CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N08057-037
Claimant	: U.S. United Barge Line, LLC
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [redacted]
Amount Requested	: $333,976.00

I. Facts

On the morning of July 23, 2008, the tank barge DM 932 sank as a result of a collision and discharged oil into the Mississippi River, a navigable waterway of the United States. Approximately 282,828 gallons of oil[1] were released into the Mississippi River and the resulting spill response, coordinated by the FOSC Unified Command, initially closed the River to vessel traffic and

II. Responsible Party

American Commercial Lines LLC (ACL), the Responsible Party (RP), owned the barge at the time of the incident and is a responsible party under the Oil Pollution Act.

III. The Claimant and the Claim

On June 25, 2009, United Maritime Group, LLC (UMG), through its attorney, [redacted][2], Balch and Bingham, LLP, presented a claim to the National Pollution Funds Center (NPFC) for reimbursement of alleged loss of profits in the amount of $1,415,293.03. UMG includes subsidiaries U.S. United Barge Line, LLC (UBL)[3], U.S. United Bulk Terminal, LLC (UBT) and U.S. United Ocean Services, LLC (UOS)[4]. The original claim contained both Removal and Loss of Profit components and was assigned claim number N08057-037. Subsequently the NPFC divided the claim, keeping all Loss of Profit components in claim N08057-037 in the amount of $1,184,032.00 and moved Removal claim components to claim number N08057-038 in the amount of $231,261.03.[5] Finally, the NPFC divided the UMG loss of profits claim into three claims – one for each of the UMG subsidiaries (N08057-037 for UBL, N08057-0114 for UBT and N08057-0115 for UOS). The claims for UBT and UOS are adjudicated under N08057-0114 and –0115, respectively.[6]

This determination addresses the UBL claim, which is for alleged loss of profits and overhead expenses for 177 barges, three tugs and Davant Harbor Operations losses, all related to the closure of United Barge Terminal (UBT) from 1000 on July 23, 2008 through 2359 on July 28, 2008 (133.98 hours). After several e-mail communications, UBL determined its sum certain to

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[1] See House Subcommittee Hearing on DM 932 Oil Spill, dated 9/15/2008.
[2] UMG was later represented by The Miller Law Firm (Miller), as Mr. [redacted] switched law firms in July 2009, remaining as legal counsel for UMG.
[3] UBL includes its wholly owned subsidiary company U.S. United Inland Services, LLC
[4] Collectively known as UMG.
[5] See email from CW04 [redacted] NPFC, to Mr. [redacted] dated 7/10/2009.
[6] To date, N08057-038, -0114 and -0115 have all been adjudicated and, collectively, $720,233.65 has been paid to the Claimant.

be $333,976.00; $297,880.00 in Loss of Profits and Earning Capacity and $36,096.00 in Overhead and Incidental Expenses.[7]

A. Background

UBL is an inland marine transportation company that operates a fleet of line haul vessels and barges on the Mississippi, Illinois and Ohio Rivers. Its main business is to move coal and pet coke from the Ohio and Illinois Rivers down to the UBT Terminal in Davant, Louisiana (Mississippi River Mile Marker (MM) 54), which is located down river from the oil spill incident. Additionally, through its wholly owned subsidiary, U.S. United Inland Services, LLC (UIS), UBL provides fleeting and shift tug assistance at UBT. At the time of the DM 932 discharge of oil, UBL was operating a number of barges moving cargo to the UBT Terminal in Davant. During the oil spill incident these barges were located either at UBT or were located at several other locations along the River awaiting transit to UBT.[8]

B. Summary Tables of Claimant's Component Loss of Profits and Earning Capacity[9]

The following tables summarize the Claimant's asserted basis for loss and claimed amounts for the separate components of the claim. UBL claims that 177 of its owned, chartered and bought-in barges were delayed at various points on the Mississippi River, with the bulk of them delayed at UBT.

Barge loss of time summary table:

# of Barges Delayed	Delay Location	Delay Times	Delay Hours / Days	Rate Per Barge Hour	Barge Losses	Comments
104	UBT Terminal Fleet	7/23/2008 @ 1000 to 7/28/2008 @ 2359	133.98	$3.72	$51,835.00	Includes 102 owned barges and 2 chartered barges
4	UBT Terminal Fleet	7/23/2008 @ 1000 to 7/28/2008 @ 2359	5.6 Days	$250.00 per day	$5,600.00	Bought in barges.
19	USR MM 127	7/23/2008 @ 1000 to 7/28/2008 @ 2359	133.98	$3.72		
6	CGB MM 133	7/23/2008 @ 1000 to 7/28/2008 @ 2359	133.98	$3.72		
9	IMT MM 56	7/23/2008 @ 1000 to 7/28/2008 @ 2359	133.98	$3.72		
11	Meraux MM 86.5	7/23/2008 @ 1000 to 7/28/2008 @ 2359	133.98	$3.72	$22,429.00	45 barges total

[7] See email from Mr. [redacted], to Ms. [redacted] NPFC, dated 10/22/2013.
[8] In addition, it was moving steel-related products northbound and grain and a variety of other products in its covered barges. These barges were not affected by the incident and are not at issue in this claim.
[9] See The Miller Law Firm letter dated September 17, 2009, Exhibit J-1.

9	With the Girlie Knight @ MM127	7/24/2008 @2300 to 7/29/2008 @ 0900	106.00	$3.72	$3,549.00	Delayed at MM 127, Martha Lynn moved them to UBT
15	With the M/V Martha Lynn @ MM 127	7/27/2008 @ 1825 to 7/29/2008 @ 0900	38.58	$3.72	$2,153.00	Delayed with Martha Lynn, then moved to UBT
177					**$85,566.00**	**Sub Total**

Tug time delay table:

Vessel Delayed	Delay Location	Delay Times	Hours Delayed	Rate Per Vessel Hour	Vessel Losses	Comments
Girlie Knight	MM 127	7/24/2008 @ 2300 to 7/28/2008 @ 1730	90.50	$602.00	$54,481.00	
Martha Lynn	MM 133	7/27/2008 @ 1825 to 7/31/2008 @ 2130	99.08	$785.00	$77,780.00	
Jenny S	MM 127	7/23/2008 @ 1230 to 7/26/2008 @0125	60.92	$545.00	$33,200.00	
					$165,461.00	**Subtotal**

Loss of revenue Davant Harbor fleeting operations:

Davant Harbor Operations Losses			133.98	$350.00	**$46,853.00**	External Business Only

Claimed overhead expenses:

Claimed Overhead	Hours Delayed	Rate Per Vessel Hour	Vessel Losses	Comments
Barges (173)	124	$0.65	$14,031.00	Does not include the 4 bought-in barges. Hours claimed were an average of all barge delays.
M/V Girlie Knight	90.50	$58.30	5,276.00	
M/V Martha Lynn	99.08	$56.01	$5,550.00	
M/V Jenny S	60.92	$52.09	$3,173.00	
UIS/Davant Harbor	133.98	$60.20	$8,065.60	

			$36,096.00	**Subtotal**

Total Claimed Losses Due to Delays: $333,976.00

The Claimant provided an "Oil Spill Delay Cost Worksheet"[10] to document UBL's lost time for 177 of its barges and 3 of its towboats. In support of barge delay periods at UBT, the Claimant provided a summary of the BOSS Operating System Traffic reports (BOSS) records for the UBL barges arriving at the UBT prior to July 25, 2008 and departing UBT after the River was reopened. The Claimant also provided individual BOSS reports for each of the 102 Owned barges, 2 Chartered Barges and 4 Bought in Barges[11] delayed at UBT, and bought-in barge invoices to confirm UBL's utilization of the bought-in barges.[12]

C. Claimant's Calculation of Asserted Loss of Profits Itemized in Component Claims.

1. Claimed Barge Loss of Profits

The "Hours Delayed" for barges at and outside UBT was based on the UBT closure from 1000 hours on 7/23/2008 and re-opening at 2359 hours on 7/28/2008, causing a delay of 5 days, 13 hours and 59 minutes, or approximately 133.98 hours. For all barges (excluding the bought-in barges, which were claimed as $250.00/day[13]), the "Rate per Barge Hour" was based on internal financial documents whereby the Claimant takes its total barge revenue from May through September 2008 (a 153 day period) ($18,066,214.00) and divides it by 153 days. This is then divided by 711 barges (assumedly the total UBL barge fleet) which results in $166.08 per barge/per day. Dividing this by 24, the average revenue/barge/hour equals $6.92.

The Claimant then calculates its net revenue/barge/hour by deducting its port costs (Northbound, Southbound and Tampa barges) for the same 153 day period. First, it divides the port costs ($8,261,702.00) by 153 days, which equals $54,652.00 port costs per day. That cost is then divided by 711 barges to arrive at $76.87 per barge/per day and then by 24 to determine that the costs are $3.20 per barge/hour. Finally, the Claimant deducts the port costs per barge/hour from the revenue earned per barge hour ($6.92) to reach the net revenue/barge/hour to be $3.72. The Claimant applies this $3.72 per hour to quantify the Claimant's alleged barge loss of profits for each of its barges in the barge components below.[14]

2. Claimed Tug Loss of Profits (M/V Girlie Knight; Jenny S and Martha Lynn)

The tug delay times, as well as the claimed barges with the M/V Girlie Knight and M/V Jenny S, were based on the times shown on the dailies provided for each individual tug in Exhibits J-4 through J-6.

The Claimant, using the same 153-day time period and a similar methodology, calculating tug revenue per hour, which was then utilized to calculate a loss of profits for each of the tugs. The revenues and fuel and lube costs were averaged; the average fuel and lube costs were deducted from the average revenues to arrive at a daily and then a Margin Rate/hour.

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[10] See The Miller Law Firm letter dated September 17, 2009, Exhibit J-1
[11] The four "Bought-In" barges were contracted to UBL by Cargill Marine and Terminal, Inc.
[12] See The Miller Law Firm letter dated September 17, 2009, Exhibit J-2
[13] See The Miller Law Firm letter dated September 17, 2009, Exhibit J-2.
[14] See The Miller Law Firm letter dated September 17, 2009, Exhibits K-1 and K-3.

For the M/V Girlie Knight, the total revenue for the 153 days ($5,495,308.00) was divided by the tug's total operating days (147) to reach $37,383.00 revenue per day. To calculate the net average revenue per day, the Claimant divided the fuel and lube costs for the 153-day period ($3,370,298) divided by 147 days which equals $22,927.00 per day. This is deducted from the $37,383 revenue per day to equal the "Margin per Day" total of $14,456.00. Dividing that by 24 hours calculates the Margin Rate/hour for the M/V Girlie Knight to be $602.00 (rounded down from $602.33) per hour for this vessel.

