

CLAIM SUMMARY / DETERMINATION FORM

Date	: 02/19/2010
Claim Number	: P05005-146
Claimant	: Valero Refining Company-New Jersey
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: ██████████
Amount Requested	: \$513,304.00

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).

B. Claim Detail:

CLAIMANT, Valero Refining Company – New Jersey (“Valero” or “Claimant”) 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 on 19 November 2007. It should be noted that claimant's original submission was for a sum certain of \$520,578. This included removal costs in the amount of \$7,274.00 that were set aside and adjudicated separately in claim # P05005-145, which was paid on 8 August 2008. The revised sum certain for this adjudication is \$513,304.00. The NPFC notified the RP of the claim submitted by Valero Refining Company (Valero) via an email dated 26 November 2007, which Valero acknowledged and deemed denied.

Claimant seeks \$513,304.00 in reimbursement for loss of profits stemming from increased shipping and delivery costs of oil to Valero Paulsboro, additional expenses for maintenance of and repairs to Valero docks as well as assessment costs. Valero Paulsboro is located approximately 1 mile downstream from the Athos I allision and well within the safety zone where vessel traffic was restricted. The claimant alleges these restrictions caused an increase in its shipping costs as they are associated with delays in the movement of oil in and out of Valero's Paulsboro facility during the oil-spill incident and response, namely: M/T Cap Diamant's lost charter time¹; M/T Eagle Atlanta's increased expenses due to delays²; M/T Senang Spirit's increased expenses due to delays³; and increased expenses (demurrage charges)⁴ associated with two unmanned barges – PENN 210 (owned by Penn Maritime Service) and VB-38 (owned by Vane Line Bunkering). Also claimed are Commerce Construction's increased costs for disruption of repair and maintenance work at Valero's dock and the increased transportation costs incurred for the delivery of lube oil to Gordon Terminal Service via trucks, when transport via barge was not possible during the oil-spill incident.

At the time of the claim submission Valero requested additional time to submit supporting documentation which the NPFC granted and set a due date of 31 January 2008. On 31 January 2008, the NPFC received

¹ Claimant's 31 January 2009 Information Submission Binder, TAB 12, Schedule 2 – Calculation of Demurrage Spreadsheet, page 2; \$78,876.73.

² *Ibid.* Schedule 4A, Calculation of Demurrage Spreadsheet, page 6; \$59,917.78.

³ *Ibid.* Schedule 3, Calculation of Demurrage Spreadsheet, page 4; \$37,597.01.

⁴ *Ibid.* Schedule 5 Calculation of Demurrage and Extra Boiler Costs, page 10 for \$86,479.17 and from which \$2,741.67, for normal costs, are subtracted (Schedule 1) to arrive at claimed amount of \$83,737.50.

supporting documentation from the Claimant which is summarized in Table #1. Going forward, this claim will be analyzed and adjudicated following the table's order:

TABLE #1

Item #	Damage Source	Reason	Claimed Sum Certain ⁵ - Spreadsheet	Sum Certain ⁶
1	M/T Cap Diamant	Demurrage (Time Charter time allocation)	\$82,793.40	\$78,876.73
2	M/T Eagle Atlanta	Demurrage (voyage charter)	\$59,098.00	\$59,917.78
3	M/T Senang Spirit	Demurrage (voyage charter)	\$196,249.95	\$37,597.01
4	Penn 210 Barge	Demurrage	\$86,478.00	\$83,737.50
5	Penn 210 Barge	Extra Heating Costs	\$0.00	\$37,277.50 ⁷
6	VB-38 Barge	Demurrage	\$4,813.00	\$4,813.50
7	Gordon Terminal - Lube oil Trucking	Increased transport costs	\$15,000.00	\$8,685.49
8	Commerce Construction - Dock repair / maintenance	Increased construction costs due to disruption	\$19,245.00	\$19,245.00 ⁸
Sub-Total Claimed			\$463,677.35	\$330,150.51 ⁹
9	Assessment Costs		\$49,627.00	\$49,627.00 ¹⁰
GRAND TOTAL			\$513,304.35 ¹¹	\$379,777.51
DELTA BETWEEN SUBMISSIONS				(\$133,526.58)

Although Claimant alleged a sum certain of \$513,304.00, the documentation received on 31 January 2008 supports \$379,777.51, a difference of \$133,526.58. The NPFC notified claimant of this discrepancy but the request for claimant to amend the sum certain went unanswered¹².

C. APPLICABLE LAW:

Claims may be presented first to the Fund if the President or his delegated representative has advertised¹³ 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 –

⁵ Claim Submission – Received by NPFC on 19 November 2007

⁶ Claimant's 31 January 2008 Information Submission Binder, TAB 12, Schedule 1.

⁷ Costs are documented by the information submission of 31 January 2008. This item was not called out when claim was submitted on 19 November 2007.

⁸ All costs claimed add up to \$19,245.23, for a difference of \$0.23 from what was shown on claimant's summary spreadsheet.

⁹ Claimant's 31 January 2008 Information Submission Binder. Page 27.

¹⁰ *Ibid.* TAB 15, Documentation for these Assessment Costs, are not included in the 31 January 2008 submission. However, an email from ██████ to ██████ dated 12 August 2009 documented \$87,661.37 in costs that were described as adjudication costs. The NPFC presumed these costs to be assessment and considered them as such.

¹¹ Mathematical error by claimant left out \$0.35 from total.

¹² ██████ email to Valero's ██████ of 18 November 2009.

¹³ Enclosure #1- USCG Press Release 16 February 2005. (Doc#1)

(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, 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. 233 & 235.

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.” 33 CFR 136.233 (a) – (d)

If a third party claimant 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).

D. BACKGROUND AND FACTS¹⁴:

In the process of adjudicating this claim, the NPFC claims manager collected additional information from the claimant and other sources in order to document what took place at the time of the incident. The additional information from other sources is provided as Enclosure #1 to this determination.

I. OVERVIEW

1. 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.
2. The NPFC notified the RP of claimed costs for which the RP responded¹⁵ by denying these costs. 33 U.S.C. § 2713(a)
3. Real or personal property or natural resources have been injured, destroyed, or lost; specifically oil was released into and injured the Delaware River, a natural resource of the United States. 33 U.S.C. § 2703(B)
4. The claim was submitted on time. 33 CFR § 136.101(a)(1)(i). 33 U.S.C. 2712 (h)(2)
5. In accordance with 33 CFR § 136.105(e)(12). 33 U.S.C. 2713 (b)(2) the claimant has certified that there is no suit in court for the claimed uncompensated removal costs and damages.
6. The claimant seeks \$513,304.00 in loss of profits as a consequence of the increased expenses due to shipping delays from the slowed or stopped marine traffic on the Delaware River. 33 CFR § 136.105(b)
7. In the process of adjudicating this claim, the NPFC Claims Manager collected additional information from the claimant and other sources to corroborate what took place at the time of the incident. 33 CFR § 136.105(e)(13)
8. The claimant asserts that if not for the oil-spill incident it would not have incurred the additional expenses claimed. 33 CFR § 136.231(a)

Basis for the Claim:

As discussed above, this claim arises from the Athos I oil-spill incident on the Delaware River that occurred on 26 November 2004, causing Valero to incur increased expenses associated with shipping delays from the slowed or stopped marine traffic on the Delaware River. Valero’s Paulsboro refinery is highly dependent on river traffic, primarily for crude oil deliveries and cargoes, which are often discharged at multiple docks. The oil-spill incident specifically impacted three vessels and two barges contracted by Valero. The oil-spill incident also impacted ongoing construction activities by a contractor performing repairs and maintenance to Valero’s docks. As a whole, this claim deals with fixed-rate contracts or purchase orders for vessels picking-up and delivering oil, additional transportation costs for trucks versus barges and additional construction costs.

¹⁴ NPFC research is included as Enclosure (#1) to this claim determination.

¹⁵ Email from ██████ to ██████ dated 26 November 2007 @ 5:32PM

To receive payment from the Fund for lost profits, a claimant must prove that it lost profits and that the loss resulted from the oil-spill incident. For example, decreased revenue and/or increased expenses caused by an oil-spill incident which reduce the profits claimant would have otherwise earned could be compensable as lost profit damages by the Fund. In this instance, the Delaware Bay is deemed a natural resource that has been injured by the Athos I oil-spill incident¹⁶. Therefore, where ever Valero proves that it incurred increased expense(s) that were not offset by additional revenue and which reduced its profits as a result of this oil-spill incident these expenses could be compensable under OPA.

Valero asserts that it lost profits when it incurred increased expenses, where the revenue was fixed and the profit¹⁷ was directly affected by the expenses the claimant incurred in the process of fulfilling contractual commitments, as result of the Athos I oil-spill incident from 26 November 2004 until 8 December 2004 without any offset in revenues. While a vessel delay in and of itself does not necessarily equate to increased expenses and increased expenses alone may or may not be a loss of profits, the financial data¹⁸ provided by the claimant and verified by the NPFC, demonstrates that in this case Valero could not pass the increased costs onto others. This is because the pricing for refinery products is determined by the market.¹⁹ The affected oil deliveries, where claimant alleges a loss of profits, were to Valero's Paulsboro refinery on the Delaware River, or to its customer Gordon Terminal Service in Kearny, NJ. Valero asserts that its expenses for the various charter party trips continued to accrue while the vessels were delayed, either inbound or outbound.

For this claim, the claims manager has followed a process to analyze and adjudicate the asserted loss of profits as presented by the claimant. In doing so, the NPFC uses the same identification convention used by claimant so that each item corresponds to the number found in the table which claimant provided with the supporting information submitted on 31 January 2008.

ANALYSIS & DETERMINATION

ITEM #1 – M/T Cap Diamant

Claimant asserts that the M/T Cap Diamant (Cap Diamant) lost 3.267361 days²⁰ of charter time as a result of the Athos I oil-spill incident. On 6 November 2003,²¹ Mid Americas Shipping Company, LTD., the owner of the Cap Diamant, chartered this vessel to Ultramar LTD., a wholly owned subsidiary of Valero Energy Corporation. The contract called for 4-month extensions for a maximum term of twenty-four (24) months²² to transport "*crude oil(s) and/or dirty petroleum products*"²³. The rate of hire for this charter divided the year into two periods - summer and winter, with a summer rate of \$23,500.00 per day pro rata and a winter rate of \$26,500.00 per day pro rata.

Pursuant to the Ship's Agent Port Log,²⁴ at the time of the Athos I oil-spill incident (2230 on 26 November 2004), the Cap Diamant was anchored at Big Stone Anchorage awaiting high tide and pending

¹⁶ Enclosure #1- USCG SITREP-POL/ACTUAL dated 271013Z Nov 2004. (Doc #2)

¹⁷ Profit = Revenues – Expenses, is the formula used throughout the determination.

¹⁸ Valero Energy Corp 10-K for fiscal year ended 31 December 2004.

¹⁹ Enclosure #1- Monthly U.S. No.2 Distillate Retail Sales by All Sellers for the months of November and December 2004 which shows prices dropping versus rising. The statistic confirms that the marketplace drives prices and that a single entity, such as Valero, cannot pass onto its customers, increased costs that have such a short duration on a geographically limited impact area. Source: U.S. Energy Information Administration found at: http://tonto.eia.doe.gov/dnav/pet/pet_stoc_cu_sl_m.htm (Doc #3)

²⁰ Claimant's 31 January 2009 Information Submission Binder, TAB 12, Page 2 of 17; (waiting time [2.569444 days] + cleaning time [0.697917 days] =3.267361)

²¹ *Ibid.* TAB 3 - McQuilling Brokerage Partners, Inc. Charter Party dated 6 November 2003 between Mid Americas Shipping Co. LTD & Ultramar LTD.

²² *Ibid.* Charter Party Special Clauses; Clause #37 – Term and Clause #38 – Extension Period(s)

²³ *Ibid.* Paragraph 4

²⁴ *Ibid.* TAB 5, Cap Diamant's Port Log

the availability of the #1 Berth at Valero Paulsboro which was occupied by the Maritrans 400²⁵. This is Paulsboro's deepest berth²⁶ and was the only one able to service the Maritrans 400 and the Cap Diamant, as the other berths have a shallower depth and are therefore more limited²⁷. The physical characteristics of the Cap Diamant limited Valero from discharging this vessel at any berth except the #1 Berth. Since this berth was already occupied by the Maritrans 400, there was no alternate berth available at Paulsboro. Therefore, the Cap Diamant had to wait until the Maritrans 400 completed offloading and vacated the berth, which happened on 27 November 2004 at 1500.²⁸ Ideally at that time the Cap Diamant should have been able to proceed toward the #1 Berth, however, due to the Safety Zone implemented during the ongoing oil-spill incident response, the Maritrans 400 was prevented from vacating the berth until 0245 on 29 November 2004²⁹; approximately 2 days after it was ready to sail.

Time Delayed:

As stated above, at the time of the oil-spill incident, the Cap Diamant was chartered by Valero through a time charter,³⁰ which is why neither Valero nor the Cap Diamant incurs demurrage on a voyage-by-voyage basis.

The damage presented by Valero, as charterer, is based on Valero's cost allocation³¹ of the Cap Diamant's charter time, which it claims was lost while it waited³² for the barge Maritrans 400³³ to vacate Valero Paulsboro's #1 Berth. The claimed period of loss starts at 1900 on 27 November 2004 after the Maritrans 400 is released by Valero and ends at 0840 on 30 November 2004³⁴ when the barge is allowed to sail after being cleared.

In the case of a time charter, where the charterer (Valero) claims the loss of charter time as damage due to an oil-spill incident, the charterer has to wait until after the end of the charter. This particular charter's specific end³⁵ is unknown, but conceivably can be the maximum allowed in the charter party, which is two years (24 months) from its inception and if so, would approximately end on 5 November 2005. However, the claimant did not provide documentation as to the actual end date for this charter. Without a final accounting there is no way to reconcile the time lost/gained through the duration of the charter to determine the actual demurrage incurred and what, if any loss, is allocated to the oil-spill incident.

Calculation of Lost Profits

Although claimant provided information for the voyage³⁶ that immediately followed the one in this claim, it also needed to provide a reconciliation of the entire time charter. At this time, we have not been provided with the information and analysis that would link and make the case that the oil-spill incident

²⁵ Claimant's 31 January 2009 Information Submission Binder, TAB 5 - Cap Diamant's Port Log. See entry for Friday 26 November 2004 @ 12:51.

²⁶ *Ibid.* See Email from ██████████@urco.com dated 24 November 2004 stating "At the berth the draft alongside is 40' fresh water."

²⁷ Enclosure #1- This is a fact confirmed by the President of the Pilots Association for the Bay & River Delaware in a telephone conversation with ██████████ on 8 January 2010. (Doc #4)

²⁸ Claimant's 31 January 2009 Information Submission Binder, TAB 4, Maritrans Operating Partners L.P. – Activity Tasks for Maritrans 400 – Request #66853

²⁹ *Ibid.*

³⁰ *Ibid.* TAB 3 - McQuilling Brokerage Partners, Inc. Charter Party dated 6 November 2003 between Mid Americas Shipping Co. LTD & Ultramar LTD – Special Clause #15; Delivery.

³¹ *Ibid.* TAB 12, Schedule 1 ("Basis" column)

³² *Ibid.* – Section III, Facility Actions, Schedules - page 12.

³³ Enclosure #1- A bulk liquid cargo (tank) barge having an approximate length of 644 feet and currently owned by OSG and renamed OSG-400. (Doc #5)

³⁴ Claimant's 31 January 2009 Information Submission Binder, TAB 12 – Page 2 of 17

³⁵ *Ibid.* TAB 3 – Time Charter Party Special Clauses - #15 Delivery and Redelivery

³⁶ *Ibid.* TAB 5 – ██████████'s email to ██████████s of 4 December 2009; Subject "Cap Diamant voyage to Ceiba. This is also provided in Enclosure #1 (Doc #6)

delays, claimed as lost time, affected subsequent voyages within this time charter. To be considered OPA compensable, the claimant would need to provide such analysis³⁷ with supporting documentation, to include mitigation, and demonstrate the requisite causation. Such analysis would need to take into account the charter’s Special Clause (#38) governing how the periods are calculated and where it states: “Period to consist of firm four (4) months periods plus or minus fifteen (15) days at Charterers’ option (per “Term”) above – Special Clause No. 37), with up to five (5) optional four (4) months periods plus or minus fifteen (15) days at Charterers’ option, wherein commencement of the next four (4) months period;...” Given this, Valero (charterer), has the option to absorb the delay time claimed without any penalty, as is provided in the contract.

Under this time charter³⁸, the vessel owner, Monrovia, pays for vessel expenses with the exception of those specified in Clause #7. That clause requires that the charterer (Valero) pay for certain items including the fuel. The fuel consumed during the time of alleged delay is OPA compensable, if properly documented. However, Valero has not claimed this as a loss.

Claimant’s burden is to demonstrate that it suffered a loss of profits either through income reduced or as an impairment of earning capacity. Given what has been presented, this burden has not been met. 33 CFR 136.235. While on contract under the time charter agreement, claimant agreed to pay a fixed hire rate (\$23,500 during Summer Period or \$26,500.00 during Winter Period) regardless of the status of the vessel. The claimant has not provided the NPFC with information showing that there were additional payments made or opportunities lost due to the delay at Valero Paulsboro. For failing to show that Valero paid additional amounts for the time delayed at Valero Paulsboro and for also failing to demonstrate that this time delay impacted follow-on voyages, that carried through to the end of the time charter, this portion of the claim for lost time in the amount of \$78,876.73, is deemed denied.

Item #1	M/T Cap Diamant – Demurrage	
	Amount Offered	Amount Denied
Amount Requested/Claimed		
\$78,876.73	\$0.00	\$78,876.73

ITEM #2 – M/T Eagle Atlanta

This portion of the claim is attributed to the demurrage incurred by the M/T Eagle Atlanta (Eagle) during the Athos I oil-spill incident. American Eagle Tankers (American), owner of the Eagle, chartered its vessel to Valero via a contract of affreightment (COA).³⁹ A COA is a charterparty⁴⁰. The COA for Voyage 7 dated 15 November 2004⁴¹, required Eagle to deliver a cargo of crude oil loaded in Covenas, Colombia to Valero’s Paulsboro facility and called for a daily/demurrage rate of \$47,200.00 per day pro rata. At the time of the Athos I oil-spill incident, the Eagle was enroute⁴² to Valero Paulsboro. As noted in the Statement of Facts/Port Log⁴³ signed by the Master, the Eagle anchored and tendered its notice of readiness (NOR) at 0300⁴⁴ on 30 November 2004. The Eagle anchored at Big Stone Anchorage and

³⁷ At a minimum, this would include information on each voyage, when it began, how far vessel had to travel, downtime experienced during transits and expenses paid.

³⁸ Claimant’s 31 January 2009 Information Submission Binder, TAB 3 – McQuilling Brokerage Partners, Inc. – Time Charter Party dated 6 November 2003.

³⁹ Contract of Affreightment is defined as “An agreement for carriage of goods by water. This type of contract usually takes the form of a bill of lading or charterparty.” - Black’s Law Dictionary

⁴⁰ The charterparty is a contract by which a ship is leased by the owner to a merchant for the conveyance of goods on a predetermined voyage to one or more places; a special contract between the ship owner and charterer for the carriage of goods at sea. – Black’s Law Dictionary

⁴¹ Claimant’s 31 January 2009 Information Submission Binder, TAB 6, See email dated 15 November 2004 between cmd@mcquillin.com and [REDACTED] (Tanker) – Doc - No. 29205 dtd 15/NOV/2004 14:18 (UTC -0500) CMD

⁴² *Ibid.* Valero Marketing and Supply’s (VM&S) Analysis of Ship Movement. File number 190238 showing Eagle Atlanta completing loading of cargo at Covenas, Colombia at 1500 – 11/24/04.

⁴³ *Ibid.* Statement of Facts///Port Log – Eagle Atlanta

⁴⁴ *Ibid.* TAB 6 Statement of Facts///Port Log – Eagle Atlanta

awaited the availability of the #1 Berth which was occupied by the Cap Diamant and had also been delayed by the Athos I oil-spill incident in reaching the berth. The Eagle was finally cleared for arrival at 2136⁴⁵ on 2 December 2004, which is when it pulled anchors and proceeded to berth.

Time Delayed

When the Eagle arrived at the Delaware Bay entrance on 30 November with a load of Vasconia⁴⁶ crude oil loaded in Covenas, Colombia the M/V Athos I oil-spill incident had already occurred and response efforts were underway. Due to the oil-spill incident a vessel traffic management system (VTMS) was implemented and a Safety Zone⁴⁷ was established which controlled and imposed significant traffic restrictions on vessel movement⁴⁸. This VTMS directed Eagle to anchor at Big Stone Anchorage. After anchoring, Eagle tendered its NOR at 0300. The claimant submitted the Statement of Facts / Port Log for the voyage, which is among exhibits provided and confirms these oil-spill-related delays. This information was further corroborated by the NPFC with the vessel traffic movement log kept by then CG MSO Philadelphia. Claimant quantified the delays in Schedule 4A⁴⁹ to arrive at a total of 30.466667 hours after applying a 50% discount factor, per the charter party's Special Provisions⁵⁰.

The NPFC acknowledges that the oil-spill incident caused delays and that the period of loss started at 0840 on 30 November 2004, which is 2h 14m before the morning high tide at Big Stone Anchorage, to the time it actually was allowed to proceed to berth at 2136 on 2 December 2004⁵¹, for a delay of 60 hours, 56 minutes (60.933333hrs).

The NPFC concludes that Eagle was delayed 60 hours, 56 minutes (60.933333hrs) or 2.538889 days.

Calculation of Lost Profits

Having found that Eagle was delayed 60.933333hrs or 2.538889 days, the issue remaining is that of quantifying the dollar value of profits lost during that delay and applying any credits due the charterer by the owner in accordance with charter party agreement. When a 50% discount factor is applied, per the charter party's Special Provisions⁵², the NPFC concludes that the total time delayed is 30 hours and 28 minutes, which equates to 30.466667 hours or 1.2694444 days. This conclusion confirms the amount of time claimant has claimed this vessel lost due to the oil-spill incident⁵³. After applying the demurrage daily rate of \$47,200⁵⁴, the NPFC concludes that the cost incurred by Valero for the Eagle is \$59,917.78. A proof of payment of \$817,660.41 to American Eagle Tanker was confirmed and found in the JP Morgan Chase Statement of Account⁵⁵. The delay directly increased expenses of delivered product without any offset in the revenues. Using the premise that **Profit = Revenues – Expenses** and where the Revenues remained constant, but the Expenses increased, the NPFC concludes that but for the oil-spill incident Valero's profits would have been \$59,917.78 more than they actually were.

⁴⁵ Claimant's 31 January 2009 Information Submission Binder, TAB.6 Statement of Facts///Port Log – Eagle Atlanta

⁴⁶ *Ibid.* Valero Marketing and Supply's Analysis of Ship Movement for Eagle Atlanta, File# 190238

⁴⁷ Enclosure #1- SITREP-POL 6 (Doc #7)

⁴⁸ Enclosure #1-SITREP-POL 5 (Doc #8)

⁴⁹ Claimant's 31 January 2009 Information Submission Binder, TAB 12, Calculation of Demurrage – Eagle Atlanta - Pg 8 of 12

⁵⁰ *Ibid.* TAB 3, American Eagle Tankers COA; Paragraph M.2 – ISPS Clause.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.* TAB 12, Schedule 4A

⁵⁴ *Ibid.* TAB 6, See Demurrage Invoice #D00784C referencing Charter Party dated 09/29/04.

⁵⁵ *Ibid.* TAB 15, page 4. JP Morgan Chase Statement of Account

Item #2	M/T Eagle Atlanta - Demurrage	
Amount Requested/Claimed	Amount Offered	Amount Denied
\$59,917.78	\$59,917.78	\$0.00

ITEM #3 – M/T SENANG SPIRIT

This portion of the claim is attributed to the demurrage incurred by the M/T SENANG SPIRIT (Senang) during the Athos I oil-spill incident. On 16 November 2004, Teekay Chartering Limited (Teekay) (represented by a broker, Charles R. Weber Co., Inc.) chartered the Senang to Valero for one voyage via a charterparty⁵⁶ to deliver crude oil from St. Eustatius, N.A. to Valero Paulsboro. The daily/demurrage rate for this charter was \$75,000.00 per day pro rata. At the time of the Athos I oil-spill incident, the Senang was enroute from St. Eustatius, N.A. to Valero Paulsboro. The Senang arrived at the Delaware Bay entrance at 1300 hours on 28 November⁵⁷. At the time, the oil-spill had already occurred and response efforts were underway, so the vessel anchored at Big Stone Anchorage and tendered its NOR at 1418.⁵⁸ However, when the Senang tendered its NOR it was early, despite the fact that it had been previously advised that the #1 Berth at Valero Paulsboro would not be available until the morning of 4 December.⁵⁹

When the vessel arrived in the Delaware River on 28 November it had a draft of 39' 8"⁶⁰. Normally, a vessel at this draft could proceed to Valero's Paulsboro's #1 Berth, if it were unoccupied, however, the #1 Berth was occupied by Maritrans 400 and the Senang arrived earlier than scheduled. Therefore, it anchored at Big Stone Anchorage as it waited for the #1 Berth's availability. In addition to Senang, the Cap Diamant and the Eagle Atlanta were already awaiting availability of #1 Berth and were ahead in the queue. Based on the information supplied by the claimant, the vessel would have weighed anchors at 19:25 on 3 December to allow transit time to meet the AM high tide on December 4⁶¹. However at that time, the berth was being occupied by the Eagle Atlanta. It wasn't until 4 December 2004 at 0736, when the vessel pulled anchors and proceeded to berth, arriving at 2024 on 4 December 2004⁶² rather than earlier that morning as intended.⁶³

Time Delayed

The claimant took into account the Senang's early arrival when it claimed a period of delay of 12.183333 hours (0.507639 days) from the 3 to 4 December 2006.⁶⁴ Claimant submitted the Statement of Facts / Port Log⁶⁵ for the voyage, which is among the exhibits used to construct a timeline on the Senang. The NPFC also considered the VTMS's movement log kept by then MSO Philadelphia.

Claimant took into account the early arrival when it quantified the delays in Schedule 3⁶⁶ to arrive at a total of 12.183333 hours (0.507639 days). Given that the charter party agreement does not provide for any discounts for the circumstances that affected Senang, all time is accounted on a one-for-one basis.

⁵⁶ Claimant's 31 January 2009 Information Submission Binder, TAB 7 – Email dated 16 November 2004 from chartering@crweber.com to Smith, Larry (Tanker) confirming Senang Spirit voyage.

⁵⁷ *Ibid.* TAB 7, Statement of Facts//Port Log – “Senang Spirit”

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* E-mail from [REDACTED] to [REDACTED] of 24 November 2004 @ 2:42PM.

⁶⁰ *Ibid.* Statement of Facts//Port Log – “Senang Spirit”

⁶¹ *Ibid.* TAB 12, Schedule 3, page 5 of 17 (See Tab 7, email dtd 24 Nov 04 Senang Spirit V225/ Valero Marketing)

⁶² *Ibid.* TAB 7, Statement of Facts//Port Log – “Senang Spirit”

⁶³ *Ibid.* E-mail from [REDACTED] to [REDACTED] of 24 November 2004 @ 2:42PM

⁶⁴ Claimant's 31 January 2009 Information Submission Binder, TAB 7, E-mail from [REDACTED] to [REDACTED] of 24 November @ 2:42PM.

⁶⁵ *Ibid.* Statement of Facts//Port Log – M/T Senang Spirit.

⁶⁶ *Ibid.* TAB 12, page 5 of 17 – Calculation of Demurrage – Senang Spirit.

In its submission, the claimant points out that had it not been for the oil-spill incident, the Eagle Atlanta would have completed its discharge at #1 Berth, which in turn would have allowed the Senang to weigh anchors on the evening of 3 December 2004, in time to make high tide and arrive at the #1 Berth in the morning of 4 December. Instead, the Senang departed on 4 December 2004 at 0736⁶⁷, which was 2h 43m after high tide.⁶⁸

The NPFC acknowledges that the oil-spill incident caused delays and has determined that the period of loss started on 3 December at 1925 and ended 4 December at 0736 when it weighed anchors. Based on this, the NPFC concludes that Senang was delayed 12 hours, 11 minutes or 0.507639 days.

Calculation of Lost Profits

Having found that Senang was delayed 0.507639 days, the issue remaining is that of quantifying the dollar value of profits lost during that delay and applying any credits due the charterer by the owner in accordance with charter party agreement. Aside from the brokerage fee (1.25%), nothing in the charter party shows claimant being entitled to any discounts; that said this is a straight calculation of days lost by the applicable rate; \$75,000.00⁶⁹, which yields a total of \$37,597.01⁷⁰.

This total confirms the amount claimed for the time lost by Senang due to the oil-spill incident⁷¹. Claimant provided a proof of payment in the amount of \$193,796.87 which was confirmed by wire transfer statements to Teekay Chartering Limited and JP Morgan Chase.⁷² This delay directly increased expenses of delivered product without any offset to revenues. Using the premise that **Profit = Revenues – Expenses** and where the Revenues remained constant, but the Expenses increased, the NPFC concludes that but for the oil-spill incident Valero’s profits would have been \$37,597.01 more than they actually were.

Item #3	M/T Senang Spirit – Demurrage	
Amount Requested/Claimed	Amount Offered	Amount Denied
\$37,597.01	\$37,597.01	\$0.00

ITEMS #4 & #5 – BARGE PENN-210

Claimant attributes this portion of the claim, for demurrage and extra heating costs incurred by the PENN-210 Barge, to the Athos I oil-spill incident. Penn Maritime Service (Penn Marine) owned the barge PENN 210 which was hired⁷³ by Valero for moving product to different locations. The movement of product required that the product transported maintain certain temperature, accomplished by heating with onboard boilers. Due to the ongoing response to the Athos I oil-spill incident, barge movement was restricted, which in addition to causing it to accrue demurrage charges also caused additional heating charges that are included and claimed as a lost profit.

The PENN-210 is an unmanned barge that at the time of the Athos I oil-spill incident was docked at Valero Paulsboro Berth 3B⁷⁴ loading 22,016.99 bbls of asphalt to be delivered to Trumbull⁷⁵ in Kearny,

⁶⁷ Claimant’s 31 January 2009 Information Submission Binder, TAB 12 page 4 of 17

⁶⁸ *Ibid.* page 5 of 17

⁶⁹ *Ibid.* TAB 7, Teekay Marine Services Invoice for Senang Spirit’s Voyage #225 dated 8 December 2004.

⁷⁰ *Ibid.* TAB 12, Schedule 3, page 4 of 17 - Delayed time (0.507639 days) x daily rate (\$75K) – (1.25% fee; multiply by 0.9875)

⁷¹ *Ibid.*

⁷² *Ibid.* TAB 15, page 5 - JP Morgan Chase Statement of Account

⁷³ *Ibid.* TAB 9, page 14 – Valero Refining and Marketing – Scheduling Print for Movement #184351 dated 10 December 2004.

⁷⁴ *Ibid.* Page 19

⁷⁵ *Ibid.* TAB 9, page 14 – Valero Refining & Marketing – Scheduling Print – Movement # 184351 dated 10 December 2004.

NJ. As claimant presents there are three (3) distinct damage components associated with this barge. First is the demurrage incurred while it was held at Paulsboro after Valero released it, second is the demurrage incurred at Kearny, NJ while it discharged product and third is the additional heating costs incurred while it sat at Paulsboro and waited to be released. Though the barge completed loading product and was released by Valero on 27 November 2004 at 0955⁷⁶, it remained there, boomed in and pending release⁷⁷. While at Valero Paulsboro, it was found to be oiled and required cleaning. It was not released by the USCG until 6 December 2004 at 1106⁷⁸, which is when the barge was able to proceed to its destination; Trumbull in Kearny, NJ.⁷⁹

Time Delayed

For the first component, the NPFC concludes that the PENN-210 was affected and delayed by the oil-spill incident starting at 09:55 on 27 November 2004 and ending at 1106 on 6 December 2004, which equates to a delay of 217 hours, 11 minutes or 217.18 hrs. Upon comparing the claimed time of 219.92 hrs⁸⁰ to the NPFC's calculation, it is apparent that claimant overstates the time delayed in this portion by 2.74 hours. The NPFC values this period as \$76,013.00 after using the hourly rate of \$350.00.⁸¹

The second component regarding the PENN-210 is a demurrage charge by Penn Maritime to Valero for the time that the barge was discharging cargo at Kearny, NJ. This charge is discerned by a note stating "*Oil Spill Delay at Discharge Port (Kearny)*" for a total of 19.33 hrs⁸². It is important to note that the facility at Trumbull (Kearny, NJ) is accessed by water via the Atlantic Ocean, not the Delaware River, and was not affected by the oil-spill incident. Given this and upon close examination of the documentation provided⁸³ the NPFC notes that the delay is attributed to the slow discharge of cold cargo.⁸⁴ The documentation shows that the cargo arrived at Kearny at a temperature of 219 °F⁸⁵ instead of 250 °F⁸⁶ or higher, as noted by Intertek Testing Services.⁸⁷ At this time of the year in Kearny, NJ, the average ambient temperature range is 45° – 32° F⁸⁸. The NPFC finds no connection between the oil-spill incident and the slow flow of product upon discharge. For this reason, this portion of the claim is denied.

The third and final component for the PENN-210 relates to the additional heating costs for the cargo, from the time it was released by Valero Paulsboro to the point when the CG deemed the barge clean of oil and ready to sail.⁸⁹ It should be noted that the claimant asserts in the claim narrative⁹⁰ that this period of delay is 27 November 2004 at 0955⁹¹ through 6 December 2004 at 1350, which claimant quantifies as 227 hours.⁹² However, upon examining the documentation provided, the NPFC notes that the Penn Maritime

⁷⁶ Claimant's 31 January 2009 Information Submission Binder, TAB 9, page 14 – Valero Refining & Marketing – Scheduling Print – Movement # 184351 dated 10 December 2004..

⁷⁷ *Ibid.* Page 1 – [REDACTED] email dated 29 November 04

⁷⁸ *Ibid.* TAB 15 – USCG's Vessel Traffic Management Group's Log

⁷⁹ *Ibid.* TAB 9 – Penn Maritime's Daily Vessel Report for Penn 210 dated 6 December 2004

⁸⁰ *Ibid.* TAB 12, Schedule 5, page 10 of 17

⁸¹ *Ibid.* TAB 9, page 4 – Penn Maritime Invoice for order #184351 (Demurrage)

⁸² *Ibid.* Page 11 of 17

⁸³ *Ibid.* TAB 9, E-mail from [REDACTED] of 4 December 2009 to [REDACTED] providing Penn Marine's Demurrage Breakdown for Penn-210 barge and Penn-210's Daily Report dated 6 December 2004.

⁸⁴ *Ibid.* Penn Maritime's Demurrage breakdown; comments for 9 December 2004 entry stating "*Slow disc. (discharge) due to cold cargo because of delays in Philly/spill.*"

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* Page 19, footnote # 9.

⁸⁷ *Ibid.* Page 15.

⁸⁸ Enclosure #1- Information from www.weather.com for Kearny, NJ (07032). (Doc #9)

⁸⁹ Claimant's 31 January 2009 Information Submission Binder, TAB 15 – USCG's Vessel Traffic Management Group's Log

⁹⁰ *Ibid.* Page 25

⁹¹ *Ibid.*

⁹² *Ibid.*

invoice dated 17 December 2004⁹³ reflects a shorter period that started 28 November 2004 at 0500 and ended 6 December 2004 at 1430 for a total of 201.50 hours. The NPFC determined that the period of delay is 217.18 hrs for a difference of 9.82 hrs from the claimed period. However, given that claimant was only billed and paid for a period of 201.50 hrs, the NPFC adopts this period which it values at \$37,277.50 after using the hourly rate of \$185.00⁹⁴.

Calculation of Lost Profits

Based on the above discussion of the three Barge PENN-210 items, the NPFC summarizes them as follows:

Item #4	Barge PENN 210 – Demurrage (27 November 2004 – 6 December 2004)	
Amount Requested/Claimed	Amount Offered	Amount Denied
\$76,972.00 ⁹⁵	\$76,013.00	\$959.00
Item #4	Barge PENN 210 – Demurrage (Kearny, NJ)	
Amount Requested/Claimed	Amount Offered	Amount Denied
\$6,765.50 ⁹⁶	\$0.00	\$6,765.50
Item #5	Barge PENN 210 – Extra Heating Costs (Pending FOOSC Clearance)	
Amount Requested/Claimed	Amount Offered	Amount Denied
\$37,277.50	\$37,277.50	\$0.00

Two (2) proofs of payment to Penn Maritime were confirmed and are found on pages 2 (\$37,277.50) and 7 (\$415,833.46) within the JP Morgan Chase Statement of Account⁹⁷. The delay directly increased expenses of delivered product without any offset in the revenues. Using the premise that **Profit = Revenues – Expenses**, where the Revenues remained constant but the Expenses increased, the NPFC concludes that but for the oil-spill incident Valero’s profits would have been \$113,290.50 more than they actually were.

ITEM #6 – BARGE VB-38

This portion of the claim is attributed to the demurrage incurred by the VB-38 barge as a result of the Athos I oil-spill incident. Vane Line Bunkering Inc. (Vane Line) is the owner of the barge VB-38 which was on contract via a purchase order⁹⁸ to a ConocoPhillips (CP) subsidiary (ConocoPhillips Domestic Marine) to move CP’s product to different locations. At the same time, CP was on contract⁹⁹ to provide Valero (claimant) with NLR, Non-Leaded Regular gasoline (87 octane)¹⁰⁰, to Valero Paulsboro at dock #3B. Claimant states that due to the ongoing response to the Athos I oil-spill incident, the movement of the barge was restricted, which caused the accrual of demurrage charges that are included and claimed as a lost profit.

Claimant’s submission describes this barge as an unmanned barge scheduled to load 30,000 bbls of product at the Conoco/Phillips refinery (Trainer, PA) and deliver to Valero’s Paulsboro Refinery on 7 December 2004. Claimant asserts that VB-38 was delayed¹⁰¹ for a total of 32.09 hours by “vessel traffic

⁹³ Claimant’s 31 January 2009 Information Submission Binder, TAB 9 page 7 of 27.

⁹⁴ *Ibid.*, TAB 9 page 7 of 27 – Penn Maritime Invoice for order #184351 (Heater Charges)

⁹⁵ *Ibid.*, TAB 12 – page 10 of 17; 219.92 hours x \$350.00/hour (PENN 210 hourly rate)

⁹⁶ *Ibid.* Page 11 of 17, 19.33 hrs x \$350 = \$6,765.50

⁹⁷ *Ibid.* TAB 15, pages 1 & 5.

⁹⁸ *Ibid.* TAB 11, page 10 (Vane Line Bunkering Invoice dated 10 December 2004)

⁹⁹ *Ibid.* Pg 8, ConocoPhillips Spot EFP Deal Agreement – Contract # VAL04PE00069

¹⁰⁰ Enclosure #1 [REDACTED] email to [REDACTED] of 7 January 2010. (Doc #6)

¹⁰¹ Claimant’s 31 January 2009 Information Submission Binder, TAB 11

restraints” during the period starting 8 December 2004 at 15:00 and ending 10 December 2004, since it took that much longer than normal, which cost Valero \$4,813.50 in demurrage.¹⁰²

Time Delayed

After barge VB-38 completed loading at Conoco/Phillips it sailed at 12:30 on 8 December 2004¹⁰³ and arrived at Valero at 02:10 on 10 December 2004.¹⁰⁴ It is during this period that claimant asserts having experienced demurrage¹⁰⁵ due to the oil-spill incident. The documents provided include CP’s Invoice & Demurrage Calculations; Vane Line Bunkering Inc.’s invoice, demurrage calculation and fleet status report, which contained the same information on the sail/arrival dates and times. However, these documents do not explain why it took so long to move from CP to Valero. In its submission, claimant provides the following to prove causation: *“We believe this delay is (caused by) the Coast Guard’s Traffic Management System that prioritized vessel and cargo movements during the Athos I incident.”*

On 8 December 2004, the USCG issued SITREP-POL 16, which states, *“Safety zone remains in effect requiring commercial vsls to travel at minimum-wake speed and prohibiting recreational boating traffic; SZ currently being enforced during daylight hrs only. Commercial traffic flowing at normal condition. (added emphasis)”*¹⁰⁶. At the time of the alleged delay, the river was open to all inbound & outbound commercial traffic, albeit at a reduced speed. Given this, the NPFC is unable to conclude that the alleged delay was caused by the oil-spill incident.

The NPFC denies the demurrage incurred by VB-38, which was claimed as an expense resulting from the oil-spill incident, from the time it sailed from Conoco/Phillips until it docked at Paulsboro #3B berth, as this is not supported by the evidence.¹⁰⁷ Since claimant has not met its burden to show and prove that this delay was caused by the oil-spill incident, this portion of the claim is denied.

Calculation of Lost Profits

Item #6	VB-38 Barge – Demurrage	
	Amount Requested/Claimed	Amount Denied
\$4,813.50	\$0.00	\$4,813.50

ITEM #7 – LUBE OIL TRUCKING FOR GORDON TERMINAL

This portion of the claim is attributed to the increased expenses Valero incurred to supply its customer, Gordon Terminal Service (GTS) with lube oil (VP 700¹⁰⁸). GTS is a Valero customer that normally receives lube oil by barge, with monthly average (normal) deliveries of approximately 16,400 bbls. Due to the oil-spill incident no barge was ordered by the end of November 2004. To mitigate the losses Valero supplied lube oil via truck instead of by barge. Claimant alleged that the transport of lube oil via truck increased the cost of doing business, since the most economical method of transport by barge was not available during the ongoing oil-spill incident. However, while Valero provided the transportation invoices it received, by themselves these do not prove that the claim of it incurring increased expenses.

In addition to claimant provided information, the NPFC researched¹⁰⁹ GTS and found that it provided the following services for oil and chemical producers: contract terminalling, blending, packaging, and

¹⁰² Claimant’s 31 January 2009 Information Submission Binder, TAB 12
¹⁰³ *Ibid.*, TAB 11 Pg 13 – Fleet Status Report for Order #04L00018
¹⁰⁴ *Ibid.*
¹⁰⁵ *Ibid.* TAB 15
¹⁰⁶ Enclosure #1- SITREP-POL 16. (Doc # 10)
¹⁰⁷ Claimant’s 31 January 2009 Information Submission Binder, TAB 11, pg 7
¹⁰⁸ A straight cut oil, per Material Safety Data Sheet for Valero VP Lubricant Base Oils.
¹⁰⁹ Enclosure #1- www.GordonTerminal.com (Doc # 11)

shipping services¹¹⁰. GTS's line of business is best understood as one that receives (via barge, railcar and truck)¹¹¹ the ingredients that formulate / make lubricating oils, according to customers' specifications, and are either packaged on site and shipped, or shipped in bulk form via tank transport or rail car, with Valero typically providing various ingredients for their line of products.

Calculation of Lost Profits

While it may be reasonable to infer that the oil-spill incident affected barge deliveries of bulk VP 700 oil, Valero has not met its burden in supporting these costs such as the underlying contract, the transportation rates paid and what it billed and received from its customer. The NPFC made two requests¹¹² to claimant for information to establish the connection between the customer (GTS) and supplier (Valero) and to clarify who would bear the increased transportation. These requests went unanswered.

Given that the transport of lube oil via truck and its alleged increase to the cost of doing business is only an inference and the claimant has not met its burden of proof, this portion of the claim is denied.

Item #7	Lube Oil Trucking to Gordon Terminal – Increased Transport Cost	
Amount Requested/Claimed	Amount Offered	Amount Denied
\$8,685.49	\$0.00	\$8,685.49

ITEM #8 – DOCK REPAIR / MAINTENANCE BY COMMERCE CONSTRUCTION

This portion of the claim is attributed to the increased costs Valero incurred when its contractor, Commerce Construction (Commerce) incurred additional costs, as its scheduled maintenance and repair work at Valero's docks was disrupted by the Athos I oil-spill incident. At the time of the oil-spill incident, Commerce, a construction company on contract¹¹³ with Valero, was performing maintenance to repair and renew the Fender System, Guard Log, Spill Boom Brackets, and Rubber Baffle Walls at docks (Berths) 3A and 3B¹¹⁴. The oil in the water caused construction operations to be interrupted when barges at docks 3A and 3B were unable to move and allow for the execution of planned maintenance and repair work.

From 29 November 2004 thru 3 December 2004 contractor personnel remained onsite and Commerce paid these personnel, although little or no work was accomplished.¹¹⁵ The oil in the water also damaged Commerce's personal property (i.e. diving gear). Valero reimbursed Commerce for both the payroll during the delay and the damaged property.¹¹⁶

Based on a contract, named "Work Agreement",¹¹⁷ which both parties signed on 23 July 1999, Commerce was to perform work specified on the contract's Exhibit "A", which is missing. After requesting it from the claimant who was unable to produce it, the NPFC was pointed to the description of work in Commerce's invoices (billings 1-A through 3-A),¹¹⁸ and where the work described matches claimant's statements. The contract's initial period of performance established a "Term" that ran from 30 May 1999 to 3 September 1999. The next document provided by claimant, a "First Amendment to Work

¹¹⁰ Enclosure #1- www.GordonTerminal.com "About Gordon Terminal" (Doc # 11)

¹¹¹ *Ibid.*- Services

¹¹² *Ibid.*- ██████'s ██████ emails of 11 December 2009 and 14 December 2009; Subject: Gordon Terminal – Lube Oil Deliveries. (Doc # 12)

¹¹³ Claimant's 31 January 2009 Information Submission Binder, TAB 3, First Amendment to Contract Agreement and Work Agreement between Valero Refining Company – New Jersey and Commerce Construction Corporation.

¹¹⁴ *Ibid.* Pg 20

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.* TAB 14, See email from ██████ to ██████ of 28 December 2009, with proof of payment.

¹¹⁷ *Ibid.* TAB 3, Valero & Commerce Construction's Joint Work Agreement (JWA) – dated 5 June 2003.

¹¹⁸ Claimant's 31 January 2009 Information Submission Binder, TAB 14.

Agreement” signed by Valero with Commerce on 5 June 2003¹¹⁹ references the original contract and established a “Term” (contract period) which extends the contract’s term through 30 May 2004 and instituted an automatic annual renewal on its anniversary date, 30 May. Unless cancelled by either party with a 60 days written cancellation notice, this provision kept the contract in place indefinitely. Claimant demonstrated that a contractual relationship was established between Valero and Commerce which specifically covered the period when the claimed damages occurred. After the oil-spill incident, the work crews showed up to perform work for three days, after which Valero shut down the maintenance/repair operations, given that little or no work was being accomplished. Thereafter, Commerce billed Valero for the three days, per its Joint Work Agreement/contract (Cancellations– Clause #11¹²⁰), which Valero honored and paid.

Valero contends that oil in the water disrupted maintenance and repair operations. It also ordered construction operations to shut down, to mitigate its losses when little or no work was being accomplished by Commerce. The damages included wages, personal property (gear and supplies) and equipment rental costs, which are summarized in Enclosure 2.

Calculation of Lost Profits

Using the premise that **Profit = Revenues – Expenses**, where the Revenues remained constant but the Expenses increased, the NPFC concludes that but for the oil-spill incident Valero’s profits would have been \$19,163.48 more than they actually were. Based on the evidence, the NPFC determines that Claimant incurred these costs as a consequence of the oil-spill incident and that it has presented evidence and proof of payment to substantiate these additional expenses as a loss of profit.

Item #8	Dock Repair / Maintenance by Commerce Construction	
Amount Requested/Claimed	Amount Offered	Amount Denied
\$19,245.00	\$19,163.48	\$81.52

ITEM #9 – LIGHTHOUSE TECHNICAL CONSULTANTS – ASSESSMENT COSTS

The claimant hired Lighthouse Technical Consultants, Inc. (LTCI) to assess the damages, which subcontracted with PCCI¹²¹ and RGL – Forensic Accountants and Consultants (RGL). PCCI incurred over 80% of the documented direct assessment costs¹²² while RGL reviewed and analyzed claimant’s business documents to measure its losses. Their efforts were presented and billed to Valero by LTCI.

Based on the activity records provided by PCCI, the efforts of researching and assessing the information that would document the claimant’s damages, were conducted primarily by PCCI

¹¹⁹ Claimant’s 31 January 2009 Information Submission Binder, TAB 14

¹²⁰ *Ibid.* TAB 3, page 6.

¹²¹ A Marine and Environmental Engineering firm.

¹²² Valero’s claim submission, received by NPFC on 19 November 2007, stated a sum certain of \$520,578 which included \$49,627 for assessment costs. The assessment costs were never addressed in claimant’s 31 January 2008 submittal. At a later time, in August 2009, Mr. Rick Cool delivered, on behalf of the claimant, the assessment costs bundled by LTCI. This submittal lacked a letter from claimant stating what this information was or how it was to be considered. Although on 2 December 2009 the NPFC made a request for claimant to consider amending the sum certain, claimant took no action. In the absence of a response from the claimant, the claims manager considered all items included in the submission. The submission consisted of a series of invoices to Valero Energy Corporation for professional services. The amount captured by the “top” invoice from Lighthouse Technical Consultants, Inc. (LTCI) shows \$87,661.37. This LTCI invoice included other invoices and spreadsheets attached that further broke down the amounts in the invoice by specific contractor - LTCI, PCCI and RGL, which when added together summed \$88,373.53. A discrepancy of \$518.03 between LTCI’s top invoice and the claims manager sum stems from LTCI’s invoice omitting \$518.03 as “expenses advanced” which are shown on RGL’s top invoice.

with further assistance by RGL. Also, it appears that during this process, the activities of PCCI and RGL were occasionally joined by an LTCI member. From the documentation provided, the activities in which an LTCI member interacted with PCCI and RGL were few and far between. When comparing the activities of the PCCI and RGL members with LTCI, it appears that LTCI’s primary purpose was not assessment but something else - strategy consultation, organization of site visit, preparation for site visit. Given that claimant has not met its burden of proving and supporting the claim that LTCI’s activities and associated costs are in fact OPA compensable assessment costs, they are deemed denied.

NPFC developed a spreadsheet¹²³ capturing the activities of LTCI, PCCI and RGL which was used to summarize all alleged costs included in the LTCI package. It should be noted that the documentation submitted reflected costs which totaled \$87,861.37 however, Valero claimed assessment costs in the amount \$49,627.00.¹²⁴ Enclosure (3) is the spreadsheet that captures the details of all items claimed and the NPFC’s adjudication of each one. The NPFC determined the total OPA compensable assessment costs are \$23,743.11.

Item #9	Assessment Costs	
	Amount Offered	Amount Denied
Amount Requested/Claimed		
\$49,627.00	\$23,743.11	\$25,883.89

E. DETERMINATION OF LOSS:

The NPFC acknowledges that the Athos I oil-spill incident impacted shipping and operations along the Delaware River. Under the OPA some of Valero’s claims, where documented, are compensable. The table below summarizes the NPFC’s determination as to each item claimed.

SUMMARY TABLE IS FOUND ON NEXT PAGE

¹²³ Enclosure (3) - Assessment Costs - Itemized NPFC cost summary and adjudication spreadsheet.

¹²⁴ The mathematical total based on all invoices from PCCI and RGL should be \$88,373.53. This discrepancy stems from LTCI’s top invoice omitting \$518.03 from RGL in “expenses advanced”; shown on RGL’s top invoice dated 29 August 2008.

TABLE #2

#	Damage Source	Reason	Claimed Amount ¹²⁵	Determined Amount	Denied Amount
1	Cap Diamant	Demurrage based on allocation of charter time	\$78,876.73	\$0.00	(\$78,876.73)
2	Eagle Atlanta	Demurrage Paid	\$59,917.78	\$59,917.78	\$0.00
3	Senang Spirit	Demurrage Paid	\$37,597.01	\$37,597.01	\$0.00
4	Penn 210	Demurrage Paid	\$83,737.50	\$76,013.00	(\$7,724.50)
5	Penn 210	Extra Heating Costs Paid	\$37,277.50	\$37,277.50	\$0.00
6	VB-38	Demurrage Paid	\$4,813.50	\$0.00	(\$4,813.50)
7	Increased Transportation Costs	Additional expenses incurred when using trucks vs. barges	\$8,685.49	\$0.00	(\$8,685.49)
8	Increased Construction Costs	Construction disruption and damage of personal property (PPE & diving gear)	\$19,245.00	\$19,163.48	(\$81.52)
Sub Total			\$330,150.51	\$229,968.77	(\$100,181.74)
9	Assessment Costs	Damage	\$49,627.00 ¹²⁶	\$23,743.11	(\$25,883.89)
TOTAL			\$379,777.51¹²⁷	\$253,711.88	(\$126,065.63)
Amount Claimed – 19 November 2007 Submission			\$513,304.00 ¹²⁸		

F. CONSIDERATION

In consideration of all the evidence collected, the NPFC finds that an OPA incident did in fact occur which caused Valero a loss of profits as previously discussed. In addition, claimant has proven that it incurred some OPA compensable assessment costs. Based on the above, I find that the claimant has experienced **\$253,711.88**, in OPA-compensable costs resulting from the Athos I oil-spill incident on November 26, 2004. I recommend that the claimant be offered said amount to settle this claim.

G. DETERMINED AMOUNT **\$253,711.88**

¹²⁵ Claimant's 31 January 2009 Information Submission Binder, TAB 12, Schedule 1, w/o assessment costs

¹²⁶ This amount was never amended, although a request for such was made to the claimant. In the absence of a response from the claimant, the claims manager considered all items included in the hand-carried submission of cost data made in August 2009 which lacked a letter from claimant, but consisted of a series of invoices to Valero Energy Corporation for professional services. The amount captured by the "top" invoice from Lighthouse Technical Consultants, Inc (LTCI) is \$87,661.37. This LTCI invoice had other invoices and spreadsheets attached that further broke down the amount in the invoice by specific contractor - LTCI, PCCI and RGL. Together the sum is \$88,373.53. This discrepancy seems to stem from LTCI's omission of \$518.03 in "expenses advanced" and shown on RGL's top invoice.

¹²⁷ This is the amount supported by the documentation provided by the claimant, given that a request for the claimant to amend the sum certain went unanswered.

¹²⁸ Although the claim's sum certain was not amended, there is a difference of \$95,292.12 between the claim submission (19 November 2007) and the result the claims manager arrived at after adding the amounts in the 31 January 2008 submission and the presumed assessment costs delivered in August 2009.

Claim Supervisor:
Date of Supervisor's Review:
Supervisor Action:
Supervisor's Comments:



- Encl (1) NPFC's Research; Researched Documents (included/supplemented to the administrative file and called out in 13 footnotes cited)
(2) Spreadsheet - Adjudication of Commerce Construction costs
(3) Spreadsheet - Adjudication of Assessment Costs for Claim #P05005-146 – Valero Refining Co.