CLAIM SUMMARY / DETERMINATION FORM

Date	: 26 June 2009
Claim Number	: P05005-025
Claimant	: ConocoPhillips, Trainer Refinery
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [redacted]
Amount Requested	: $1,037,200.00

FACTS:

On 26 November 2004, the Athos I spilled oil into the Delaware River, a navigable water of the United States. ConocoPhillips (COP) submitted this claim for lost profits associated with the period between 1 December 2004 and 5 December 2004, when its refinery in Trainer, Pennsylvania slowed operations during the Athos I spill. The claimant argues that the oil spill prevented its refinery from receiving crude shipments by barge, which in turn forced it to lower its production rate during the aforementioned period.

The NPFC denied COP's claim on 23 January 2008. The claimant timely requested reconsideration and the NPFC retained a contractor to aid with some of the claim's technical aspects. After receiving significant additional information and explanations from the claimant, the NPFC is satisfied that the claimant has met its burden of proof.

APPLICABLE LAW:

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

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).

DETERMINATION OF LOSS:

The NPFC finds that ConocoPhillips should be compensated $720,989.00 for lost profits associated with claim number P05005-025.

DETERMINATION:

A. Overview

ConocoPhillips ("COP" or "Claimant") owns and operates the Trainer Refinery, an oil refining facility on the Delaware River. The refinery receives crude oil via the river by vessel, and then refines the oil into various refined products via five primary refining units. These refined products are more valuable than is the crude oil, and COP profits from the spread, or margin, on the refined products. COP claims that the Athos I oil spill, which closed the Delaware River,[1] interrupted the flow of incoming crude it receives by vessel, which caused it to produce less refined product and to alter its planned output mix. Therefore, COP claims, it refined less crude than it would have absent the spill, and it was forced to produce a suboptimal output mix (i.e., a mix with a lower associated profit margin than the mix it would have produced according to its pre-spill plan). In previously adjudicated and finalized COP claims related to the tank vessel delivery delays and diversions it was clearly established that the ATHOS I oil spill into the Delaware Bay both damaged a natural resource at and around the COP facility and also interfered with the delivery of crude oil required to continue to operate the COP facility at full capacity.[2]

COP has provided production (refining) data that demonstrates the reduced production during the impacted period (time frame deliveries were prevented/delayed from being received) as well as the production during normal conditions and those periods immediately prior to and after the impacted period.[3] The data provided also

[1] The FOSC ordered the river closed, POLREPs and FOSC documentation clearly show COP Trainer facility within the impacted area.
[2] Refer to claim determinations for P05005-026, 133 & 134.
[3] Production input/volumes - Data kept in the Refinery's Operations Data Information System, known locally as PI, as a part of COP Trainer normal business practice. The data contained in the spreadsheets originally submitted as a part of COP's claim were downloaded into Excel from PI, which is a format commonly used in COP. Historic Operating Data records are maintained in PI since 2003.

demonstrates the inability to shift/mitigate production losses to capacity that might be held elsewhere in the regional market.

COP has provided a methodology for quantifying the financial impact of the lost production during the impacted period and then demonstrated that production could not be made up elsewhere or at a different time, the quantification methodology uses actual market prices and average industry margins as published. Production volumes are pulled from COP's local database.[4]

COP's claim takes the difference between the but-for feed rates[5] and actual feed rates of its various refining units to yield a feed rate loss. Then, it multiplies this feed rate loss by the actual margin earned on actual feed rates during the impacted period. The resulting product is COP's estimate of its damages.

Because of the complexity of the claim, the NPFC contracted Industrial Economics, Incorporated ("IEC") to assist in reviewing certain aspects of the claim related to the more technical aspects associated with the refining industry and marketplace, as one primary underlying assumption by the claimant is that lost production cannot be made up. IEC independently reviewed and analyzed the production and pricing and all other components of the claim with relation to the quantitative or valuation issues and provided feedback directly to the NPFC. The NPFC and IEC (in a report dated 13 March 2009) identified various areas in which the claimant had not met its burden of proof to show that it realized economic losses due to the Athos I oil spill. COP, through its representative Scott Bilger, provided a rebuttal response to the issues raised within the report and this rebuttal sufficiently addressed certain of the NPFC's concerns. Some concerns however, remain specifically with regard to using planned production volumes and mix for determining the "but-for" production as well as the reasonableness of using average industry margins as a proxy for COP margins.[6]

B. Determined Loss

COP's claimed loss was $1,037,200.00 for the forgone production of refined products. On reconsideration the NPFC has reviewed all documentation and arguments within the claim. The claimant has documented that the delay in the delivery of crude oil impaired their production of refined products during the Athos Oil spill response. The impact to production was demonstrated and supported through actual facility data and then quantified or valued using proxies. Unfortunately, the reasonableness of using these proxies has not been demonstrated by the claimant. For that reason, the NPFC revisited the claimants analysis provided under cover letter of 19 March, 2008 in which a "loss of final product approach" was provided. In this approach the claimant used actual production volume losses and valued them using their own internal average profit margins as applied it to the lost revenue based upon an analysis of what their own actual historic product revenues for the impacted period while also providing these numbers for the period preceding and subsequent to the impacted period. This methodology resulted in a reported loss of profit of $720,989.00 and does so using actual repeatable data from

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[4] Income/P&L data - kept in CRD (essbase) as a part of COP Trainer normal business practice. The data contained in the spreadsheets, originally submitted as a part of COP's claim, were downloaded into Excel from CRD (essbase) which is a format commonly used in COP. Historic records are maintained in CRD (essbase), currently data exists for the Trainer refinery from 2001 forward.

[5] The methodology uses the "planned production" as the pseudo for the "but-for" production and this is one assumption in the methodology that has not been sufficiently supported.

[6] IEc Memorandum 13 March 2009 to Neil Bridge, NPFC; page 6 paragraph 20, first two bullets.

the claimant. This methodology with its associated actual and historic data reasonably meets the comparable financial data requirement specified in 33 CFR 136.231 (c).

Determined amount: $$720,989.00

Conclusion

The NPFC has determined that ConocoPhillips' Trainer Refinery lost $720,989.00 because of the Athos I oil spill on the Delaware River. The Athos spill caused the USCG to shut down portions of the Delaware River, which in turn delayed crucial crude oil shipments that were due to arrive at the Trainer Refinery by barge. Lacking the expected crude shipments, COP was forced to produce less refined product than it would have had the spill not occurred. In addition, COP produced a suboptimal mix of product compared to what it would have produced had the spill not occurred. Both of these factors contributed to COP losing profits. COP was not able to mitigate its losses at the Trainer Refinery, nor was it able to mitigate losses at the Bayway Refinery. The NPFC has reviewed the documentation and the report of its contractor, and is satisfied that the claimant has met its burden of proof under OPA.

Claim Supervisor: [redacted]

Date of Supervisor's review: 3/17/10

Supervisor Action: APPROVED ON RECONSIDERATION

Supervisor's Comments: