CLAIM SUMMARY / DETERMINATION FORM

Date	: 10/03/2011
Claim Number	: P05005-140
Claimant	: Sunoco, Inc.
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits
Claim Manager	: [redacted]
Amount Requested	: $11,425,212.00

I. Facts

A. *Oil Spill Incident*

On 26 November 2004, the 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 crude oil into the Delaware River, a navigable waterway of the United States. The National Pollution Funds Center (NPFC) reviewed the Coast Guard situation report-pollution (SITREP-POL) and confirmed that the river was restricted during the months of November and December 2004.

B. *Claim History*

1. Original Claim Submission

The law firm of Blank and Rome, representing Sunoco, Inc. (Sunoco) submitted a Removal Costs and Loss of Profits and Earning Capacity claim for loss profits resulting from the 26 November 2004 oil discharge. The claim was received at the NPFC on 30 October 2007 in the amount of **$16,355,671.38**[1] for damages. Sunoco's claim is broken down into the following categories: (1) Operations, (2) Prices, (3) Expenses, (4) Market, (5) Other Alternatives, (6) Chemicals Operational Impact and (7) Sunoco Logistics Loss Profit due to increased expenses.

With the original aggregate claim submission of **$16,118,928.30**, the sum certain for NPFC **Claim # P05005-140** was **$14,110,217.30** as follows: Sunoco requested **$13,082,946.35** in refinery business losses it sustained from 27 November 2004 through 09 December 2004, resulting in more than one million barrels of lost throughput, when its Philadelphia, Marcus Hook and Eagle Point Refineries (known collectively as the northeastern region (NER)) experienced reduced operations. Sunoco states that the oil-spill prevented its refineries from receiving timely crude shipments, which in turn caused the refineries to slow operations and adjust production plans. Additionally, Sunoco requested **$921, 317.28** for chemical business losses from 27 November 2004 through 01 December 2004, when its Frankford chemical operations business had to reduce operations when feedstock from the Sunoco refineries could not be delivered. Further, Sunoco requested **$86,526.71** for lost profits due to increased expense for "Sunoco Logistics," business losses and management staffing. Sunoco Logistics provides dock, pipeline and tank service to Sunoco refineries in the Philadelphia area.

Sunoco requested **$236,674.08** for removal costs activities that included purchase and leasing of equipment, boom operations at docks, water intakes, vessel and equipment cleaning, lightering of some vessels to allow them to enter into the spill area for cleaning purposes, and employees and contractors overtime hours and fees to clean up oil in the areas near the refineries and to prevent damage to the facilities.[2] The original amount offered was

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[1] *See*, Blank & Rome letter to the NPFC dated October 30, 2007 with attached claim form.
[2] *See*, NPFC P05005-139 Claim Submission, dated 10/29/2007.

$166,857.61.[3] Subsequently, Sunoco requested reconsideration and substantiated the additional costs. On 22 January 2009, Sunoco accepted NPFC's determination on reconsideration of **$221,455.75 for** compensable removal costs.[4]

Sunoco requested **$2,008,711.00** for increased costs of goods.[5] Such as, the costs of lightering two vessels and contracting two vessels to backfill and meet scheduled on-loads of crude oil to meet production requirements; for loss of profits stemming from increased shipping, and delivery costs of crude oil to maintain refinery operations, production schedules and to mitigate possible lost production and revenues. Further, Sunoco requested its increased expense due to the delay of a vessel waiting lightering at anchorage. On 16 February 2010, Sunoco accepted NPFC's determination of **$1,957,254.06** for its increased cost of goods and expenses.[6]

In addition to the **$16,355,671.38** amount claimed, Sunoco requested **$19,427.00** for increased expenses to obtain a Jones Act waiver of the coastwise laws to authorize transport of crude oil by foreign vessels from the Big Stone Anchorage in the Delaware Bay to Sunoco's NER Refineries.[7] On 28 April 2010, Sunoco accepted NPFC's determination of **$19,427.00** for the amount claimed to obtain a Jones Act waiver.[8]

2. Revised Sum Certain

Subsequent to an initial review and request for additional information from the NPFC, wherein issues concerning Sunoco's damages model and calculations were identified for the refinery and chemical business losses,[9] Sunoco reduced the sum certain of the claim to **$11,425,212.00** on 29 August 2009. **[10]** The majority of the reduction relates to Sunoco's removal of the reduction impact from ethylene products, which yield a $2.4 million reduction in the refinery claim. Sunoco was unable to identify the accurate data for these products and maintained that "plan" product volumes represent a reasonable basis for establishing product margins. The refinery business losses claim was revised from **$13,082,946.00** to **$10,660,822.00.** NPFC analysis revealed that the margin applied to foregone phenol production was overstated by approximately $4.51 cents per pound. Ultimately, as a result of applying this correction, the chemical business losses were revised from **$921,317.00** to **$677,841.00.**[11]

3. NPFC Initial Claim Determination

On 14 April 2010, **Claim # P05005-140** was denied because Sunoco failed to provide the evidence deemed necessary in proving the alleged loss of profits associated with its refinery, chemical and logistic business. 33 CFR §136.105(e)(6) & (13) and 33 CFR §136.233(c).

C. Claim Reconsideration:

Sunoco requests that the NPFC reconsider the alleged lost profits associated with its: Refinery production totaling **$6,427,436.00**; Chemical business totaling **$677,863.00;** and Logistic

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[3] *See*, NPFC Claim Determination for P05005-139, dated 10/06/2008.
[4] *See*, NPFC Authorization to pay letter, dated 01/22/2009.
[5] *See*, NPFC P05005-157 Claim Submission, dated 10/29/2007.
[6] *See*, NPFC Claim Determination for P05005-157, dated 01/20/2010, and NPFC Authorization to pay letter, dated 2/16/2010.
[7] *See*, NPFC P05005-158 Claim Submission, dated 10/29/2007.
[8] *See*, NPFC Claim Determination for P05005-158, date 4/27/2010, and NPFC Authorization to pay letter, dated 4/28/2010.
[9] *See*, Additional Information letter from the NPFC to Sunoco, dated 4/02/2009.
[10] *See*, Letter from Sunoco to the NPFC, dated 8/19/2009.
[11] *Ibid.*

business totaling **$80,000.00**. Sunoco revised its sum certain upon reconsideration to **$7,185,299.00** in response to a 14 May 2010 meeting at the NPFC and discussion of the NPFC 21 April 2010 summary/determination of each of those claims.

At that discussion, the NPFC explained the type of additional information requested from Sunoco that is required to substantiate its claims. Certain aspects of Sunoco's claims were identified as incomplete, unexplained, or appeared to be inconsistent with a reasonable methodology for calculating economic damages. Identified were potential computational or methodological issues. In the refinery damages claim, the use of the "plan" product volumes to represent the "But-For" Scenario, Industrial Economics Inc., (IEC)[12] observed that "actual" product volumes appeared to differ materially from "plan" outside of the damages period. And noted, that simply excluding the correlated reduction in margin from this differing product mix would yield a decline in damages of approximately $7.1 million, from $13.1 million to about $6.0 million. Further, the spreadsheet tables in the original claim submission that summarized actual production and compared it to planned values and then applied certain industry profit "spreads" to the difference did not in and of itself meet the requirement of "evidence to support the claim."

The NPFC request included documentation to support Sunoco's calculated lost profits. This included actual profit/loss statements for the alleged refinery and chemical losses which included the financial information to substantiate the throughput value. This included, to perhaps utilize a more standard refinery financial reporting to identify typical margins earned on crude throughput; and to corroborate the claim with source documentation along with the description of where and how the information was pulled and collected in order for Sunoco to make its case. NPFC request databases and information systems, depending on the business that captures the information; standard operating procedures for a process that is in place that generate reports of such frequencies; written guidelines and descriptions of the reports systems, and data captures of certain frequencies.[13]

D. Documentation on Reconsideration.

Sunoco provided the following documents to support the claimed costs above:

1. Sunoco's letter to the NPFC dated 24 August 2010 with enclosures.
2. Enclosure. Memorandum –Analysis on Reconsideration.
3. Enclosure. A Spreadsheet Summary from Sunoco's Financial Analysis Management Information System (FAMIS).
4. Enclosure. Declaration of [redacted] Dr. Risk Management and Insurance, dated 19 August 2010.
5. Enclosure. Declaration of [redacted] Vice President, Crude Supply and Optimization, dated 23 August 2010.
6. Enclosure. Vice President, Crude Supply and Optimization, Exhibit A Report. Oil Flow Post-Audit, Volume figures
7. Enclosure. Vice President, Crude Supply and Optimization, Exhibit B Report. Oil Flow July 2004 Post-Audit Notes
8. Enclosure. Declaration of [redacted] Vice President, Finance Refining and Supply, dated August 23, 2010.
9. Enclosure. Declaration of [redacted] Senior Vice President, Engineer and Technology, dated August 23, 2010.

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[12] *See,* NPFC utilized the same contractor on reconsideration as on the original claim, Industrial Economics Inc., (IEC) with expertise in analyses of the financial impact.
[13] *See,* Determination for P05005-140, dated 4/21/2010 and Sunoco Reconsideration Letter, dated 8/24/2010, and received by the NPFC on 8/26/2010.

10. Enclosure. Declaration of [redacted] Business Director, Phenol and Petrochemicals, dated August 17, 2010.

II. APPLICABLE LAW

Under 33 CFR § 136.115(d) The Director, NPFC, upon written request of the claimant or of a person duly authorized to act on the claimant's behalf, reconsiders any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request must be received by the Director, NPFC, within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier. Reconsideration may only be requested once for each claim denied. This written decision is final. The failure of the Director, NPFC, to make final disposition of reconsideration within 90 days after it is received shall, at the option of the claimant any time thereafter, be deemed a final denial of the reconsideration.

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

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

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

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

If a third party claimant or an RP is able to establish an entitlement to lost profits, then he 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).

III. NPFC RECONSIDERATION ANALYSIS

The NPFC, upon reconsideration, reviews the claim *de novo*. The initial determination dated 21 April 2010, is incorporated into this determination on reconsideration.

On 24 August 2010, Sunoco submitted a request for reconsideration and further reduced the sum certain from **$11,425,212** to **$ 7,185,299.00**. Sunoco asserts its losses to be the result of oil removal operations that impacted river deliveries from the refineries.

A. Refinery Business Loss of Profits-- $6,427,436.00 requested. $3,231,207.00 approved on Reconsideration.

Sunoco maintains that the "plan" product volumes represent a reasonable basis for establishing foregone crude throughput. In addition, the margin utilized is a measure of Sunoco's realized spread on crude oil processing.

Sunoco provided comparable production and financial data for periods prior to, during and post incident. While taking any one set or segment of the production data could skew the results, taking the periods both before and after the impact more appropriately describe expected output; and provides for the usual expectation of operational interruptions: there was a non-oil-spill production interruption during the impacted period. It is recognized that Sunoco attempted to normalize for this interruption.[14]

Similarly, the industry wide data for capacity and production through summer, fall and winter 2004-2005 clearly indicate the value of looking at both pre and post-incident production and utilization data as well as comparing to the overall marketplace (Northeast to include Mid-Atlantic). IEC, foregone production and "margin" analysis section, confirm that the margins claimed are supported by evidence from Sunoco's financial system and Sunoco's General Ledger Accounting System,[15] Financial Analysis Management Information System (FAMIS) output.[16]

Sunoco revised its previous loss of profits claim for reduced production at its NER refineries from **$10,660,822.00** in its original claim, prepared using a customary business-interruption insurance methodology, to **$6,427,436.00**, based on an alternative damages methodology[17] to substantiate its claim.

Further, a comparison of margins from what is reported in Sunoco's overall 10-K[18] and industry published spreads indicate consistency. IEC, notes that, while using monthly data for lost production on certain days is less precise in valuing lost production, [19] nevertheless, Sunoco has met the requirement for comparable financial data. Using "monthly" margins for quantifying losses for specific data for individual days is often times inadequate, but in the reconsideration, these are sufficiently supported by internal financial documentation.

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[14] Section 8, Lost Profit Table, reconsideration request, Sunoco using 100% capacity took the difference for November 04 production of 814 MB and split evenly between operation interruption and ATHOS I spill, allocating 407MB to ATHOS I impact, which impacted production during final days of the month. Based upon the higher average monthly margin, in November of $8.76/B, this allocation attributes $3,563,564 to the oil spill delivery delays.

[15] *See,* Enclosure, [redacted] Declaration Exhibit A, 8/24/2010.

[16] FAMIS includes published monthly post-audit reports and industry publications.

[17] *See,* Sunoco information packet to NPFC dated August 24, 2010; IEC memorandum to NPFC dated 20 July 2011.

[18] A Form 10-K is an annual report required by the U.S. Securities and Exchange Commission (SEC), that gives a comprehensive summary of a public company's performance.

[19] *See,* Enclosure, [redacted] Declaration Exhibit A, 8/24/2010.

In its response, Sunoco sufficiently shown the effect and costs associated with the oil spill operations, the delayed crude oil deliveries and its ability to produce a finished product. However, it has not sufficiently shown that its facilities would have produced at 100 percent capacity. The claim utilizes different margin levels in each month, to account for variation in commodity prices. Sunoco asserted that eight out of the sixteen months, no unscheduled events occurred and it experienced actual production equal to, or slightly in excess of, planned production. IEC, reviewed the data and confirmed that eight out of the sixteen months, no unscheduled events occurred and Sunoco did indeed experience actual production equal to, or slightly in excess of, planned production. In the other six months where unscheduled events did occur, not including November and December, actual production was at about 96 percent of plan. Over the course of the full time period, excluding November and December, actual production was at about 98 percent of plan.

Federal objective data was reviewed: On-line Weekly Petroleum Status Reports (WPSR) generated by the Energy Information Administration (EIA) under the US Department of Energy to ascertain an overall understanding of industry trends in the production, sales and pricing of refined products both nationally and regionally, for the impacted period and the period leading up to the oil spill and after the spill; and the EIA reported data, as provided by the industry, for spot prices of crude, gasoline and heating oil price reductions of 19%, 22%, and 14%, respectively, for the New York Harbor reference port.[20] Overall, U.S. Refining capacity increased from 93% to 94 % from December 2003 to December 2004.[21] In the Northeast/Mid Atlantic area (combined reporting areas New England PADD IA and Central Atlantic PADD IB), gasoline stocks at week's end were 34MB, 34.8MB and 34.6MB on 26 November 2004, 03 December 2004 and 10 December 2004, respectively.[22]

NPFC concluded that the products, production and pricing are controlled by the market-- not the producer. The data also indicates that in the regional market of the impacted refinery, stocks were relatively stable, overall utilization of capacity was relatively consistent at 93 to 94 percent, and prices for the major refined products were on the decline during the period.

Based on available data, it appears that Sunoco would have entered the months of November and December 2004 with an expectation that actual production would have fallen somewhat short of plan. For example, unscheduled events occurred in half of the months for which data was available, yielding overall performance at 98 percent of plan.

NPFC finds, based on the particular facts and, specifically, the demonstrated actual and comparable production and financial data,[23] that 98 percent of capacity production is the appropriate expectation for the impacted period; and that loss production should be measured against this level. Ultimately, the quantification and valuation of lost refinery production determined the value of lost profits requested on reconsideration to be high. The claimed foregone throughput, approximately one million barrels of crude oil over a 12 day period, including 407,000 barrels in November 2004 and 634,000 in December 2004, was analyzed by IEC, using two separate methods. In the first method: IEC, reviewed, considered and adjusted the claimed foregone throughput and in the second method: IEC, reviewed and considered whether the claim valuation (margin) of foregone throughput is appropriate. IEC, provided analysis for both methodologies and what impact the methods revealed on the actual refinery damages. The first method analyzed by IEC, provided a reasonable basis for determining damages and the second method analyzed and provided an appropriate reference point for corroboration.

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[20] *See,* EIA WPSR, p. 27, dated 12/31/2004.
[21] *See,* EIA WPSR, p. 2, dated 12/31/2004.
[22] *Ibid,* p. 6.
[23] *See,* Exhibit IEC Reconsideration Review of Sunoco's demonstrated comparable monthly financials and production data, 4/2004-7/2005.

Multiplying the foregone crude throughput figures by the margin amounts yields the measure damages. A summary of the two analyses follows:[24]

Adjusted But-For Crude Run Analysis: The November 2004 crude run loss (in barrels) was approximately 230,230 bbls at a margin of $8.76/bbl, and the December 2004 crude run loss was approximately 268,670 bbls at a margin of $4.52/bbl, the amount of damages incurred due to forgone crude volumes would have amounted to roughly $3,231,207.00.

Adjusted Margins Analysis If the November 2004 crude run loss (in barrels) was approximately 407,000 bbls at a margin of $5.86/bbl, and the December 2004 crude run loss was approximately 634,000 bbls at a margin of $2.32/bbl, the amount of damages incurred due to forgone crude volumes would have amounted to roughly $3,855,900.00.

The NPFC finds **$3,231,207.00** as compensable lost profits based upon lost oil refinery production during the impacted period.

B. Chemicals Damages: $677,863.00 requested. $0.00 offered on Reconsideration.

Sunoco submitted a declaration from relevant plant personnel, Mr. [redacted] Business Director, Phenol and Petrochemicals. Sunoco, declared the lack of cumene production from the refinery is not a part of the chemicals claim. The chemicals claim is specific to the loss of cumene feedstock supply caused by the river closure, as cumene feedstock barges were unable to be delivered to the Frankford facility; that the entire production of feedstock was sold out for the month of November; and that Sunoco made a business decision to slow down production at the Plant, in an attempt to mitigate potential damages and maintain operations due to the uncertainty of the river flow of traffic.[25]

Further, Sunoco stated the loss of phenol production was not due to a reduced rate of cumene production at the refineries but due to the reduced cumene supply which affected the rate of the production of phenol and loss of profits. In November, phenol was sold-out; the reduction in phenol production caused the Frankford Plant to lose 5.397 million pounds of phenol sales. Sunoco stated that at the time of the spill, the Frankford cumene feed inventory was approximately five million pounds, with daily cumene consumption of more than four million pounds at current/planned rates. The phenol production rate was reduced to safely maintain minimum rates for several days for safety and operational reasons: one million pounds of cumene remained in storage in case of an emergency, and another one million pounds of cumene were not attainable as tank bottom, "heel." Sunoco's requests of **$677,863.00** for chemical damages remained unchanged from the original claim.

Sunoco stated that the oil removal response and river closure impacted production, but unlike the refinery portion of this claim, no evidence to support this assertion has been provided with regard to the cumene deliveries. In fact, it appears some cumene comes from the refinery, but no documentation related to scheduled barge traffic and/or associated delays were provided. For the oil refinery portion of the claim, Sunoco provided documentation in the form of shipping logs and schedules that demonstrated Sunoco's income was reduced as a consequence of injury to natural resources and the amount of that injury. Additionally, while the affidavit provides support to the assertion of a reduction in production due to a business decision for the chemical

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[24] *See,* IEC, Report Memorandum, dated 7/20/2011.

[25] *See,* Enclosure. Declaration of [redacted] Business Director, Phenol and Petrochemicals, dated August 17, 2010.

facility at the time; it does not provide the objective information or evidence required to establish the amount of Sunoco's profits or earnings through financial statements, income tax returns or similar documentation. In comparison, Sunoco did provide support of how objective production and pricing data was captured (and from what source): regular internal production audits and analysis and objective supporting documentation for comparable production periods, commodity market prices, refinery utilization rates to include external reports to corroborate internal data such as information from the Energy Information Administration.

Weekly industry market reports were provided to support pricing and demand assumptions for cumene (raw) and phenol (finished product).[26] Upon second review, this evidence neither meets the proof requirements to demonstrate profits and earnings in comparable periods, nor establishes losses through tax returns, financial statements and similar documents. For example, the 02 December, 2004 Aromatics Market Report under phenol says, "demand(s) strong, but should have some typical seasonal slowdown." Also, from the December 2004 Chemical Data Monthly Petrochemical and Plastics Analysis Report: "Regarding supply and demand, volumes appear to have waned in the phenolic resins sector. That reflects normal seasonality. Also, there may be some year-end inventory adjustments underway and some order reductions and plant cutbacks in anticipation of lower future prices."[27] Sunoco's documentation of its loss remains unclear and NPFC could not verify these inventory variances.

In summary, raw material deliveries and vessel delays were not identified and documented to support the claim that the damage to the Delaware River impacted deliveries of raw materials that resulted in a loss of profits with regard to phenol production. Additionally, there was no corroboration of these raw material deliveries and vessel delays from the FOSC. Furthermore, questions remain regarding evidence that phenol production was at capacity, that mitigation was impossible, that the oil delayed the delivery of cumene feedstock, that the deliveries reduced production, and that this production was forever lost, because it did not provide comparables or financials. The NPFC finds Sunoco has failed to prove a loss of profits for the chemical business losses at the Frankford manufacturing facility. Therefore, the **$677,863.00** requested is denied.

C. Logistics Business Losses: $80,000 requested. $0.00 offered on Reconsideration.

Sunoco requests compensation for loss profits due to reduced throughput. Sunoco Logistics provides dock, pipeline and tank service to Sunoco refineries in the Philadelphia area related to plant management and staffing, which remained constant at each facility, and the movement of its oil from one point to another. At the Fort Mifflin facility, all crude oil was offloaded with the Ship/Barge pumps to storage in tanks (tankage) or via pipeline to Darby Creek Tank Farm. Utility costs were incurred when the oil was pumped from facility tanks to the pipeline. Facilities had no utility cost associated with the unloading operation from ships and barges. At the Marcus Hook Tank Farm, the Tank Farm pumps were only used to ship product out of the Tank Farm. At the Eagle Point Dock, all crude or product movement across the dock was from both ship/barge pumps and refinery pumps.

Sunoco states that while it saved money on power in the amount of approximately **$5,000.00,** thus, revising its original Logistics portion of this claim from **$86,527.00** to **$80,000.00,** staffing remained constant and, therefore, a loss occurred.

Sunoco has provided certain refinements and supplemental documentation, including declarations from relevant plant personnel to demonstrate a loss. Regardless, Sunoco has already

[26] *See,* December 2004 Chemical Data Monthly Petrochemical and Plastics Analysis Report, page 44, under Exhibit 12D, submitted with the claim to the NPFC on 10/29/2007.
[27] *See,* Aromatics Market Report, dated 11/02/2004, Exhibit 12E, submitted with the claim to the NPFC, on 10/29/2007.

claimed a loss of profits for the affected refineries and facility. A loss of profits that is directly tied to production outputs incorporates expenses to produce at the higher level.

Logistics falls under the umbrella of a company's overall profits. Therefore logistics is part of the regular costs of Sunoco doing business. The NPFC already compensated Sunoco for this portion of its claim. As identified in the IEC Report, in Sunoco's initial claim, Sunoco Refining backed out and/or offset $86,000.00 of "costs" saved for Sun Logistics pipeline usage. On reconsideration, Sunoco's refinery claim does not take this into consideration that all revenues and expenses are captured in the refinery loss profit value. The NPFC finds Sunoco has failed to prove a loss of profits or earning capacity separate from the already claimed loss of profits for the affected refineries. Therefore, the **$80,000.00** requested is denied.

IV. SUMMARY

On reconsideration, NPFC determined **$3,231,207.00** of the **$ 7,185,299.00** is compensable under OPA 90.

Sunoco demonstrated, by a preponderance of the evidence, that it could not pass its increased costs, as a result of the oil spill, on to others; or offset the additional expenses or lost production at the NER.[28] Its increased expenses continued throughout the ATHOS I oil spill for the time period between 27 November 2004 and 9 December 2000, without offsetting revenues. Its increased expenses had no impact on pricing in the commodity market as evidenced by the unaffected market rates.[29] Sunoco was unable to offset the additional expenses or lost production in the NER because transportation costs from its next closest refineries would have increased expenses; and during this period all refineries had little available capacity.[30] As a result, Sunoco chose the option of alternative delivery vessels, and substantiated costs, to mitigate its loss of production and revenues.[31]

The NPFC denies both the Chemical and Logistics portions of this claim because Sunoco has failed to provide the evidence deemed necessary in proving the alleged loss of profits.

V. Offer on Reconsideration:

The NPFC hereby determines that the OSLTF will pay **$3,231,207.00** as full compensation for the damages incurred by Sunoco and submitted to the NPFC under claim # P05005-140. The NPFC denies **$3,954,092.00** in claimed damages.

Claim Supervisor: [redacted]

Date of Supervisor's review: 10/3/11

Supervisor Action: offer allowed

Supervisor's Comments:

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[28] *See,* Determination Package for NPFC, Claim # P05005-0158.

[29] *See,* Weekly United States Spot Price, FOB Weighted by Estimated Import Volume (Dollars per Barrel), which demonstrates that the price of oil in November and December 2004 decreased and were not passed on to Sunoco's customers.

[30] *See,* Original claim submission narrative, submitted to the NPFC on 10/29/2007; Letter from Mr. [redacted] Sunoco, to Ms. [redacted] NPFC, dated 8/19/2009.

[31] *See,* Determination Package for NPFC Claim # P05005-0158.