

## CLAIM SUMMARY / DETERMINATION FORM

Date	: 4/13/2011
Claim Number	: N08057-0095
Claimant	: Equinox Dawn, Ltd.
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [REDACTED]
Amount Requested	: \$90,719.46

### **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.C., Inc. (Chaffe) presented a claim to the National Pollution Funds Center (NPFC) for its client, Equinox Dawn Shipping, Ltd Greeks (Equinox Dawn). At the time of the collision and discharge of oil, the M/V Equinox Dawn was under a Time Charter to Hyundai Merchant Marine Co., Ltd. (Hyundai) for a minimum 23 to maximum 25 months in Charterers' option.<sup>2</sup>

Under the terms of the Charter Party (Clause 17), "should the vessel deviate or put back during a voyage, contrary to the orders or directions of the Charterers on Owners' or Master's initiative, for any reason other than an accident to the cargo or safety of navigation ..., the hire is to be suspended from the time of her deviating or putting back until she is again in the same or equidistant position from the destination and the voyage resumed therefrom." All bunkers used by the vessel while off hire shall be to the Owners' account. The daily hire rate is \$53,300.<sup>3</sup>

The M/V Equinox Dawn ("vessel") ended its sea passage from Veracruz, Mexico, at 1024 hours on July 23, 2008. At 1124 a pilot boarded, notice of readiness was tendered and at 1135 the vessel entered Southwest Pass bound for its intended loading berth at CHS Inc., located at Myrtle Gove Terminal Elevator at Belle Chasse, LA (Mississippi River Mile Marker (MM) 59). During the vessel's upriver transit the Coast Guard closed the river from the Port of New Orleans (MM 98) to Mile Marker 50. The vessel was directed as a result of the closure to anchor at Boothville (MM 12.5) at 1445 hours on July 23, 2008. The owner, on its initiative, weighed anchor at 1518 hours on July 23, 2008, and deviated the voyage by transiting downriver to

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

<sup>2</sup> See Time Charter between Equinox Dawn and Hyundai, signed 5/27/2008, submitted to the NPFC with the claim by Chaffe for Equinox Dawn on 3/04/2011.

<sup>3</sup> See Clause 17, in the Time Charter between Equinox Dawn and Hyundai, signed 5/27/2008 and submitted to the NPFC with the claim by Chaffe for Equinox Dawn on 3/04/2011.

Southwest Pass Anchorage. The vessel exited the Mississippi River and cleared Southwest Pass and anchored at 1825 hours on July 23, 2008, and sat idle until 2048 hours on July 27, 2008, when the river was re-opened to inbound traffic. Equinox Dawn states that the vessel deviated in order to prevent oil on the river from coming in contact with the vessel's hull, avoiding quarantine and potential oil cleaning delays.

Equinox Dawn acknowledges that the vessel was off hire from approximately 1518 hours on July 23, 2008 until 2400 hours on July 27, 2008, when the Coast Guard lifted the restriction on incoming vessels and allowed the M/V Equinox Dawn to resume operations. At this time the vessel's anchors were up, the vessel picked up a compulsory pilot and entered Southwest Pass at 2136. It changed pilots at Pilot Town (MM 2.5) at 2310 hours and anchored at Davant Anchorage (MM 54.0) at 0315 hours on July 28, 2008.

Equinox Dawn argues that the charterer agreed to put the vessel off hire from 1924 hours on July 26, 2008, until 2400 hours on July 27, 2008, when the vessel passed Bootheville again on its way back upriver to the berth at CHS, Myrtle Grove. This period was approximately 1 day, 4 hours and 36 minutes, or 1.191667 days.<sup>4</sup> Thus, Equinox Dawn seeks to recover the amount paid during this off hire period, as well an address commission of 2.50%, as a result of the 1.191667 days of additional off hire.

Equinox Dawn also argues that it is entitled to the costs associated with the 35 metric tons of fuel consumed during the 1.191667 days, or **\$19,250** as well as **\$47.67** as the "cable/victualling/communication" (CVE) costs for this time period and **\$6,318.04** in additional pilot and launch expenses.<sup>5</sup> In total, the amount claimed is **\$90,719.46**.

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

The responsible party for a vessel or facility from which oil is discharged, or poses a substantial threat of a discharge of oil into or upon the navigable waters is liable for the removal costs and damages resulting from such incident. 33 U.S.C. § 2702(a).

Damages include damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property or natural resources, which shall be recoverable by any claimant. 33 U.S.C. § 2702(b)(2)(E).

In general, claims for the removal costs or damages must first be presented to the RP. 33 U.S.C. § 2713(a). If the claim is not settled by payment by any person within ninety days, the claimant may commence an action in court against the RP or present the claim to the Fund. 33 U.S.C. § 2713(c).

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. 33 U.S.C. § 2713.

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).

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<sup>4</sup> See claim submission cover letter and Hire Statement from Hyundai to Equinox Dawn, submitted with the claim by Chaffe for Equinox Dawn on 3/04/2011.

<sup>5</sup> See Hire Statement from Hyundai to Equinox Dawn, submitted with the claim by Chaffe for Equinox Dawn on 3/04/2011.

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) & 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 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, 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. CLAIMANT’ ARGUMENT:**

### ***A. Claimant’s Argument: :***

Equinox Dawn provided Port Logs/Statement of Facts for the M/V Equinox Dawn for the period from July 23, 2008 at 1024 hours to July 28, 2008 at 2335 hours, which reflect that the Mississippi River was closed, the vessel was delayed and the vessel shifted to sea per owners' instructions.<sup>6</sup> Equinox Dawn also provided the charter party between Equinox Dawn Ltd. and Hyundai Merchant Marine Co., Ltd., the 10<sup>th</sup> Hire Statement and an undated e-mail communication from Hyundai Merchant Marine noting that the Charterers put the vessel off hire for a period of 1 day, 4 hours, 36 minutes (1.191667 days).

**B. Vessel Delay Time:**

Equinox Dawn claims that the charterers put the vessel off hire from 1924 hours on July 26, 2008 until approximately 2400 hours on July 27, 2008, for 1 day, 4 hours and 36 minutes, or approximately 1.191667 days.<sup>7</sup> Using the charter party's daily hire rate of \$53,300, Equinox Dawn calculates the off hire costs at \$63,515.85 (\$53,300 x 1.191667 days). Applying the address commission<sup>8</sup> of 2.50% (adding in \$1587.90), the total claimed amount lost due to off hire costs is **\$65,103.75**.

**C. Increased Bunkers**

Equinox Dawn also claims that the vessel consumed 35 metric tons (mt) during the 1.191667 days of off hire.<sup>9</sup> According to the 10<sup>th</sup> Hire Statement 35 metric tons were consumed during the off hire period for a total of **\$19,250** (35 mt x \$550/mt).

**D. Additional Costs**

Equinox Dawn claims incurred additional CVE costs for the 1.191667 days and additional pilot and launch fees resulting from the deviation of the voyage.

**CVE:**

The charter party provides that CVE costs were \$1200 per 30-day period or \$40.00 a day.<sup>10</sup> Equinox Dawn calculates CVE costs for the 1.191667 days to be **\$47.67** (\$40 x 1.191667 days).

**Pilot and Launch Fees:**

Equinox Dawn claims the additional pilot and launch fees incurred when the vessel deviated from Bootheville Anchorage down river to Southwest Pass and returning through Bootheville on the voyage upriver to CHS Myrtle Grove.<sup>11</sup>

<u>Date</u>	<u>Direction</u>	<u>Launch/Pilot</u>	<u>Amount</u>
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<sup>6</sup> See Port Log/Statement of Facts for the M/V Equinox Dawn, submitted with the claim by Chaffe for Equinox Dawn on 3/04/2011.

<sup>7</sup> See Hire Statement from Hyundai to Equinox Dawn, submitted with the claim by Chaffe for Equinox Dawn on 3/04/2011.

<sup>8</sup> See Clause 69, in the Time Charter between Equinox Dawn and Hyundai, signed 5/27/2008 and submitted to the NPFC with the claim by Chaffe for Equinox Dawn on 3/04/2011.

<sup>9</sup> See Clause 17, in the Time Charter between Equinox Dawn and Hyundai, signed 5/27/2008 and submitted to the NPFC with the claim by Chaffe for Equinox Dawn on 3/04/2011.

<sup>10</sup> See Clause 58, in the Time Charter between Equinox Dawn and Hyundai, signed 5/27/2008 and submitted to the NPFC with the claim by Chaffe for Equinox Dawn on 3/04/2011.

<sup>11</sup> See Clause 7, in the Time Charter between Equinox Dawn and Hyundai, signed 5/27/2008 and submitted to the NPFC with the claim by Chaffe for Equinox Dawn on 3/04/2011.

7/23/2008	Outward	Assoc. Branch Bar Pilots	\$2210.02
7/23/2008	Outward	Crescent River Pilots	\$865.75
7/23/2008	Outward	Launch Service	\$531.30
7/27/2008	Inbound	Assoc. Branch Bar Pilots	\$2179.67
7/27/2008	Inbound	Launch Service	\$531.30

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**TOTAL: \$6,318.04**

**VI. NPFC ANALYSIS:**

**A. Findings of Fact:**

1. The incident was the discharge of oil into the Mississippi River on July 23, 2008. 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 within three years after the date on which the injury and its connection with the discharge was reasonably discoverable with the exercise of due care.
5. Presentment of costs to the RP was made by Chaffe, representatives for Equinox Dawn, prior to the submission of the claim. The NPFC also made notification of claimed costs to the RP for which the RP responded denying these costs.

**B. Analysis:**

The charter party between Equinox Dawn and Hyundai Merchant Marine provides that should the vessel deviate or put back during a voyage contrary to the orders or directions of the charterers on the Owners' or Master's initiative, for any reason other than accident to the cargo or safety of navigation, the hire is suspended from the time of its deviating or putting back until it is again in the same or equidistant position from the destination and the voyage resumed there from. Fuel consumed during off hire shall be to the Owners' account.

Equinox Dawn, on its own initiative, deviated the voyage from Bootheville down river to Southwest Pass in order to avoid potential oil contamination to its hull, and acknowledges that this period is off hire. Equinox Dawn acknowledges that the time period from approximately 1518 hours on July 23, 2008, (when the vessel shifted to sea from Bootheville and transited downriver to Southwest Pass) to 2400 hours on July 27, 2008, (when the vessel passed Bootheville Anchorage) was off hire and the charterers are not responsible for hire during this period.

However, Equinox argues that the charterer placed the vessel off hire from approximately 1924 hours on July 26, 2008 until approximately 2400 on July 28, 2008 (1 day, 4 hours, 36 minutes or 1.191667 days). It bases this argument on an e-mail from Hyundai Merchant Marine which states that the "Chrts put vsl off hire as follows: ....Off hire period is 1 day + 4 hours + 36 minutes.... 1.191667 days x 53,300 usd = 63,515.85." Hyundai's email also deducts the 2.50 % add commission; adds the CVE and extra bunkers in the amount of \$19,250.00 for a total of \$84,401.42 usd. Charterers note that it will deduct these amounts from its next hire as off hire period.

Equinox Dawn misconstrues the email from Hyundai Merchant Marine. This e-mail from Hyundai is notice to it that the 1.191667 days is a continuation of the off hire because off hire continues until the vessel is again in the same position from the destination. Pursuant to the terms of the charter party, hire is suspended from the *time of the vessel deviating or putting back until it is again in the same or equidistant position from the destination and the voyage resumed there from*. Hyundai explains in the e-mail that this is the approximate time it took the vessel to be in the same position from the destination, i.e., actually passing Bootheville again on its trip back upriver to Myrtle Grove to load its cargo. Thus, the \$65,103.75 for the 1.191667 days is denied.

Equinox Dawn also argues that it is entitled to reimbursement of the fuel costs for fuel consumed during the 1.191667 days, CVE costs and the pilot and launch fees incurred for the deviation from Bootheville to Southwest Pass and return through Bootheville until the voyage is resumed at Bootheville.

Pursuant to the charter party fuel consumed during off hire is to Owners' account. Because the 1.191667 days is a continuation of off hire, Equinox Dawn is responsible for the claimed \$19,250 in fuel costs. These costs are denied.

Equinox Dawn argues that it is entitled to the CVE costs associated with the 1.191667 days. As noted above, the 1.191667 days is a continuation of off hire and Hyundai is not responsible for these costs.

Finally, the additional pilot and launch fees were incurred because the vessel deviated from Bootheville to Southwest Pass and back through Bootheville, and were incurred because Equinox Dawn, as the vessel owner, decided to deviate the voyage. These costs are denied.

***C. Determination:***

The NPFC hereby determines that the OSLTF will pay \$0.00 as full compensation for the claimed lost profits incurred by Equinox Dawn and submitted to the NPFC under claim # N08057-0095. The alleged damages claimed by the Claimant were not the result of injury to the natural resource but the result of the Claimant's initiative to deviate the voyage from Bootheville to Southwest Pass.

**VI. DETERMINED AMOUNT: \$0.00**

Claim Supervisor: 

Date of Supervisor's review: 4/14/11

Supervisor Action: Denial Allowed

Supervisor Comments: