CLAIM SUMMARY / RECONSIDERATION

Claim Number:	N08057-0093
Claimant:	AEP River Operations LLC
Type of Claimant:	Corporate
Type of Claim:	Loss of Profits and Earnings
Claim Manager:	[redacted]
Amount Requested:	$1,148,806.40

I. Incident

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision and discharged oil into the Mississippi River, a navigable waterway of the United States.[1]

Under the Oil Pollution Act of 1990, the responsible party (RP) for the incident is American Commercial Lines LLC (ACL).[2]

II. History of the Claim

AEP River Operations LLC[3] (Claimant or AEP) submitted its claim to the Fund asserting a loss of profits and impairment of earning capacity on January 20, 2011 in the amount of $1,148,806.40.

Part A. Ancillary Expenses (Standby Expenses):	$ 23,375.57
Part B. Third-Party Vessel Lay-up Expenses:	$135,062.25
Part C. Business Interruption/Increased Time to Place Barges for Next Cargo:	$794,589.00
Part D. Business Loss on Oiled Barges in Transit:	$128,160.00
Part E. Boat Downtime and Expense:	$ 67,619.58
Total	$1,148,806.40

On January 14, 2014 the NPFC denied Claimant's lost profits claim on two grounds. Claimant had previously settled certain components of its claim with the RP and the claimed amounts in Parts A, D and E represented lost profits that were allegedly not settled and paid by the RP. The NPFC denied Parts A and E on the grounds that Claimant had not evidenced that it retained subrogable rights to these parts that the United States would acquire if paid from the Fund.

The NPFC denied Part B on the grounds that the allegedly extraordinary layup charges incurred due to the incident were in fact related to time charters, which Claimant was liable to pay under all circumstances. The NPFC denied Part C, the business interruption component on the grounds that Claimant, when claiming $794,589.00, had not factored in the revenues it received from the freight, the $360,000 in expenses it received from the RP or the saved expenses. Finally, the NPFC denied Part D, the business loss on oiled barges in transit,

[1] See USCG POLREPS #7, #8 & #9 Part 5 of claim Administrative Record
[2] 33 USC §2702 (a)
[3] Effective July 30, 2008 AEP MEMCO LLC changed its name to AEP River Operations LLC.

on the grounds that the $267/gross margin/barge day was not supported by convincing evidence.

Claimant requested reconsideration of the denial of its claim, seeking an extension of time to submit factual and legal arguments in support of the request. On April 14, 2014, the NPFC received Claimant's supporting documentation with a cover letter explaining its factual and legal arguments for reconsideration.

Claimant now seeks reconsideration of Parts A, D and E only in the amount of **$219,155.15**.

Part A. Ancillary Expenses	$ 23,375.57
Part D. Lost Profits on Oiled Barges Still in Transit	$128,160.00
Part E. AEP Tugboat Downtime and Expense	$ 67,619.58
Total	$219,155.15

III. Reconsideration:

NPFC reviewed the administrative record for Parts A, D and E *de novo*, along with the additional information submitted by Claimant in support of its request for reconsideration. Specifically, Claimant provided its Barge and Boat Income Statements for 2006 through 2009 and 2006 – 2009 Barge Income Statement Summaries. These are more fully discussed below.

Part A. Ancillary Expenses $23,375.57:

Background:

The NPFC notes that calculation of Claimant's claimed uncompensated loss of profits in this claim is complicated by the fact that (1) the responsible party made partial payments to the Claimant for certain removal costs and (2) the NPFC initially transferred some claimed removal costs submitted to the Fund in 2011 to this loss of profits claim.[4]

This $23,375.57 represents the balance of a loss of profits not paid by the responsible party for standby expenses paid to Eckstein Marine and South Stream. In its initial claim to the Fund Claimant did not evidence that it retained subrogable rights to this amount; therefore, the NPFC denied this amount.

Reconsideration Analysis:

In its request for reconsideration Claimant explains that when the RP made its partial payment on invoice E080031 (which included the standby expenses paid to Eckstein Marine and South Stream) the payment was an "unallocated payment on account against that invoice.[5] While there were 18 items in invoice E080031, the responsible party did not impute its partial payment to any of these items; therefore, the payment was considered to be proportionally made to each item.

[4] The removal costs claim is not at issue and not addressed in this claim; however, some of the partial payments paid by the responsible party to the Claimant for the removal costs claim were transferred to the loss of profits claim; hence the complication in determining the remaining uncompensated damages and any remaining subrogable rights.
[5] See Claimant's Exhibit A3, Item 3, attached to April 14, 2014, letter to the NPFC.

Louisiana law, which is relevant to this claim, provides that if an obligor owes several debts to an obligee he has the right to impute payment to the debt he intends to pay.[6] Under Art. 1868 payment is imputed as follows: first, on the basis of whether a particular debt is due; second, according to whether it bears interest; third according to whether it is secured, and fourth according to the date it became due. If all these factors are equal, then payment must be imputed to all the debts proportionally.[7]

Claimant asserts that the responsible party did not allocate its payment on any part of the debt in invoice E080031. This is confirmed by [redacted] attorney representing the responsible party, in an email dated April 13, 2011.[8] Thus, the partial payment is imputed proportionally to all the debts, which after deducting the allocated amounts for each item in invoice E080031, leaves an uncompensated amount of $23,375.57.

Importantly, there is no evidence in the administrative record that Claimant, when it settled certain removal costs and damages, released its rights to the claimed amounts in this component of the claim. The only settlement between Claimant and the responsible party for removal costs and loss of profits associated with this incident is a Partial Receipt, Release, Indemnity and Assignment Agreement dated April 20, 2009.[9] This Agreement specifically releases only fuel charges for the listed invoices along with the balance due on unrelated barge cleanings on invoice RMS 5081563 that is unrelated to the invoices in this claim. Further, the accompanying check, which was provided by Claimant does not state "payment in full and final settlement". Also, the receipts for payment of the partial payments states "partial payments."

On June 12, 2014 the NPFC requested the RP and Worley Catastrophe, the RP's third-party claims administrator, provide the NPFC an accounting of the RP's payments and copies of any releases between Claimant and RP relating to the DM-932 incident. On June 25, 2014 the RP, in an email to the NPFC, outlined its payments and included a copy of the only signed release between the two parties.[10]

Based on a review of the sole Partial Receipt, Release, Indemnity and Assignment Agreement and communications with the responsible party's claims administrator, the NPFC determines that Claimant retains its rights to the $23,376.57. This amount is payable from the Fund.

Part D.[11] Lost Profits on Oiled Barges in Transit $128,160.00:

Background:

Claimant alleges it suffered $128,160.00 in a loss of profits on 39 barges "delayed in their journeys" for varying amounts of time because they were oiled and could not be moved. Claimant submitted Appendix E-1 in its initial claim asserting that the 39 barges lost 480 barge days and multiplied its delay days by the gross margin of $267.00 per barge per day to arrive at

[6] LA. CIVIL CODE, Art. 1864
[7] LA. CIVIL CODE, Art. 1868.
[8] See Claimant's Exhibit A3 to the April 14, 2014 letter to the NPFC.
[9] See Claimant's Exhibit B8 to the April 14, 2014 letter to the NPFC.
[10] See email dated June 25, 2014
[11] Claimant's original claim submission and reconsideration letter labeled this claim component as Part E, but the NPFC's initial determination labeled it as Part D due to movement of one claim component over to AEP's removal claim N08057-0092. NPFC labeled this as Part D to remain consistent with our initial claim determination.

$128,160.00.[12][13] In a request for additional information dated February 7, 2011, NPFC noted that "itemizing a gross margin per barge day does not show actual losses on these 39 barges;" however, Claimant provided no explanation or documentation evidencing a loss of profits.

The NPFC denied this part of the lost profits claim because Claimant failed to explain how the calculated "gross margin per barge day" established a loss of profits for the 39 barges.[14] Additionally, Claimant failed to demonstrate that its gross margin of $267 per barge per day was adequately supported.

Reconsideration Analysis:

In support of its request for reconsideration, Claimant submitted 2006 – 2009 Barge Income Statements (Exhibits E2, E4, E6, and E7). Additionally, Claimant submits annual summaries of monthly data (Exhibit E10). Claimant compares the gross margins per barge day for July-August months from 2006 through 2008.[15] Claimant reiterates all of its prior submissions in connection with its initial claim that support its gross margin as the best measure of its lost profits for barges delayed due to the incident.

In its reconsideration argument Claimant maintains its gross margin of $267 per barge day is supported by its Barge Income Statements. The NPFC understands how the $267 gross margin per barge day was calculated based on the Income Statements; however, Claimant merely calculates a loss of profits without establishing that the barges in fact suffered a loss of profits.

The Barge Income Statements for 2006 – 2009 provide more than the gross margins per barge day comparisons. They also reflect that Claimant realized net income of $76,119,185 for 2006, $58,354,194 for 2007, **$65,651,334** for 2008 (the impacted year) and $46,664,559 for 2009. The average net income for 2006, 2007 and 2009 is $60,379,313. Claimant realized more than $5 million of net income in 2008 than the three-year average for 2006, 2007 and 2009; therefore, Claimant provided no evidence that the barge revenue for these 39 barges was impacted by the ten day-river closure in 2008.

Claimant asserts that it suffered a loss of profits for July and August in 2008. The NPFC reviewed Claimant's monthly barge revenues from 2006 through 2009 and compared the July and August barge net revenue to the yearly barge net revenue for each of those years. The NPFC finds that Claimant's percentage of its yearly barge revenue for the affected months of July **(9.01%)** and August **(8.87%)** 2008 are higher than the percentage of its yearly revenues for the same months in 2006 (July 8.20%; August 8.13%), 2007 (July 7.58%; August 8.82%), and 2009 (July 8.06%; August 7.74%). Further, the revenue earned during July and August of 2008 is $50,970 and $50,157 respectively and represents 17.88% of total revenue for the year. This is a higher percentage than the same two-month period in 2006 (16.33%), 2007 (16.40%) and 2009 (15.80).[16]

[12] Claimant used data from the monthly financial statements and averaged the gross margin/barge day for June 2008 at $276 and July 2008 $257 and averaged the gross margin/barge day for August to be $267

[13] See Claimant's original submission Exhibit E-1 Barge Chart

[14] In a letter from the NPFC dated February 7, 2011, the NPFC questioned how the gross margin per barge day evidenced a loss of profits.

[15] AEP submits that 2009 gross margin should be disregarded because of the national financial crisis that negatively affected all business as well as AEP

[16] See NPFC spreadsheet Monthly & Yearly Revenues attached

Claimant states that the barges were "delayed in their journeys" at the time of the closure. It is not known whether these 39 barges were carrying freight at the time of the river closure. If so, Claimant would have realized the revenue from the freight on these barges (when the river reopened) and would have to deduct the freight revenue realized from the claimed loss of profits for each barge.

The NPFC finds Claimant fails to provide evidence that these 39 barges suffered a loss of profits due to the delays on the river; therefore, this component is denied.

Part E.[17] AEP Tugboat Downtime and Expense $67,619.58:[18]

Background:

Claimant alleges that it suffered a loss of profits in the amount of $67,619.58 for four of its vessels because they could not operate their normal functions due to the incident: LINDA FINN, SAFETY PRIDE, REGINA H and TIM WALL.[19] According to the Claimant these vessels service its fleet and shift barges to and from terminals.[20] Claimant asserts that the hourly rate for its vessels is $225 based on its tariff/rate sheet.[21] Claimant submitted invoices that reflect that the vessels suffered 309.55 hours of downtime during the incident at $225.00, which totals $69,648.75. Claimant reduced this sum by $2025.00 for 9 hours of duplicate entries for the LINDA FINN, which reduces the total to $67,619.58.[22]

In a May 18, 2011 letter, Claimant provided spreadsheets, which are an analysis of each vessel's logs noting whether the vessels were shifting (S) barges, cleaning (C) barges or were detained. In its determination dated January 13, 2014, the NPFC denied the vessels downtime because Claimant failed to prove these vessels were in constant demand.[23] Also, because Claimant received partial payments from the RP and the NPFC could not determine if Claimant retained its subrogable rights to the remaining claimed amount.

Reconsideration Analysis:

In its request for reconsideration Claimant explains that the RP made partial payments of $97,478.54 and $14,953.46 totaling $112,432.00 that were applicable to the downtime of GORDON V and BLACKBEARD. This payment covered the four invoices for these two vessels. Additionally, fuel costs have been settled between the RP and the Claimant.[24] The RP agrees with this.[25] Thus, the remaining uncompensated damage is $67,619.58.

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[17] Claimant's original claim submission and reconsideration letter labeled this claim component as Part F, but the NPFC's initial determination labeled it as Part E due to movement of one claim component over to AEP's removal claim N08057-0092. NPFC labeled this as Part E to remain consistent with our initial claim determination.
[18] See Claimant letter dated May 27,2011 Recap of Economic Losses
[19] See Claimant original claim submission letter dated January 18, 2011, IV.F.a
[20] Id.
[21] See Claimant's initial claim submission, Exhibit F-2.
[22] This equals $67,623.75. Claimant reduced this cost to $67,619.58 because it could not find the $4.14 difference. See Lemle & Kelleher, LLP letter dated May 27, 2011.
[23] In its initial claim submission it included statements from [redacted], VP of Operations, who asserted that the vessels were in constant demand.
[24] See Claimants Original Claim Submission Exhibit B-8.
[25] See email from [redacted] to [redacted] dated April 13, 2011.

As noted above, the NPFC, in its effort to determine if Claimant had retained subrogable rights to the claimed amounts, reviewed the Partial Receipt, Release, Indemnity and Assignment Agreement and communicated with the RP and Worley Catastrophe, the RP's third party claims administrator. Based on this analysis the NPFC determines that Claimant retained subrogable rights to the claimed loss of profits for the $67,619.58.

Thus, the remaining issue is whether the Claimant has established that it suffered a loss of profits in the amount of $67,619.58.

On reconsideration, in response to the NPFC's request for evidence that the vessels were in constant demand, Claimant provided additional vessel logs, which are dated before and after the spill incident. No additional vessel logs were provided for the TIM WALL or the LINDA FINN. Some vessel logs could not be located for the SAFETY PRIDE and REGINA H; however, the provided logs reflect that SAFETY PRIDE and REGINA H were in general use most of the time.

Claimant calculates a loss of profits (the number of delayed hours x $225/hour) before it establishes that it suffered a loss of profits in fact. The NPFC reviewed the Claimant's spreadsheets attached to its letter dated May 18, 2011. These spreadsheets outline the hours for the LINDA FINN, SAFETY PRIDE, REGINA H and TIM WALL were allegedly delayed and the hours these tugs were cleaning or shifting barges for removal actions. The spreadsheets were matched to the actual vessel logs for verification.

The NPFC's review of Claimant's spreadsheets and the vessel logsshow the vessels were engaged in their normal functions, i.e., fleet watch and shifting barges, vessel maintenance and checking fleet barge lines by land, during a substantial portion of the claimed 309.55 hour delay.

For instance, the SAFETY PRIDE was documented as being actively engaged in fleet watch the entire claimed period. The REGINA H was underway actively engaged in her normal functions, i.e., awaiting lock clearance and standing fleet watch for the claimed period. The LINDA FINN was involved with a mix of fleet watch and crew work on other fleet activities such as painting barges, line adjustments, etc. Claimant has not established that the vessels suffered a loss of profits.

In some circumstances increased expenses incurred due to an incident may impact a Claimant's loss of profits. In this case Claimant failed to prove that it incurred additional operational/crew expenses due to the river closure. Nor has Claimant provided any evidence that it saved expenses while the vessels were conducting their normal functions. The NPFC finds Claimant failed to show by a preponderance of the evidence that it incurred a loss of profits of $67,619.58; therefore, these damages are denied.

V. Summary

The NPFC finds Ancillary Expenses in the amount of $23,375.57 are compensable (Part A) from the Fund. Claimant has failed to prove a loss of profits for its Oiled Barges in Transit (Part D) and AEP Tugboat Downtime and Expense (Part E) as stated above.

AMOUNT OFFERED: $23,375.57.

Claim Supervisor: [redacted]

Date of Supervisor's review: August 28, 2014

Supervisor Action: ***Approved***

Supervisor's Comments: