For this reason, Zito has calculated their claim based on the Ingram contracted rates, rates that are lower than the public rates. See Ingram Rate Sheet, Zito Exhibit C-8 and Zito Claim Response letter, submitted by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito on 2/26/2010

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 loss of profits or impairment of earning capacity due to injury to, destruction of, 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 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 of 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, comparative 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 an 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 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; any 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).

Under 33 CFR 136.115(d), the Director, NPFC, will, upon written request of the claimant or the claimant's representative, reconsider any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request for reconsideration must be received by the NPFC within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier.

## **V. DETERMINATION OF LOSS:**

### ***A. Overview:***

1. FOSC coordination has been established under the Federal Project by way of Incident Action Plans and United States Coast Guard (USCG) Pollution Reports under Federal Project Number N08057.

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. 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.
4. 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.
5. The claim was submitted on time.
6. The claimant seeks \$76,173.05 in loss of profits, as a consequence of the claimed lost revenue and additional expenses incurred.
7. The claimant asserts that, if not for the oil spill, Zito would not have incurred the loss of profits and additional expenses, as stated in Section A, Sub-point 6 above.
8. Presentment of costs to the RP was made by Zito, prior to the submission of the claim. The NPFC also made presentment of costs to the RP for which the RP responded denying responsibility for these costs.
9. 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. At the time of the spill, many vessels were detained and most river operations ceased. 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.<sup>5</sup>

**C. Loss of Fleeting Revenue**

Zito’s claimed lost fleeting revenue stems from the fact that their Algiers Barge Fleeting area was closed from July 23, 2008 at 03:30 hours and saw a loss of profit (due to historical averages for all three fleeting areas) until at least August 13, 2008. However, Zito was able to continue to earn profit at the Algiers fleeting area from July 23 through July 30, 2008, as there was no movement of barges from the area. Once the barges in this fleeting area were cleared to leave, however, Zito experienced a loss of profits for the time period between July 31 and August 12, 2008. Zito calculates this loss by establishing historical averages and applying the Ingram rates to the total number of projected barges lost.

Zito breaks down this loss as follows:

*Historical Averages:* Zito provided the NPFC with a calculation of daily barge counts by providing fleet pictures for 2005, 2006 and 2007.<sup>6</sup>

<b>Date</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<i>(Year)</i>
7/23	24	47	20	<i>(No. of Barges in fleet)</i>
7/24	27	73	28	

<sup>5</sup> Polreps 1-21; documenting river closures and traffic management through August 18, 2008.

<sup>6</sup> See Fleet Pictures, Zito Exhibits A-11 a-c, submitted to the NPFC with the claim by Wagner & Bagot, LLP for Zito on 1/04/2010

7/25	32	66	27
7/26	26	80	24
7/27	20	50	42
7/28	16	49	42
7/29	20	57	42
7/30	16	49	39
7/31	23	54	37
8/01	34	*	31
8/02	27	44	37
8/03	23	57	38
8/04	20	64	30
8/05	16	62	30
8/06	25	68	29
8/07	38	72	33
8/08	36	63	24
8/09	30	67	47
8/10	24	69	62
8/11	26	74	63
8/12	25	73	58

Totals:	528	1238	715
Divided by 21*:	25.14	61.90	34.05 (Average barges in fleeting area for the 21-day period, 7/23 through 8/12/2008)

\* The barge count for 8/01/2006 was not included with the claim submission; therefore, 2006 averages are taken out of a 20-day period.

When adding up these three totals and then dividing them by three, the historical average amounts to approximately 41 barges per day at the Algiers Barge Fleeting Area ( $25.14 + 61.90 + 34.05 = 121.09$ ;  $121.09/3 = 40.36$ , or 41 when rounded up).

Taking this Historical Average of 41, Zito takes the actuals from July 31 through August 12 in 2008 (as they continued to get paid from July 23 through July 30, 2008) in order to find the difference for each day and calculate the approximate loss:

Date	Barges in Fleet	Difference from Historical Average (41)
7/31	40	1
8/01	40	1
8/02	37	4
8/03	26	15
8/04	15	26
8/05	5	36
8/06	11	30
8/07	1	40
8/08	1	40
8/09	1	40
8/10	1	40
8/11	1	40
8/12	1	40
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<b>Total Fleeting Loss:</b>		<b>353</b>

**Multiplied by \$33.00 per barge<sup>7</sup>:      \$11,649.00**

The total fleeting loss, then, is estimated to be approximately **\$11,649.00** when applying the Ingram rates.

***D. Loss of Boat Revenue for the M/V Connie Z***

Zito is claiming a loss of boat revenue due to the closing of the Mississippi River and the fouling of the M/V Connie Z in the amount of \$61,288.47 from July 23 through August 12, 2008. The Connie Z was required, under USCG regulations, to be manned and was usually in continual use moving barges in assembling and breaking up barge tows for Zito.<sup>8</sup> While the M/V Connie Z commenced operating as a trip boat on August 5, 2008, it still experienced a loss for the duration of the affected time period.<sup>9</sup>

Zito breaks down this loss as follows:

*Historical Averages:* Zito provided the NPFC with a calculation of daily ins/outs per day from 7/23 through 8/13/2008 in 2006 and 2007 for the M/V Connie Z:

<b>Date</b>	<b>2006</b>	<b>2007</b>	<i>(Year)</i>
7/23	53	21	<i>(No. of ins/outs)</i>
7/24	15	6	
7/25	18	9	
7/26	51	24	
7/27	3	7	
7/28	24	19	
7/29	29	29	
7/30	15	21	
7/31	33	9	
8/01	17	10	
8/02	27	22	
8/03	22	36	
8/04	27	19	
8/05	11	22	
8/06	27	7	
8/07	21	10	
8/08	3	22	
8/09	9	29	
8/10	29	33	
8/11	32	4	
8/12	63	16	
8/13	2	26	
Totals:	531	401	
Divided by 22:	24.14	18.23	

<sup>7</sup> Ingram Rate, which includes the fuel surcharge. See Zito Claim Response letter, submitted by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito on 2/26/2010

<sup>8</sup> See email from MST2 Brandi Sable to Ms. Alyssa Lombardi, NPFC, dated 4/20/2010.

<sup>9</sup> See Zito Claim Submission letter, submitted by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito on 2/26/2010

Taking this Historical Average of 21.19, Zito calculates the approximate loss as such, based on the Ingram rate of \$219.00 per move<sup>10</sup>:

21.19 (average moves per day) multiplied by 21 days (7/23 through 8/12/2008) equals 444.99, or approximately 445 total moves. Applying the Ingram Rate, \$219.00 (which includes all fuel surcharges), to this, the total amount that Zito would have made for the Connie Z amounts to approximately \$97,455.00 (\$219.00 X 445 = \$97,455.00). The actual income for the M/V Connie Z during this time period amounts to \$36,166.53.<sup>11</sup> Therefore, subtracting the actual profit from the projected profit of \$97,455.00, the total loss of earnings equals approximately **\$61,288.47** (\$97,455.00 - \$36,166.53 = \$61,288.47).

#### **E. *Expenses Related to the Assist Boat, M/V Shane C***

Zito is claiming loss of profits due to the hiring of the M/V Shane C to do shifting and fleetling to clean barges and to move the cleaned barges to outbound tows on July 31, 2008, in the amount of \$5,629.25. Shane C. Marine Towing, LLC (Shane Marine) charged Zito \$275.00 per hour, with a contracted fuel surcharge of 78%.<sup>12</sup> Zito directed the Shane C from approximately 03:30 hours until 15:00 hours on 7/31/2008, for a total of 11.5 hours.<sup>13</sup> 11.5 hours at \$275.00 per hour totals \$3,162.50, to which the 78% fuel surcharge is applied. 78% of \$3,162.50 equals \$2,466.75. When combining the two totals, the total invoice for use of the Shane C equals **\$5,629.25**.

#### **F. *Analysis:***

Zito Fleetling, LLC submitted a claim with which they were able to demonstrate that they were indeed negatively impacted by the DM 932 oil spill. After researching and reviewing the claim, the NPFC has determined that all of Zito's claimed lost profits, when applying the Ingram Rate, are valid and compensable. Additionally, Zito was required to provide historic data and records for activity at its other two fleetling areas to demonstrate no increase activity at those locations resulted from the reduced activity at the impacted facility.<sup>14</sup>

#### **G. *Determination:***

The NPFC hereby determines that the OSLTF will pay **\$76,173.05** as full compensation for the lost profits incurred by the Claimant as a result of the increased expenses incurred during the DM 932 oil spill and submitted to the NPFC under claim # N08057-069. All increased expenses claimed are for charges paid for by the Claimant without mitigating or offsetting increases in revenues for the voyage in question. The lost profits determined are 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: \$76,173.05**

<sup>10</sup> See Ingram Rate Sheet, Zito Exhibit C-8 and Zito Claim Response letter, submitted by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito on 2/26/2010

<sup>11</sup> See Daily Boat Log for M/V Connie Z, submitted to the NPFC with the claim by Wagner & Bagot, LLP for Zito on 1/04/2010 and Actual Income of Connie Z, Zito Exhibit C-9, submitted by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito on 2/26/2010

<sup>12</sup> See Shane C. Marine Towing, LLC Invoice, Zito Exhibit A-7, submitted to the NPFC with the claim by Wagner & Bagot, LLP for Zito on 1/04/2010 and Joseph C. Domino Inc. Marine Towing Rate Sheet, Zito Exhibit C-5, submitted by Mr. C. Gordon Starling, Wagner & Bagot, LLP, for Zito on 2/26/2010

<sup>13</sup> See Shane C Domino Towing Daily Log, Zito Exhibit A-6, submitted to the NPFC with the claim by Wagner & Bagot, LLP for Zito on 1/04/2010

<sup>14</sup> See Historical Averages documents for MM 105 and MM 103, sent vi email by Zito to Ms. Alyssa Lombardi, NPFC, dated 3/30/2010 and 4/06/2010, respectively

Claim Supervisor: *Tom Morrison*

Date of Supervisor's review:

Supervisor Action:

Supervisor Comments:

U.S. Department of  
Homeland Security

**United States  
Coast Guard**



Director  
United States Coast Guard  
National Pollution Funds Center

US COAST GUARD STOP 7100  
4200 WILSON BLVD STE 1000  
ARLINGTON VA 20598-7100  
E-mail: [REDACTED]@uscg.mil  
Fax: 202-493-6900

5890  
4/21/2010

VIA EMAIL [REDACTED]@wb-lalaw.com

Zito Fleeting, LLC  
c/o Wagner & Bagot, LLP  
Attn: Mr. C. Gordon Starling  
650 Poydras Street, Ste 2660  
New Orleans, LA 70130-6158

Re: Claim Number N08057-069

Dear Mr. Starling:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act (OPA) (33 U.S.C. 2701 et seq.), has determined that \$76,173.05 is full compensation for OPA claim number N08057-069.

This determination is based on an analysis of the information submitted. Please see the attached determination for further details regarding the rationale for this decision.

All costs that are not determined as compensable are considered denied. You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claims. Reconsideration will be based upon the information provided and a claim may be reconsidered only once. Disposition of the reconsideration will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include corresponding claim number.

Mail reconsideration request to:

DIRECTOR (CA)  
NATIONAL POLLUTION FUNDS CENTER  
US COAST GUARD STOP 7100  
4200 WILSON BLVD STE 1000  
ARLINGTON VA 20598-7100

If you accept this determination, please sign the enclosed Acceptance/Release Form where indicated and return to the above address.

If we do not receive the signed original Acceptance/Release Form 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 Central Contractor Registration (CCR) record prior to payment. If you do not, you may register free of charge at [www.ccr.gov](http://www.ccr.gov). Your payment will be mailed or electronically deposited in your account within 60 days of receipt of the Release Form.

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,

Alyssa Lombardi  
Claims Manager

ENCL: Claim Summary/Determination Form  
Acceptance/Release Form

U.S. Department of  
Homeland Security

**United States  
Coast Guard**



Director  
United States Coast Guard  
National Pollution Funds Center

US COAST GUARD STOP 7100  
4200 WILSON BLVD STE 1000  
ARLINGTON VA 20598-7100  
E-mail: [REDACTED]@uscg.mil  
Fax: 202-493-6900

Claim Number: N08057-069	Claimant Name: Zito Fleeting, LLC c/o Wagner & Bagot, LLP Attn: Mr. C. Gordon Starling 650 Poydras Street, Ste 2660 New Orleans, LA 70130-6158

I, the undersigned, ACCEPT the determination of \$76,173.05 as full compensation for the removal costs and damages paid or incurred by Claimant for services provided by the claimant, and claimed to the Oil Spill Liability Trust Fund (Fund) under Claim Number N08057-069. These costs resulted from the below-described incident.

Date: July 23, 2008

Location: Mississippi River

Subject: DM932 Oil Spill incident.

This determination represents full and final release and satisfaction of all removal costs and damages paid or incurred by Claimant under Claim Number N08057-069 under the Oil Pollution Act of 1990 (33 U.S.C. 2712(a)(4)). This determination is not an admission of liability by any party. 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 loss. 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 the incident. 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 costs which are the subject of the claim against the Oil Spill Liability Trust Fund (Fund).

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 any compensation received from any other source for the same claim, 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
_____	_____
Typed or Printed Name of Claimant or Name of Authorized Representative	Signature

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

_____	_____	_____
DUNS #	Bank Routing Number	Bank Account Number