For the M/V Martha Lynn, the claimed total operating days were all 153. Dividing the total revenue for the M/V Martha Lynn ($6,645,676.00) earned during this period by 153 equals the daily average revenue of $43,436.00. Fuel and costs ($3,764,522), when divided by the 153-day period averaged $24,605.00 per day, which was deducted from the $43,436 to calculate the "Margin per Day" total of $18,831.00. Dividing that by 24 hours calculates the Margin Rate/hour for the M.V Martha Lynn to be $785.00 (rounded up from $784.63).

For the M/V Jenny S., the claimed total operating days were 141. Dividing the total 153-day revenue of the M/V Jenny S. ($4,934,081.00) by the tug's 141 operating days, the daily average revenue was $34,993.00. Fuel and lube costs averaging $21,907.00 per day were deducted from the daily average revenue providing the "Margin per Day" total of $13,086.00. Dividing that by 24 hours calculates the Margin Rate/hour for the M/V Jenny S to be $545.00 (rounded down from $545.25).

3. Davant Harbor Losses

UBL also claims loss of profits it would have realized for non-fleeting activities at the UBT/Davant terminal calculated at $350.00 per hour.[15] When multiplied by the 133.98 hours of delay, the claimed loss due to non-fleeting revenue equals $46,853.00.

4. Overhead Expenses[16]

UBL claims an average overhead rate of $0.65 per barge per hour. It weighed the average delay to be 124 hours (as the delay periods differed), and then multiplied this by the overhead amount, which totals $80.60. After subtracting the 4 bought-in barges, UBL applied this total to 173 of the 177 barges, with a total overhead loss for its barges of **$14,031.00** (actual calculations come to $13,943.80).

UBL also claims that each of the three tugs incurred overhead costs as a result of the spill. The M/V Girlie Knight's claimed overhead was $58.30 per hour, multiplied by 90.50 hours of delay, resulting in a total loss amount of **$5,276.00** (rounded down from $5,276.15). The M/V Martha Lynn's claimed overhead was $56.01 per hour, multiplied by 99.08 hours of delay, resulting in a total loss amount of **$5,550.00** (rounded up from $5,549.47). Lastly, the M/V Jenny S's alleged overhead was $52.09 per hour, multiplied by 60.92 hours of delay, resulting in a total amount of **$3,173.00** (rounded down from $3,173.32).

[15] See The Miller Law Firm letter dated September 17, 2009, Exhibit K-6.
[16] See The Miller Law Firm letter dated September 17, 2009, Exhibit J-1.

Finally, UBL claims the overhead losses for Davant operations to be $60.20 per hour,[17] multiplied by 133.98 hours of delay, resulting in a total overhead loss at UBT amounts to **$8,066.00** (though actual calculations are $8,065.60).

Total Claimed Overhead Expenses: $36,096.00

Total UBL Claim: $333,976.00

5. RP Presentment

On December 1, 2008, UMG presented its claim to Nicoletti, Hornig and Sweeney, the legal representative for American Commercial Lines, the named Responsible Party (RP) for the incident. The RP denied the claim by filing a declaratory judgment action in the U.S. District Court for the Eastern District of Louisiana. This action was dismissed by the court on November 30, 2009.[18] The NPFC made notification of the claim to the RP on July 22, 2009, and the RP denied the claim via letter on September 1, 2009.

IV. Applicable Law

Notwithstanding any other provision or rule of law and subject to the provisions of this Act, each responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for removal costs and damages specified in subsection (b) of this section that result from such incident. 33 U.S.C. § 2702(a).

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

The President shall promulgate, and may from time to time amend, regulations for the presentation, filing, processing, settlement and adjudication of claims under this Act against the Fund. 33 U.S.C. § 2713(e). The claims regulations are found at 33 CFR Part 136.

The Fund shall be available to the President for the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages. 33 U.S.C. § 2712(a)(4).

With certain exceptions all claims for removal costs and damages shall be presented first to the responsible party or guarantor of the source. If a claim is presented in accordance with subsection (a) of this section and each person to whom the claim is presented denies all liability for the claim, or the claim is not settled by any person by payment within 90 days after the date the claim was presented the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund. 33 U.S.C. §§ 2713(a) and (c).

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[17] See The Miller Law Firm letter dated September 17, 2009, Exhibit K-6.
[18] See U.S. District Court for the Eastern District of Louisiana Case # 09-31035

Under 33 CFR 136.105(a-b) & 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.

With regard to claims for loss profits and impairment of earning capacity, the NPFC must independently determine that the proof criteria in OPA and the implementing regulations, at 33 CFR part 136 are met, including the general provisions of 33 CFR 136.105, and the specific requirements for loss of profits and earning capacity claims in Subpart C, 33 CFR 136.231, *et seq.*

Pursuant to the provisions of 33 CFR 136.231, claims for the loss of profits or impairment of earning capacity due to injury to, destruction or, or loss or real or personal property or natural resources may be presented to the Fund by the claimant sustaining the loss or impairment.

"In addition to the requirements of subparts A & B or this part, a claimant must establish the following-

(a) **That real or personal property or natural resources have been injured, destroyed, or lost.**
(b) **That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.**
(c) **The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents.** In addition, comparable figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
(d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant receives as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established." 33 CFR 136.233(a-d).

V. The Administrative Record

The administrative record consists of the following:

A. Claimant's Initial Submission:

The Claimant provided certain documentation with its initial claim submission dated June 15, 2009. As it pertains to the UBL claim, this included an extensive cover letter and claim summary that included a breakdown of how the UBL portion of the claim was calculated.[19]

B. Additional Information Requested and Received from the Claimant:

1. In a July 14, 2009 letter to the Claimant, the NPFC asked for all owned and contracted barges to be identified, with the accompanying contracts in place at the time of the spill, as well as proof/documentation for the following claimed costs and losses: what vessels and barges were owned or contracted; start and stop delay periods both at UBT and the outside terminals, including hours, rates and total losses;

[19] See Claim Submission documents, submitted to the NFC by the claimant on 6/15/2009.

rate per barge hour figures, including how barge and vessel losses were calculated; both the Davant Harbor and the non-fleeting revenue loss calculations; and the delay hours and rates for Davant Harbor operations. The NPFC also requested that UBL show its saved expenses and how it attempted to mitigate its losses. Finally, the NPFC requested comparable financial data for the May – December time period for 2006, 2007 and 2009. UBL answered this request by providing certain additional information in a supplemental submission, dated September 17, 2009,[20] but did not provide financial data for the May – December periods for 2006, 2007 or 2009.

2. In its September 2, 2011 email to the Claimant, the NPFC requested the claimant provide copies of all contracts in place at the time of the spill that were pertinent to all UBL claimed costs.[21]

   UBL answered this request by providing a supplemental submission dated October 18, 2011. The Claimant provided an Exhibit A attached to this supplemental submission, with a table of contents included. Of the 25 contracts submitted to the NPFC, only four contracts of affreightment with UBL-(Exhibits A-19 through A-22) are pertinent to this claim. The others are for UBT (or its predecessor, TECO Bulk Terminal, LLC).

C. NPFC independently compiled and gathered additional information:

1. The NPFC developed a spreadsheet from the Claimant's BOSS reports for the 177 barges (the NPFC spreadsheet). This spreadsheet tracked the arrival date of the 177 barges at the UBT prior to the incident and the departure date of these barges from UBT after the incident.

VI. NPFC Determination

The claimant bears the burden of providing all evidence, information and documentation deemed necessary by the Director, NPFC, to support its claim. 33 CFR 136.105(a) and (b). For loss of profits and impairment of earning capacity claims this includes evidence of reduced income as a result of injury or loss of property or resources (in this case "delay" caused income reduction), the amount of claimant's profits or earnings during the impacted period, and the amount of profits or earnings in comparable periods, all supported by income tax returns, financial statements and similar documents. 33 CFR 136.233(c). The amount of compensation allowable is limited to the actual net reduction or loss of earnings and must factor in saved overhead or normal expenses not incurred as a result of the incident. 33 CFR 136.235(d).

While this claim is complex in its several components, all of them suffer from common deficiencies as are addressed in the following pages. In general, the Claimant apparently attempts to establish reduced income and quantify its loss of profits for each component by averaging revenue and expenses for a 153-day period of time from May 1, 2008 – September 30, 2008 but did not consider revenues and expenses for the same period in 2006, 2007 or 2009.[22]

[20] The documentation pertinent to this claim (UBL) is found in the following exhibits: J-1 through J-6; K-1 through K-7; L; M; and N. A brief description of each exhibit can be found in the Claimant's cover letter for this submission.

[21] See email from Ms. [redacted] NPFC, to [redacted] and dated 9/02/2011.

[22] The NPFC requested comparable financial documents or information in a request dated July 14, 2009.

Further, Claimant did not provide information on expenses that were saved because of the incident. Finally claimant has not established that the claimed delays resulted from the incident. As a result Claimant has not established that it suffered a loss of profits. Further explanation is provided below.

1. Vessel Delays: Barge Losses - $85,566.00

a) 104 Barges – 102 Owned and 2 Chartered at UBT - $51,835.00

The Claimant states that UBT was closed from July 24, 2008 through July 29, 2008 (133.98 hours) and 177 barges suffered a loss of profits because they were either delayed at UBT or were delayed up river because the UBT was closed; therefore, they could not move cargo and they suffered lost revenues. For the reasons discussed below this component of the claim is denied.

The Claims Regulations provide that a claimant must establish that its income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resource. This may be established by providing the amount of its 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. 33 CFR 136.233(c). In this case Claimant provided financial information for the May 1, 2008 through September 30, 2008 time period (the impacted period) but did not provide comparable financial information for the years 2006, 2007 or 2009. Thus, Claimant has not established that its income was reduced due to the incident.

Second, Claimant earns revenue by the freight carried by its barges. Claimant did not provide financial evidence of freight revenue realized during the delay period. While the freight revenue from its barges may have been realized after the River and UBT reopened it would affect the quantum of the claimed loss of profits.

Third, and related to both one and two above, notwithstanding that Claimant earned revenue from its barges that arrived at UBT, it calculated additional expected revenue based on its 153-day averages of revenue and expenses. This methodology raises questions of reliability and is not persuasive. Claimant calculates its net average/barge/hour by averaging revenues for all its 711 barges during the 153 day period but only deducts average port costs during the 153-day period. Based on this methodology it determines that the barge net revenue/hour is **$3.72.** It does not deduct average fixed costs such as insurance, taxes, leases, repairs or overhead that would give a more accurate picture of a barge's net revenue.[23] [24] The fixed costs as represented in Exhibit K-1 (and more fully discussed below) are much higher than the port costs and would reduce the net revenue/barge/hour to approximately $1.54 per hour.[25] Additionally, because the barges were delayed it is unclear why the port costs would not be saved expenses rather than actual expenses.

Finally, Claimant has not established that 104 of its barges were delayed at UBT due to the River closure, thus suffering a loss of profits. Claimant provided its BOSS reports to the NFPC, which reflect that thirty barges arrived at UBT within five days prior to the incident and six barges

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23 Claimant calculated its overhead expenses separately and are discussed below.

[24] In fact the port costs for the delayed barges in this claim might in fact be saved expenses that must be deducted because if the barges were delayed at UBT they would not have incurred port charges.

[25] The NPFC does not believe that the Claimant's $1.54 rate is persuasive to validate the alleged loss because no comparable financials have been provided as required by the Claims Regulations. 33 CFR 136.233 (c).

arrived within ten days after of the incident.[26] The remaining 68 were at UBT between 15 and 50+ days and there is insufficient evidence that these vessels were delayed due to the incident.

This component of the claim is denied. Should the Claimant seek reconsideration, it must provide (1) an explanation as to why it is claiming a loss of profits for the 104 barges when the evidence reflects that most of the barges were at UBT days or weeks prior to the incident; (2) comparable financial information for the May to December time periods for the years 2006, 2007 and 2009, that might establish that the barges suffered a loss of profits, and (3) an explanation and supporting financial data evidencing that its formula calculating the net revenue/barge/hour to be $3.72 is a reliable factor in its claimed loss of profits for each component.

b) **Bought in Barges - $5,600.00**

UBL claims 4 Bought in Barges were delayed from 7/23/2008 at 1000 to 7/28/2008 at 2359 for 5.6 days at $250.00 per day for a total of $5,600.00.[27] However, on the BOSS Operating System spreadsheet provided in the Claimant's Exhibit J-2, it shows a delay time of 133.98 hours or 5.58 days. The total claimed in Exhibit J-2 is $5,580.00 (5.58 days x 4 barges x $250.00 per day).

Perhaps the delay time is a clerical error. More importantly, the Claimant provides no explanation for seeking reimbursement of the daily $250 rate for each of the four bought in barges. It is not known if the Claimant contracted these vessels under a time charter whereby the daily rate ($250) would be owed to the barge owner under all conditions or, alternatively, if the Claimant hired these vessels under a voyage contract, where the Claimant owes the owner for each day the vessel is chartered. In the case of a voyage charter, the daily rate would be an added expense.

This component is denied. Should the Claimant seek reconsideration, it must provide the contracts for the bought in barges or an explanation and proof of payment for the daily rate for each of the barges.

3. 45 Barges - $22,429.00

The Claimant's supplemental submission at Exhibit J-1 claims 45 barges were delayed at terminals outside of UBT for 133.98 hours, including Upper St. Rose Fleet, Consolidated Grain and Barge Fleet, International Marine Terminals and Meraux Fleet. Claimant's assertion that the 45 barges were delayed for 133.98 hours is not supported by its own evidence. Additionally, Claimant quantifies its loss of profits using the net revenue of $3.72/barge/hour. *See* above.

a) *19 Barges at Upper St. Rose Fleet*

The Claimant's Exhibit J-1 claims 19 of the 45 barges were delayed at Upper St. Rose Fleet, with 13 of them moved to UBT by the M/V Girlie Knight and 6 moved by the M/V Martha Lynn after the delay. The NPFC finds the Claimant's Exhibit J-3 only provides 16 BOSS Reports[28] for analysis; the reports for 3 barges are missing.

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[26] See the NPFC Spreadsheet attached to this determination.
[27] See The Miller Law Firm letter dated September 17, 2009, Exhibit J-1.
[28] The 16 barges with BOSS reports provided are noted on the NPFC's spreadsheet.

The NPFC finds the Claimant's delay time of 133.98 hours is not supported by the BOSS reports or vessel logs provided. The record provided supports a delay for the M/V Girlie Knight of 49.75 hours (32.75 hour delay before adding 3 barges plus a 17 hour delay after), which does not include the crew change that took place during the delay period. The M/V Martha Lynn vessel logs[29] document that it picked up 6 barges[30] on 7/28/2008 at 1745 from two tugs that did not provide vessel logs to the NPFC. Therefore a delay start time prior to this exchange cannot be ascertained by the NPFC. The vessel logs document the barges arriving at UBT on 7/29/2008 at 0900. The NPFC finds the total delay time documented in the record for these 6 barges to be 15.25 hours.

b) *6 Barges at Consolidated Grain and Barge*

The Claimant's Exhibit J-1 claims 6 barges were delayed at Consolidated Grain and Barge while they were enroute to UBT. The Claimant only provided 5 BOSS reports for these 6 barges.[31] No tug logs were provided; therefore, it is not clear that the delay time was due to the incident.

The 5 barges identified in the BOSS reports document that these barges were constructively placed at Cooper Consolidated in LaPlace, LA (MM 134) on 7/24/2008 to be unloaded. The vessels were unloaded on 8/06/2008. There is no explanation as to why there was a delay in unloading the six barges (July 24 – August 6) or any evidence that this delay was due to the incident.

c) *9 Barges at International Marine Terminals*

The Claimant's Exhibit J-1 claims 9 UBL barges were delayed at the International Marine Terminals due to the incident. No tug logs were provided; therefore it is not clear if the barges were delayed due to the incident.

The NPFC reviewed the BOSS reports provided in the Claimant's Exhibit J-3[32] for these barges. Of the 9 barges, two were documented as constructively placed to unload at LMR MM 56 on 7/02/2008; seven on 7/12/2008. Although all of these barges were at IMT during the River closure they arrived between 11 and 21days prior to the incident and the documentation does not support a delay that can be directly attributed to the spill. Some of the barge release dates occur a day after the spill, with no pick up dates noted on the BOSS reports. Three of the barges show an unload date of 7/23/2008 (the day of the spill), release date of 7/24/2008 and pickup date of 7/25/2008, which appears to show normal operations and no impact from the incident. *See* NPFC spreadsheet for details.

d) *11 Barges at Meraux Fleet*

The Claimant's Exhibit J-1 claims 11 UBL barges were delayed at the Meraux Fleet due to the incident. No tug logs were provided; therefore, there is no evidence that any delays were due to the incident. According to the Claimant's Exhibit J-3[33] six of the barges were constructively

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[29] See Claimant supplemental submission dated 9/17/2009, Exhibit J-5.
[30] The 6 barges include the MST 415, MST 510, MST 524, MST 701B, TLB 126, and ABC 770.
[31] The BOSS reports were provided in Claimant's supplemental submission dated 9/17/2009, Exhibit 3. The barges identified in these reports are the MST 514, MST 379, MST 450, MST 393 and MST 402.
[32] See Claimant's supplemental submission dated 9/17/2009.
[33] See Claimant's supplemental submission dated 9/17/2009.

placed to load at MM 94 on 7/18/2008. Several of the BOSS reports showed barges were picked up well before the spill date; some well after with no ties to the spill incident date of 7/23/2008. After reviewing all of the BOSS reports, the NPFC could find no evidence that any delay for these 11 barges was due to the incident.

In summary, the claimed losses for the 45 barges are denied on the grounds that, based on the BOSS records and logs, some delay times are inaccurate or there is insufficient or no information or logs. If Claimant seeks reconsideration it should clarify the delay times due to the incident and provide evidence for those barges with no or incomplete information.

4. 24 Barges at Upper St. Rose Fleet - $5,702.00

a) *9 Barges at MM 12 with M/V Girlie Knight / M/V Martha Lynn*

The Claimant claims that 9 barges[34] being towed by the M/V Girlie Knight were delayed at Upper St. Rose Fleet from 7/24/2008 at 2300 to 7/29/2008 at 0900 for a total of 106 hours.[35] The NPFC finds the dates and times of the claimed delay are accurately documented in both vessels log books; however, the Claimant quantifies its loss of profits by using the $3.72/net revenue/barge/hour. *See* above.

b) *15 Barges at Upper St. Rose Fleet With M/V Martha Lynn*

The Claimant's Exhibit J-1 claims 15 barges were delayed with the M/V Martha Lynn from 7/27/2008 at 1825 to 7/29/2008 at 0900 for 38.58 hours at $3.72 per barge hour resulting in a loss of **$2,153.00**.[36] In the same submission, the Claimant's Exhibit J-5 contains the M/V Martha Lynn's boat logs which confirm the 15 barges[37] claimed were with the M/V Martha Lynn during the delay. The NPFC finds the dates and times of the claimed delay are accurately documented in the M/V Martha Lynn's log books. However, the Claimant quantifies its losses by using the $3.72 net revenue/barge/hour. *See* above.

This component is denied. Should the Claimant seek reconsideration, it must establish that the $3.72 net revenue/barge/hour is a reliable factor in determining the claimed loss of profits.

5. Tug Delays: M/V Girlie Knight, M/V Martha Lynn and M/V Jenny S.[38] - $165,461.00

Claimant uses a similar formula to calculate the Margin Rate per hour for each of the three tugs, i.e., it averaged each tug's revenues for the 153-day period and subtracted the tug's average fuel and lubricating oil costs for the same 153-day period and divided that number by 24 hours to determine a Margin Rate/hour. Similar to the methodology for its barges Claimant does not factor in comparable revenues and expenses for 2006, 2007, or 2009. Further, Claimant only deducted fuel and lubricating oil costs and did not factor in fixed costs, such as insurance, lease or mortgage costs, overhead, operating expenses and wages. Nor does Claimant consider saved

[34] The 9 barges include the MST 168, MST 171, MST 431, MST 435, MST 496B, MST 515, MST 547, MST 700B and TBL 42.

[35] See The Miller Law Firm letter dated September 17, 2009, Exhibit J-4.

[36] See The Miller Law Firm letter dated September 17, 2009, Exhibit J-1.

[37] See NPFC Spreadsheet noting these barges.

[38] See Claimant's supplemental submission dated 9/17/2009, Exhibit J-1.

expenses, if any. It is unclear why fuel and lubricating oil costs would not be a saved expense if the tugs were delayed. Finally, it is not clear why Claimant calculates its claimed loss of profits on a Margin Rate/hour or how a Margin Rate is relevant.

a) **M/V Girlie Knight**

UBL claims the M/V Girlie Knight was delayed from 7/24/2008 at 2300 until 7/28/2008 at1730 for a total of 90.50 hours due to the oil spill. It claims the Margin Rate/hour is $602.00 for a total loss of $54,481.00.[39] As discussed above Claimant's methodology for calculating the Margin Rate per hour, $602.33, is questionable. While it used the tug's revenue for the 153-day period, it then calculated its claimed loss of profits on the 147 days the tug was operating during that period.

The NPFC determines that the claimed delay period is inaccurate. According to the vessel logs the M/V Girlie Knight began the claimed delay at MM 153, but during this claimed delay the vessel was working and traveling downriver to its intended destination. The time spent traveling downriver would not be counted as delay time since the vessel would have traveled downriver regardless of the incident. Additionally, the time spent working to make up tows would not be delay time if the tug was going to make up tows without the delay. The NPFC finds the vessel logs support a delay from 7/24/2008 at 2300 until 7/25/2008 at 1745, which equals 18 hours and 45 minutes. Also, a delay is found from 7/26/2008 at 0345 until 7/28/2008 at 1730, which equals 61 hours and 45 minutes. Total delay time the NPFC finds in the vessel logs is 80.50 hours.

The claimed loss of profits for the M/V Girlie Knight is denied.

b) **M/V Martha Lynn**

UBL claims the M/V Martha Lynn was delayed from 7/27/2008 at 1825 until 7/31/2008 at 2130 for a total of 99.08 hours. It claims the hourly Margin Rate is $785.00 and a total loss of $77,780.00.[40] As noted above Claimant deducts only fuel and lubricating costs but does not factor in fixed costs, i.e., labor, repairs, insurance, claims, operating expenses or overhead corporate (A&G) expenses noted in the Claimant's expense category for this vessel. Further, fuel and lubricating oil costs might be saved expenses if the tug is not operating during the delay period.

The NPFC reviewed the vessel logs provided. Though the alleged start and stop times of the delay are documented in the log entries, the NPFC finds the claimed delay period inaccurate. The M/V Martha Lynn began the claimed delay at MM 127 on 7/27/2008 at 1825 and, similar to the M/V Girlie Knight above, the vessel was working during the delay period and traveling downriver to UBT. The time spent traveling downriver was not delay time if the vessel would have traveled downriver regardless of the spill incident. Additionally, the time spent working to make up tows would also not be considered delay time. The NPFC finds the vessel logs support a delay from 7/27/2008 at 1825 until 7/28/2008 at 1745, which equals 23 hours and 40 minutes. Also, a delay is found from 7/29/2008 at 1245 until 7/31/2008 at 2130, which equals 56 hours and 45 minutes. Total delay time the NPFC finds in the vessel logs is 80.42 hours.

The claimed loss of profits for the M/V Martha Lyon is denied.

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[39] See Claimant's supplemental submission dated 9/17/2009, Exhibit K-1.
[40] See Claimant's supplemental submission dated 9/17/2009, Exhibit K-1.

c) **M/V Jenny S.**

UBL claims the M/V Jenny S. was delayed from 7/23/2008 at 1230 until 7/26/2008 at 0125 for a total of 60.92 hours. It claims the hourly Margin Rate is $545.00 for a total loss of $33,200.00. The NPFC finds the hourly Margin Rate/hour of $545.26 to be questionable. The NPFC assumes the 141 operating days fall within the 153 operating days claimed from May to September 2008 in Exhibit K-1.[41] There is no explanation as to what other downtime the vessel had encountered to make up the 12 days it did not work during this period and why the Margin Rate was not based on the 153-day period. Also, the only expenses the Claimant deducts from its revenue are the fuel and lubricating oil costs (which are probably saved expenses during the delay period because these costs would not be incurred if the tug was not working.)

The NPFC reviewed the vessel logs provided[42] and finds the claimed delay period inaccurate. According to the vessel logs provided, the M/V Jenny S. was working until 7/23/2008 at 1745. On 7/24/2008 at 1000, the vessel was again provided work. From that point on, the vessel logs show the M/V Jenny S. working. The few times the vessel is logged as "waiting for tug service" were not documented as due to the incident. The NPFC finds the total delay time due to the oil spill is 16.25 hours.

The claimed loss of profits for the M/V Jenny S is denied.

6. Davant Harbor Operations Losses - $46,853.00

The Claimant claims a loss of non-fleeting revenue from external businesses due to the oil spill. It is not clear what activities would generate "non-fleeting" revenue as opposed to "fleeting" revenue and how the closure of the UBT would affect non-fleeting activities. UBL claims a 133.98 hour delay at $350.00 per hour, which results in $46,853.00. The Claimant provides documents[43] reflecting earned non-fleeting revenue of $1,284,064.00 over a 153 day period. This breaks down to $8,393.00 per day (rounded up) and $350.00 per hour (rounded up).

Claimant does not provide comparable information for 2006, 2007 or 2009 and does not provide documentation to support the summary sheet. The NPFC analyzed the documents submitted and finds no expenses deducted from the revenue prior to claiming the $350.00 per hour loss. 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. *See* Claims Regulations, 33 CFR 136.233(d). Further, the dollar value associated with these losses appears inconsistent with that claimed as saved expenses by UBT in the determination for its claim, N08057-0114.[44] The NPFC denies this claimed loss of profits.

7. Overhead Expenses - $36,096.00

UBL claims overhead expenses for the barges, tugs and the non-fleeting revenue at UBT. It is not clear what expenses or costs are included in overhead; typically overhead includes fixed costs, i.e., rent, mortgages, insurances, utilities, taxes and insurance – expenses that are incurred

[41] See Claimant's supplemental submission dated 9/17/2009, Exhibit K-1.
[42] See Claimant's supplemental submission dated 9/17/2009, Exhibit J-6.
[43] See Claimant's supplemental submission dated 9/17/2009, Exhibit K-1and K-6.
[44] See the determination for N08057-0114 (UBT), dated 9/12/2013.

regularly regardless of outside events or conditions. Claimant appears to be seeking reimbursement of these overhead costs as additional expenses due to the incident rather than to deduct them from revenues to calculate net revenues. These claimed overhead costs are denied and are more fully discussed below.

a) Barge Overhead - $14,031.00

In the Claimant's Exhibit J-1, UBL claims a delay of 124 hours at an average weighted hourly rate per barge of $0.65. This was multiplied by 173 barges (the 4 Bought in Barges from OH were subtracted out), providing a total of $13,943.80 in claimed barge overhead.

The Claimant provided no financial documentation to support its asserted $0.65 overhead per barge. The only documentation reflecting the $0.65 figure is in the Claimant's Exhibit K-1, where it shows the 'Overhead Corporate' to be $1,707,682.00 for the time period from May through September 2008. It breaks down this amount to be $11,161 per day (for the 153 operating days in this period), and divides this amount by all its barges (711). The total amount of calculated overhead per vessel per day amounts to $15.70, or $0.65/hour.

Furthermore, the Claimant provided two exhibits– K-1 and K-2-- that provide for different overhead totals for the same 153-day period. K-1 states, "Overhead Corporate to be $1,707,682.00" while Exhibit K-2 states an A&G Overhead total to be $1,754,535.00. Also, without support documentation the NPFC is unable to determine how the Claimant calculated the figures provided in the Exhibits above; therefore, it is not possible to understand what type of overhead the affected barges would have on a daily basis and if "A&G Corporate" overhead only includes barges owned or chartered by UBL. Additionally, the Claimant has not provided comparable financials for 2006, 2007 and 2009 as required by the Claims Regulations. The NPFC denies these claimed costs.

b) Tug Overhead - $13,999.00

The Claimant claims the M/V Girlie Knight had 90.50 hours of overhead costs at the rate of 58.30 per hour for a total loss of $5,276.00; the M/V Martha Lynn had 99.08 hours at a rate of $56.01 per hour for a total loss of $5,550.00; and the M/V Jenny S. had 60.92 hours of overhead costs at the rate of $52.09 for a total loss of $3,173.00. The hours claimed are the same as the hours claimed for the vessel delays above. The Claimant provides the rates per hour for each vessel in Exhibit K-1 under "Overhead Corporate (A&G)". They are derived from the same 153-day May – September 2008 time period. The Claimant's Exhibit K-2 does not break down how the overhead costs were calculated and the amount is different from Exhibit K-1. Similarly, for all three tugs, no breakdown of costs is provided for the overhead claimed. K-1 gives only the 'Overhead Corporate' for each, and does not define what costs are included in the claimed overhead expenses. K-5 offers an income statement for each claimed tug for 2008 but, again, the overhead figures are not broken down. Even K-4, which assesses all lineboats owned by the claimant, does not break down the costs. Therefore, it is unclear what is actually being claimed and whether or not those costs establish lost income due to the incident.

The NPFC denies the claimed costs. Should the Claimant seek reconsideration, it must provide financial documentation to support the hourly overhead rates for the three tugs, reconcile the

Overhead Corporate (A& G) costs in K-1 and K-2 and itemize and provide documentation reflecting the individual overhead expenses.

c) Davant Harbor Overhead - $8,066.00

UBL claims Davant Harbor absorbed 133.98 hours of overhead during the oil spill incident. The overhead rate per hour was $60.20. The claimed total overhead loss is $8,066.00 (actual calculation is $8,065.60).

The Claimant's Exhibit 6 provides the calculation for these overhead costs. However, the amounts are not broken down to be able to determine a loss and the $60.20 total is redacted. All that is provided is "Overhead Corporate' totals for Departmental administration ($0.00), TECO Barge Lines ($134,645.00), TECO Energy ($14,991.00), and TECO Transport ($62,403.00) that amount to $220,040.00 for the May through September 2008 time period (153 days). Dividing the $220,040.00 by 153 days amounts to approximately $1445.00/day, or approximately $60.20 per hour. Without knowing what the overhead claim is, the costs cannot be ascertained and are denied.

B. Summary of NPFC Analysis

This claim is denied because Claimant has not established that it suffered a loss of profits. Claimant failed to provide comparable financial information for 2006, 2007 and 2009. Further, Claimant quantifies its barge loss of profits based on a net average revenue/barge/hour of $3.72 but does not factor in all expenses, saved expenses or the freight revenue realized from its barges.

Financial information required by the Claims Regulations includes comparable financial information and any saved overhead and other expenses not incurred as a result of the incident. Claimant did not provide evidence required by the regulations in order that the NPFC could calculate or validate Claimant's claimed losses. Claimants must follow the regulations when seeking reimbursement from the Fund. Murphy Oil USA Inc. v. United States, No. 12-1256, slip op. at 6-7 (E.D. La. Feb. 27, 2014) (Because Murphy did not submit the type of evidence that would enable the NPFC to make the calculations required by the regulations the NPFC decision to deny the claim was not arbitrary and capricious, an abuse of discretion, or unsupported by substantial evidence.) *See also* Nereus Shipping v. United States of America, No 13-1522, slip op. at 13 (E.D. Pa., March 20, 2014) (Evidence submitted by Nereus plainly did not comply with the regulations, which is a proper basis for denying the claim.)

Additionally, Claimant's assertion that 177 barges lost revenue for 133.98 hours because of the UBT closure is refuted by Claimant's own evidence. It should explain why the 177 barges were delayed due to the incident notwithstanding that the Claimant's BOSS documentation refutes this fact. It should provide further explanation and evidence establishing that the non-fleeting activities and revenue were impacted by the closure of UBT.

The NPFC hereby determines that the OSLTF will offer **$0.00** as full compensation for the claimed lost profits incurred by UBL and submitted to the NPFC under claim # N08057-037.

VII. OFFER: $ 0[redacted]

Claim Supervisor: [redacted]

Date of Supervisor's review: 5/15/2014

Supervisor Action: Denial Approved,

Supervisor Comments: