

CLAIM SUMMARY / DETERMINATION FORM

Date	: 3/23/2011
Claim Number	: P05005-142
Claimant	: Nereus Shipping N.A.
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [REDACTED]
Amount Requested	: \$804,360.34

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 Nereus Shipping N.A. via an email dated November 16, 2007 and deemed the claim denied.

B. Claim Detail:

Claimant, Nereus Shipping N.A. (Nereus) presented 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 and increased expenses associated with *North Star*. Claimant seeks \$804,360.34 in reimbursement for loss of profits stemming from increased fuel consumption costs, increased expenses for Capt. [REDACTED] and increased expenses resulting from demurrage delays associated with the *North Star*. The claimant outlined three components of lost profits as a direct consequence of the T/V ATHOS I oil spill as follows¹:

<i>North Star</i> increased expenses in the amount of	\$772,326.38
<i>North Star</i> increased fuel consumption	\$ 14,217.78
<i>North Star</i> Increased port expenses	\$ 17,816.17

Claim Total	\$804,360.34
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The NPFC's original denial determination was completed and issued to the claimant on August 4, 2009. The NPFC received the claimant's request for reconsideration letter on September 28, 2009 via email followed by hard copy.

C. Contractual Relationships:

Nereus Shipping N.A.; the owner of the *North Star* chartered its vessel to Sunoco via a contract dated October 15, 2004 whereby it was scheduled to transport crude from West Africa to Sunoco refineries along the Delaware River. The rate of hire under this charter was \$90,000.00 per day pro rata (pdpr). On 11/26/04 the *North Star* arrived at Sunoco's Fort Mifflin dock where it offloaded part of its cargo as scheduled. The Athos I oil spill occurred on 11/26/04 which initially resulted in increased expenses to Nereus Shipping N.A. for a 34.4 hour delay of the

¹ See, claimant submission dated 11/05/07

North Star at Fort Mifflin from 0600 on 11/27/04 until 1625 on 11/28/04.² The increased expenses associated with this particular delay, were split between the owner of the *North Star*, Nereus Shipping N.A., and the charterer of the *North Star*, Sunoco in the amount of \$64,000.00.³ The *North Star* was delayed to be cleaned and cleared while the remaining cargo remained on board for future discharge at Eagle Point Terminal.⁴

Following the initial delay, the record indicates that Nereus (without other immediate commitments for the *North Star*) entered into a new contract with Sunoco dated 12/1/04 to lighter the *Astro Perseus* and the *Astro Capella*. This new contract for use of the *North Star*, provided for one lightering declarable before vessel (*North Star*) arrives Big Stone. This contract was exercised under special clause #12 post Athos I incident.

The terms of the new contract as demonstrated by the invoice are as follows: 9.25 days (Dec. 2, 2004 at 2020hrs until Dec. 12, 2004 at 0220hrs) at \$130,000.00 per day prorated = \$1,202,500.00; less offhire for cleaning hull per the Master's statement at 1.49652777 days at \$130,000.00 per day pro rata = (\$194,546.61) = \$1,007,953.39; plus bunkers consumption as follows:

IFO: 3151 B-2.928, 4=223, 4 MT x US \$188, 67 P MT = \$42,148.88
MGO: 155.4-143, 2=12, 2 MT x US \$416, 50 P MT = \$5,081.30 Totals: \$47,230.18

Less bunkers consumption during off-hire period per Master's statement as follows:

IFO: 84 MT x US \$188.67 P MT = \$1,584.83 Totals: \$2,084.63
MGO: 1, 2 MT x US \$416, 50 P MT = \$499.80 Total bunkers = \$45,145.55
Total new contract amounted to a total of \$1,053,096.94

Sun International, Ltd. (Sunoco); was the charterer of the *North Star* at the time of the oil spill. Sunoco entered into a new contract on 12/1/04 when its 10/15/04 contract ended to lighter the *Astro Perseus* and the *Astro Capella*. These deep draft vessels were scheduled to deliver via Sunoco's lightering contactor, Maritrans, but due to the Athos I oil spill Maritrans' vessels were backlogged, delayed, and unable to perform lightering services as scheduled. This additional contract for the use of the *North Star* cost Sunoco \$1,053,096.94 in expenses that Sunoco would not have had to incur but for the Athos I oil spill.⁵ Likewise, this contract provided *Nereus* with additional profits/earnings it would not have made on the *North Star* but for the Athos I oil-spill. Also of note, this contract was put into effect after the spill had occurred and after the *North Star* had already been cleaned once. This contract required additional operations within the oil impacted area resulting in the need for another cleaning of the *North Star*. Of the \$1,053,096.94 invoiced, Sunoco paid *Nereus* a total of \$1,004,919.06 which is broken down as follows:

<i>North Star</i> Spot Chartering fee =	\$1,053,096.94
<i>Astro Perseus</i> workboat fee =	\$ 58,000.00
<i>Astro Capella</i> workboat fee =	\$ 45,000.00
Increased agent fee/port expenses =	\$ 36,238.12
Fee reduction related to Maritrans =	\$ (187,916.00)
Total	\$1,004,919.06

APPLICABLE LAW:

² See, Claimant submission dated 11/05/07

³ See, Email from Claimant dated 4/13/09 with a Demurrage claim summary invoice dated 2/23/05

⁴ See Claimant Statement of Facts dated December 2, 2004, page 3

⁵ See, *North Star* contract dated 12/1/04 for offshore lightering found

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; . . .

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).

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, NPFC, 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).

With regard to claims for loss of 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 136.231-136.235, the details for 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 documents such as 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.
- (e) State, local, and Federal taxes.

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).

CLAIM:

I. INITIAL DETERMINATION

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 an oil spill such as the Athos I, that reduce profits the Claimant would have otherwise earned, could be compensable as lost profit damages from the Fund. However, a delay in and of itself is not indicative of a loss of profits. Also, demurrage rates, while they may indicate a value of time between contracting parties, in and of themselves they do not represent an expense or lost profit. In this instance, the Delaware Bay is deemed a natural resource that was injured by the Athos I oil spill. Therefore, those losses or expenses that Nereus clearly demonstrates which reduced profits it would have otherwise earned, could be deemed compensable. However, the Claimant failed to demonstrate these alleged losses in accordance with the regulations.

Based on the documentation initially provided by Sunoco associated with the 12/1/04 contract, Nereus earned \$1,004,919.06. Although Nereus incurred increased expenses as a result of the Athos I oil spill, in the form of increased bunkers, it also gained over \$1M in revenues from Sunoco's impromptu contract of the *North Star* which were made as a direct result of the Athos I oil spill incident. Moreover, the Claimant failed to reduce its alleged losses by, "all income resulting from the incident; all income from alternative employment or business undertaken," made as a result of the 12/1/04 contract as required by 33 CFR § 136.235(d). By failing to submit all documentation in accordance with 33 CFR § 136.235, the NPFC was unable to determine what if any losses Nereus actually incurred. Thus, NPFC denied this claim on 8/4/09, as Nereus failed to establish by the evidence that it lost profits as a result of the Athos I oil spill and did not account for or offset the \$1,004,919.06 it earned for the *North Star* as a result of the incident.

CLAIM CLARIFICATION:

CLAIMANT'S ASSERTED V. ACTUAL INCREASED EXPENSES FOR THE NORTH STAR:

In the process of adjudicating this claim on reconsideration, the claims manager noted a discrepancy between the amount the claimant requested reimbursement for increased expenses resulting from demurrage for the following time periods and the actual contract rates:

The *North Star* 10/15/04 contract calls for \$90,000.00 pdpr which was in place until 12/1/04 at 2020 hrs, at which point the 12/1/04 contract for the *North Star* went into effect at \$130,000.00 pdpr until 12/12/04 at 0220 hrs.

(under contract 10/15/04) - 11/27/04 at 0620 hrs to 11/28/04 at 1610 hrs = 33 hrs 50 min

(under contract 10/15/04) - 11/29/04 at 1225 hrs to 12/02/04 at 1315 hrs = 72 hrs 50 min (delayed per USCG for cleaning)

(under contract 12/1/04) - 12/10/04 at 0745 hrs to 12/11/04 at 1940 hrs = 35 hrs 55 min

Total delay time requested = 142 hrs 35 min which equates to 5.940972 days

Total days of 5.940972 x \$130,000.00 per day market rate = **\$772,326.38**

Actual calculations are as follows:

11/27/04 at 0620 hrs to 11/28/04 at 1610 hrs = 33 hrs 50 min @ \$90,000.00 pdpr
11/29/04 at 1225 hrs to 12/01/04 at 2400 hrs = 35 hrs 35 min @ \$90,000.00 pdpr
12/02/04 at 0001 hrs to 12/02/04 at 1315 hrs = 37 hrs 15 min @ \$90,000.00 pdpr
12/10/04 at 0745 hrs to 12/11/04 at 1940 hrs = 35 hrs 55 min @ \$130,000.00 pdpr
Total delay time requested = 142 hrs 35 min which equates to 5.940972 days

Total days @ \$90,000.00 pdpr for 106 hrs 40 min OR 4 days 10 hrs 40 min = \$400,062.50

Total days @ \$130,000.00 pdpr for 35 hrs 55 min OR 1 day 11 hrs 55 min = \$194,548.53

Total days = \$594,611.03 vice claimant calculation of \$772,326.38

The claimant also requested reimbursement of increased expenses resulting from increased fuel consumption during the overall delay period of 142 hrs 35 min in the amount of \$14,217 and additional port expenses in the total amount of \$17,816.17784 which are not in dispute.

II. CLAIMANT'S REQUEST FOR RECONSIDERATION

On reconsideration the Claimant asserts the following arguments:

1. The Claimant asserts that if the vessel had not been under contract, it would have been entitled to the fair market value of its vessel during that period of time; but for the spill, the vessel would have been proceeding under a contract with rates in the area of \$130,000 per day. Put another way, the claimant states that the finding that the total proceeds of the contract from December 2 at 1:15pm to December 10 at 7:45am are not applicable to offset the claimant's loss of use for their vessel during the three distinct periods of delay identified as: Delay period 1 – 11/27 at 6:20am to 11/28 at 4:20 pm; Delay period 2 – 11/29 at 12:25pm to 12/02 at 1:15pm; and Delay 3 – 12/10 at 7:45am to 12/11 at 7:40pm. In closing, the Claimant states the sum received on the contract can only be used to offset a claim for the loss of use on the specific days of the contract.
2. The Claimant asserts that they did not make a claim for the time period when the vessel was delayed under the 12/1/04 contract.
3. The Claimant asserts in summary, that the sums received on the new contract dated 12/1/04 during the Athos I oil spill, can only be used to offset a claim for the loss of use associated with the dates associated in that contract.

Besides these arguments, the Claimant has failed to provide any additional documentation to support his claim on reconsideration.

III. NPFC RECONSIDERATION ANALYSIS

The Claimant alleges (1) if the vessel had not been under a contract, it would have been entitled to the fair market value of its vessel during that time period; (2) that it did not make a claim for the time period when the vessel was under contract; and (3) the Claimant states that the sums received on the new contract dated 12/1/04 during the Athos I oil spill, can only be used to offset a claim for the loss of use associated with the dates associated in that contract.

In consideration of the claimant's first that if the 12/1/04 contract had not been available, the Claimant would have been entitled to claim for the fair market value of its vessel, the NPFC does not agree. The Claimant provided no documentation that the *North Star* either failed to meet a prior commitment or lost an opportunity after its 10/15/04 contract with Sunoco ended. What the evidence does show is that the

Claimant was under contract at a rate of \$90,000.00 pdpr for the time period claimed from 11/27/04 to 12/1/04 and that the parties entered into a new contract on 12/1/04 at a rate of \$130,000.00 pdpr. Claimant's argument at a rate of \$130,000.00 pdpr for the entire alleged period of loss is therefore incorrect and speculative. The NPFC can only make a determination based on the facts and evidence presented by the Claimant and as such, the NPFC cannot make a determination as to the value of the Claimant's alleged loss.

In consideration of the Claimant's second allegation on reconsideration, Nereus states that it did not make a claim for an additional day delay period because it mitigated losses by way of the 12/1/04 contract, however, the earnings from the subsequent contract must be considered in the totality of the Claimant's alleged losses. The NPFC must consider, 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 (d).

In consideration of the Claimant's third allegation on reconsideration, the Claimant states that the sums received on the new contract dated 12/1/04, can only be used to offset a claim for the loss of use associated with the dates associated in that contract. As previously stated, the NPFC disagrees with this interpretation. To the contrary, the additional revenue earned as a result of the 12/1/04 contract can and must be used to offset alleged losses associated with the oil spill incident in accordance with the claims regulations, which include "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 (d). Therefore, the Claimant is incorrect in stating that the NPFC has improperly considered the revenue earned for the *North Star* under the 12/1/04 contract. Additionally, the Claimant's calculation of \$772,326.38 was erroneous in light of the 10/15/04 (\$90,000.00 pdpr) and the 12/01/04 (\$130,000.00 pdpr) contract provisions previously addressed earlier in this determination.

It is important to note that in its letter on reconsideration the Claimant states that the NPFC found that the Claimant could not claim for the loss of use of its vessel for three distinct time periods of delay because it received sums under a contract for another separate time period, because it was greater than the loss of use of the vessel for the time periods claimed. The Claimant has misconstrued the NPFC's initial denial determination. In accordance with 33 CFR § 136.235(d), the NPFC must consider "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." While the Claimant has provided some details on the alleged periods of loss, the Claimant failed to provide information regarding the revenue stream associated with the 12/1/04 contract for the *North Star* in accordance with the regulations. Therefore, the NPFC obtained the details of the 12/1/04 contract information directly from Sunoco, the vessel's operator.

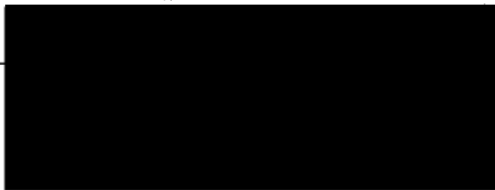
Given the costs and earnings associated with this incident, the claimant is not entitled to compensation as claimed. As demonstrated, the Claimant failed to provide information on the "alternative employment" undertaken and the "amount of income received" with regard to the 12/1/04 contract. Additionally, Nereus did not indicate, account for or offset "all income receive(d) as a result of the incident (which) must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident," in accordance with 33 CFR § 136.235(d). The additional details the NPFC obtained regarding the 12/1/4 contract with Sunoco shows that Nereus increased its income as a result of the Athos I incident which was not considered by the Claimant to reduce its alleged losses.

The NPFC denies this claim on reconsideration as the Claimant has failed to meet its burden of proof in establishing its overall loss when considering the increased revenues earned as a result of the Athos I oil spill incident.

Determination amount: \$0.00

Amount denied: \$804,360.34

Claim Supervisor:



Date of Supervisor's Review:

3/23/11

Supervisor's Action:

Denial on reconsideration approved