U.S. Department of Homeland Security

United States Coast Guard

Director
National Pollution Funds Center
United States Coast Guard

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July 02, 2009

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Ms. Margaret Lekanoff
President, Qawalangin Tribe of Unalaska
P.O. Box 334
Unalaska, AK 99685

RE: Claim Number: J05003-002

Dear Ms. Lekanoff:

The National Pollution Funds Center (NPFC) has reviewed the claim submitted by the Qawalangin Tribe of Unalaska for loss of subsistence use of natural resources resulting from the December 2004 *M/V Selendang Ayu (Selendang)* oil spill (claim J05003-002). We have determined that the Tribe has not met its burden of proving a subsistence use loss as defined under the Oil Pollution Act (OPA, 33 U.S.C. §§2701 *et seq.*) and the claims regulations (33 U.S.C. §136). Accordingly, the NPFC denies payment of the claim. The basis of this determination follows.

Background

Between December 7 and 9, 2004, the Malaysian-flagged bulk freighter *Selendang* lost power, went aground, and broke apart off the northwestern coast of Unalaska Island, Alaska, between Skan Bay and Spray Cape. Approximately 335,732 gallons of intermediate fuel oil, marine diesel, and other oils spilled into the Bering Sea. The U.S. Coast Guard (USCG) and other federal and state agencies conducted response and clean-up activities through June 2006.

In response to the oil spill and threat of oil contamination to fishing gear and fish harvests, the state of Alaska closed the Makushin and Skan Bay areas of the eastern Aleutian Islands to all commercial fishing activities and issued health advisories to curtail the consumption of subsistence foods. Fishing closures were in effect through October

2005, potentially affecting the ability of Alaska native and nonnative residents to enjoy traditions associated with natural resource activities.

On November 27, 2007, the Qawalangin Tribe of Unalaska submitted a claim to the NPFC for loss of subsistence use of natural resources from the *Selendang* spill, presented as the cultural importance of lost natural resources to traditional subsistence cultures (page 1 of the claim). The Tribe asserts that the spill and associated response actions prevented its members from participating in 32 traditional subsistence-based cultural trips (fishing, collecting, and camping) to the Makushin, Skan, Kashega, Pumicestone and Volcano Bay areas. To compensate for this claimed loss, the Tribe seeks $936,532 to renovate and operate a community cultural resource center and $108,372 for past assessment costs.

Subsistence Use Loss Claim Requirements and Claim Evaluation

OPA (33 U.S.C. §§2701 *et seq.*) and the claims regulations (33 C.F.R. §136) require that claims for loss of subsistence use of natural resources:

1) Conform with the general claims procedures, including time limitations on claims (33 C.F.R. §136.101), order of presentment (33 C.F.R. §136.103), and general requirements (33 C.F.R. §136.105);
2) Be for lost subsistence use and submitted by an eligible claimant (33 C.F.R. §§136.219-223);
3) Identify and describe the actual subsistence use of each specific natural resource for which compensation is being claimed (33 C.F.R. §§136.221(a) and (b));
4) Describe how and to what extent the subsistence use was affected by injury to or loss of each specific natural resource (33 C.F.R. §136.221(c));
5) Describe efforts to mitigate the subsistence use loss and describe each alternative source or means of subsistence available to the claimant during the period of time for which loss of subsistence is claimed, and any compensation available to the claimant for loss of subsistence (33 C.F.R. §§136.221(d) and (e)); and
6) Seek compensation based upon the reasonable replacement cost of the subsistence loss suffered by the claimant, if during the period of time for which subsistence is claimed, there was no alternative source or means of subsistence available (33 C.F.R. §136.223).

Moreover, any compensation for a loss of subsistence use of natural resource claim must be reduced by the following (33 C.F.R. § 136.223 (b)):

1) All compensation made available to the claimant to compensate for subsistence loss;
2) All income which was derived by utilizing the time which otherwise would have been used to obtain natural resources for subsistence use; and
3) Overheads or other normal expenses of subsistence use not incurred as a result of the incident.

The claim must conform to the general claims procedures

Under OPA, the Oil Spill Liability Trust Fund (OSLTF) is available to pay claims for uncompensated damages resulting from the discharge, or threat of discharge, of oil into or upon navigable waters after August 18, 1990 (33 U.S.C. §2702(a)). Claims, including those for loss of subsistence use of natural resources, must be: (a) in writing for a sum certain, (b) submitted to the NPFC within three years after the date on which the injury and its connection with the incident were reasonably discoverable, and (c) first presented to the responsible party (RP) or guarantor before submission to the NPFC for payment (except as noted in 33 C.F.R. §136.103(b)).

The NPFC finds that the *Selendang* incident involved a discharge of oil into navigable waters of the United States that began on or about December 8, 2004, thereby meeting the requirement at 33 C.F.R. §136.101. The NPFC received this claim in writing with a sum certain on November 27, 2007, within three years of the date of the spill (December 8, 2007) and the statute of limitation established by OPA.

On November 15, 2007, the Tribe submitted this claim to the owner (Ayu Navigation Sdn. Bhd.) and operator (IMC Shipping Co. Pte. (Private) Ltd.) of the *Selendang*, as the RPs for this incident. The NPFC received an email correspondence from the RPs' legal representatives on February 28, 2008 that provided the RPs' decision to deny payment of the Tribe's claim. Thus, the NPFC finds that the claimant has met the requirement under 33 C.F.R. §136.103 to present their claim to the RP.

The claim must be for lost subsistence use and submitted by an eligible claimant.

Under OPA, the OSLTF is available to pay individuals for uncompensated damages resulting from the loss of subsistence use of natural resources (33 C.F.R. §§136.219-223). These claims are distinct from claims for public loss of natural resources (33 C.F.R. §§136.207-211) (which include lost or diminished use values) that are only recoverable by a United States trustee, a State trustee, an Indian Tribe trustee, or a foreign trustee" (33 U.S.C. §2702 (b)(2)(A)).

OPA does not define the term "subsistence". However, the court in Matter of Cleveland Tankers, Inc., 791 F.Supp. 669, 678-79 (E.D. Mich. 1992) held that subsistence under OPA "relates to use of a natural resource, such as water to obtain the minimum necessities of life". See also, Sekco Energy, Inc. v. M/V MARGARET CHOUEST, 820 F.Supp. 1008, 1015 (E.D. La. 1993)(quoting Cleveland Tankers and holding that a loss of subsistence claim will not be established under OPA unless the natural resources are used for the minimum necessities for life). The NPFC relies on these court rulings to interpret the term "subsistence". Also, the legislative history for subsistence use claims suggests that Congress intended that these types of claims compensate individuals who use natural resources for their survival.[1]

[1] See, Statement of Cong. Young of Alaska in the House discussion of the OPA 90 Conference Report on Friday, August 3, 1990, at 136 Cong.Rec. H6933-02 ["I would also like to state unequivocally that, in the

Consistent with the case law, the relevant legislative history, and the term's plain meaning[2], subsistence use of natural resources are activities necessary to obtain food, shelter and other minimum necessities of life. Thus, to establish a claim for lost subsistence use of natural resources, the claimant needs to demonstrate that the resource use in question was required for food, shelter, clothing, medicinal purposes, *etc.* [3] The NPFC finds that the cultural use of a resource does not meet this definition of subsistence use of natural resources.

The Tribe presents its claim as "loss of traditional subsistence-based cultural use and customary ways of life". Damages are presented as the dollar value (direct value plus a "cultural premium") of 32 lost trips to the traditional fishing areas following official closures and in response to the perception of the oil contamination. Each lost trip is claimed to involve subsistence use, including fishing, collecting plants and other food items, and camping, as well as "cultural education and propagation" (page 4 of the claim).

After carefully reviewing the claim, and as further discussed below, the NPFC finds that the claimant has not demonstrated a subsistence use loss of natural resources. The claim does not identify natural resources used for subsistence purposes that were lost as a result of the *Selendang* incident. Although the claim asserts the claimant's inability to go on trips to or from specific areas and submits a list of traditionally used subsistence resources, the claimant fails to offer proof of the type and quantity of natural resources typcially caught for subsistence purposes on these trips. The value of a trip, whether of cultural or recreational value to the claimant, is not a compensable loss under the subsistence use provisions of OPA. However, the cultural value of the lost trips may be compensable under the NRD provisions of OPA by NRD trustees, which the claimant is not asserting to be[4]. According to the preassessment data report for the *Selendang* incident, the state and federal NRD trustees may consider such losses as those described in this claim[5].

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event of a future catastrophic oil spill, this legislation should result in prompt compensation for the subsistence fishermen who rely on their catch for consumption and survival.]

[2] Merriam-Webster dictionary definition: Subsistence: 1a(2): the condition of remaining in existence; 2: means of subsisting: as a: the minimum (as of food and shelter) necessary to support life; b: a source or means of obtaining the necessities of life.

[3] To the extent that claimant contends that NPFC's 2006 Claims Guidelines require a different showing, those Guidelines have no applicability to this claim because they were withdrawn in September 2007 in accordance with the Office of Management and Budget Bulletin No. 07-02-"Agency Good Guidance Practices" (available at http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf).

[4] Statement made in claimant's response letter of May 15, 2008, addressing questions and issues raised in the RP's letter of denial to pay claim,

[5] See discussion of potential lost human use of natural resource services associated with the enjoyment of cultural resources and recreation. Preassessment Data Report #12: Potential Human Use Losses Associated with the Selendang Ayu Oil Spill, Jenifer Kohout, (USFWS) and Norman Meade (NOAA). (http://alaska.fws.gov/fisheries/contaminants/spill/sa_record.htm).

If natural resources are used for subsistence purposes during the lost trips, the claim must clearly state this and attempt to prove the subsistence loss. For example, it is unclear whether sufficient food is packed to meet dietary requirements, or whether participants are limited to consumption of food they are able to collect during the trip. If other natural resources are collected during the trip to provide shelter, clothing, medicinal, or other subsistence needs, this must also be clearly stated.

The claim must identify and describe the actual subsistence use of each specific natural resource for which compensation is being claimed.

The claims regulations require claimants to identify and describe the actual subsistence use made of each specific natural resource for which subsistence use is being claimed (33 C.F.R. §§136.221(a) and (b)). Subsistence use loss claims should provide a detailed description of the type of resources regularly collected by the claimant during the period of loss claimed and the subsistence use(s) made of those resources during the period in question. Supporting information (*e.g.*, photographs, published accounts or written records documenting resource use for subsistence purposes) should be provided if available.

As stated above, the Tribe is claiming for their estimated value of 32 lost traditional subsistence-based cultural trips that involve fishing, collecting plants and other food items, and camping. Attachment 3.0 of the Tribe's claim provides a list of "Culturally Valued Resources", some of which may have a subsistence use (*e.g.,* edible and medicinal). To the extent that these resources are typically collected and used for subsistence (*i.e.*, to maintain the minimum necessities of life), any loss of subsistence use due to the *Selendang* incident might be compensable. However, the Tribe does not provide any description of the nature and extent of use of these resources in connection with the lost trips, or otherwise. Accordingly, the NPFC finds that the Tribe has not met the burden of demonstrating the actual subsistence use of any natural resources.

The claim must describe how and to what extent the claimant' subsistence use was affected by injury to or loss of each specific natural resource.

The claims regulations require that claimants identify how and to what extent subsistence use was affected by the injury to or loss of each specific natural resource (33 C.F.R. §136.221(c)). To show that a subsistence use loss has occurred, claimants must:

- Demonstrate that it was reasonable to change subsistence use behavior given observed effects of the spill; and
- Provide a reasonable measure and basis of the spill-related subsistence use loss being claimed.

The first condition confirms a connection between the spill and subsistence use impacts. For example, it might be reasonable for subsistence users of fish to change their subsistence use in response to fish consumption advisories or access restrictions in areas they regularly fish. In cases where the claimant has to make subsistence use decisions in

the absence of consumption advisories, access restrictions or other clear, reliable information about the level of risk associated with resource use, the claimant should demonstrate that his/her actions were consistent with those of a cautious, reasonable individual. For example, even in the absence of beach closures or consumption advisories, a claimant's decision to fish in another area because observations of significant (*i.e.,* more than trace) oiling in traditional shellfishing locations and a lack of timely, accessible information concerning potential consumption risks might satisfy this requirement. However, actions taken that ignore readily available information or are excessive may not meet this requirement (*e.g.*, claiming impacts in areas well outside the spill zone, well after resources were determined to have returned to baseline condition, and/or in conflict with well-documented findings of negligible impact, *etc.*).

The second condition requires that claimants provide a measure of a subsistence use loss (*e.g.*, numbers or weight of resource), along with an explanation and documentation of how these losses were determined. Identification of the claimant's "regular" level of resource use (*i.e.*, the amount of resource typically gathered over a given period of time), the period of time that the claimant was reasonably unable to collect the resource due to the spill, and the level of reduced use, if any (*i.e.*, the amount of resource that was able to be gathered), is sufficient to meet this requirement.

The claimant contends that it has sustained a subsistence use loss due to the inability to take 32 trips to fish, hunt, and/or gather wild resources in 2005 and 2006 following fishing area closures and response actions resulting from the *Selendang* incident. To the extent that the spill affected the fishing, hunting, and/or gathering of an established subsistence use resource, it might be reasonable for Tribal members to change their subsistence use behavior by declining to use natural resources from areas negatively impacted by the spill. However, the claim does not provide any information on the typical amount of subsistence use resources collected during these lost trips, which would allow a subsistence use loss to be determined. Thus, the NPFC finds that the Tribe has not provided a reasonable measure of lost subsistence use.

The claim must describe efforts to mitigate the subsistence use loss.

The claim regulations require that claimants describe efforts to mitigate the loss of subsistence use (33 C.F.R. §136.221(d)) (*i.e.*, find reasonable alternatives in place of the lost resources, such as collecting similar resources from nearby areas unaffected by the spill or making use of substitute resources as circumstances allow). Therefore, claim materials must:

- Describe the mitigation efforts and any offsets to potential subsistence use losses achieved; or
- Describe why mitigation was not feasible (*e.g.,* due to a lack of comparable substitute resources in nearby areas, an inability to travel to or access alternate locations, a lack of information about viable alternate sites, *etc.*).

The Tribe's claim discusses mitigation efforts solely as an evaluation of "replacement destinations" for lost "culturally-based" trips (page 13 of the claim). As described above, the loss of trips, by itself, does not represent a measure of subsistence use loss. Further, to the extent that there was a loss of subsistence use resources resulting from the loss of these trips, mitgiation options presented by the claimant should have included replacement of dietary, clothing, sheltering, medicinal or other subsistence needs affected by the spill. For example, such needs potentially could be met through market purchases of food, clothing or medicine. While such mitigation approaches may not be feasible, or may only partly substitute for lost subsistence use, they should be considered and their viability (or lack thereof) discussed.

For these reasons, the NPFC finds that the claimant has failed to show any reasonable efforts at mitigating its loss.

The claim must be based on the reasonable cost to replace the lost subsistence use of natural resources.

OPA allows compensation for both the reasonable costs to: (1) replace a lost subsistence use (33 C.F.R §136.223), and (2) assess damages claimed (33 C.F.R §136.105(e)(8)). Resource replacement can occur in a number of ways, including, but not necessarily limited to, the cost of purchasing substitute resources or the additional, incremental costs associated with traveling farther and/or spending more time collecting resources from areas unaffected by the spill.

The claims regulations specify replacement cost as the measure of compensation for lost subsistence use, less: (1) any compensation received by the claimant to compensate for the subsistence loss; (2) all income derived by using the time that otherwise would have been used to obtain natural resources for subsistence use; and (3) overheads or other normal expenses of subsistence use not incurred as a result of the incident (33 C.F.R. §136.223(a) and (b)). To meet this requirement, claimants must adjust their estimate of subsistence use loss to account for compensation received, mitigation, income from spill-related or replacement activities, and avoided costs.

If the Tribe had met the other criteria necessary to support a subsistence use loss under OPA as described above, the NPFC would analyze how much of the claim could be paid by considering any evidence submitted by the claimant to establish the cost of replacing the natural resources used by the claimant for subsistence purposes. Stated differently, if the claimant could show a loss of subsistence, the NPFC would only compensate the replacement cost of natural resources that, but for the incident, would have been used to maintain the claimants' minimum necessities of life. Because compensation for a loss of subsistence claim under OPA does not include any damages to the claimant's culture caused by an inability to take the trips described by the claimant, and since these are the only damages claimed, this claim must be denied.

Moreover, even if the NPFC could reimburse damages to the claimant's culture caused by the incident under the subsistence use claims provisions, this claim would still be

denied because the claimant does not adequately support the methods used to determine that the amount claimed represents a reasonable replacement cost as required by 33 C.F.R. 136.223. First, the claimant improperly relies upon consumer surplus values for recreational activities to calculate its damages. Recreational value is different from cultural value and the claimant's unsupported contention that the recreational value is a reasonable basis for the cultural value does not carry its burden of showing by a preponderance of the credible evidence. Secondly, the claimant's unsupported contention that it appropriately assigns a value for a cultural premium by chosing an arbitrary range for a multiplier to the recreational value, does not carry the claimant's burden of proving by a preponderance of the credible evidence that the cultural losses were valued appropriately. As a result of these deficiencies, even if cultural damages could be compensated as a subsistence loss, the claimant failed to carry its burden of showing the reasonable replacement cost of the claimed loss.

Additionally, even if cultural damages could be compensated as a subsistence loss and even if the claimant's claimed damages were reasonably calculated, this claim should still be denied based upon the claimant's failure to mitigate its losses or otherwise reduce its claimed amount as required by 33 C.F.R. § 136.223 (b). The claimant asserts that the locations of the lost canoe trips, as described in their claim, are an important cultural aspect. If the NPFC were to accept the premise that no alternate locations are acceptable to the tribe, the claimant is still responsible for making reasonable efforts to mitigate its loss, if any, by considering other mitigation alternatives. Also, the claim materials do not document whether Tribal members received any spill-related compensation, derived income during time not spent participating in subsistence use activities, and/or avoided expenses that would have been incurred as part of subsistence use activities. As a result of these deficiencies, even if cultural damages could be compensated as a subsistence loss, the claimant has failed to carry its burden of proving the reasonable replacement cost of the claimed lost of subsistence.

Based upon the above, the NPFC denies payment for the claimed losses.

Claimed Assessment Costs

As part of its claim, the Tribe also seeks $108,372 for costs incurred to assess the claimed subsistence use loss. While the claims regulation allows compensation of the reasonable costs incurred by a claimant assessing the damages claimed (33 C.F.R. §136(105)(e)(8)), the claimant has the burden of demonstrating that the underlying damages are, in fact, OPA damages (except as provided under 15 C.F.R. §§990 *et seq.*). Because the NPFC has determined that the Tribe has not demonstrated a subsistence use loss, payment of the claimed assessment costs is also denied. Additionally, even if the claimant had demonstrated a subsistence use loss that was compensable under OPA, the claimant can only recover assessment costs that have actually been incurred. In this case, the claimant has not paid its contractor any of the claimed assessment costs, and the claimant has not demonstrated that it has a legal obligation to do so (*i.e.*, a receipt of payment, a signed contract, *etc.*).

Conclusion

The NPFC has reviewed the claim submitted by the Qawalangin Tribe for lost traditional subsistence-based cultural use and customary ways of life following the *Selendang* oil spill. We have determined that the claimant has not met its burden of proving a subsistence use loss under OPA (33 U.S.C. §§2701 *et seq.*) and the implementing claims regulations (33 C.F.R. §136). Claim materials do not: (1) identify and describe an actual subsistence use of specific natural resources for which compensation is being claimed; (2) describe how and to what extent the claimant's subsistence use was affected by injury to or loss of a specific natural resource; (3) describe efforts to mitigate the claimed subsistence use loss; or (4) calculate the reasonable cost to replace the lost subsistence use resource. The NPFC further finds that claimed past assessment costs are not reasonable because the underlying damages are not subsistence use damages and the claimant has failed to show that it has actually incurred any such costs. Accordingly, this claim to compensate for lost traditional subsistence-based cultural trips following the *Selendang* oil spill and past assessment costs is denied.

Under OPA, you may ask the NPFC to reconsider this determination. If the claimant has evidence that would support a loss of subsistence use claim as described in this determination, then NPFC encourages the claimant to request reconsideration and submit additional evidence to support its claim. Reconsideration requests must be received by the NPFC in writing within 60 days of the date of this letter, and will be based upon the additional factual or legal information that you provide with your request. A claim may be reconsidered only once, and written disposition of a reconsideration request constitutes final agency action. If the NPFC fails to issue a written decision within 90 days after receipt of a request for reconsideration, this determination, at the option of the claimant, shall be deemed final agency action.

Should you choose to request NPFC reconsideration of this determination, please mail the request with the appropriate claim number (J05003-002) to:

Chief (Cn)
National Pollution Funds Center
U.S. Coast Guard
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100

If you have any questions or would like to discuss this matter, please feel free to contact me at the above address or by phone at 202-493-6856.

Sincerely,

M. Denise Coutlakis
U.S. Coast Guard

Table 1. Claimant's estimate of lost value and assessment costs.			
Undiscounted Value of "Direct Loss"			
Number of Person Trips Lost	Fishing Value of Trip/Person	Camping Value of Trip/Person	Base Trip Value. (Trips Lost x (Fishing Val. + Camping Val.))
128	$388.56 (6 days x $64.76/day[1])	$545.05 (5 nights x $109.01/night[2])	$119,502.08 (128 trips x ($388.56 + $545.05))
Notes: [1]Consumer surplus value/person/day in 2007 US$ for fishing recreation in Alaska (Kaval 2006) [2]Consumer surplus value/person/day in 2007 US$ for camping in Pacific Coast region (Kaval 2006).			
Undiscounted "Cultural Premium" Value			
Cultural Premium Range (1 to 10 x "direct loss")	Total Trip Value Range ("Direct Loss" + "Cultural Premium)	Total Value of Lost Cultural Trips (Mean Value)	
$119,502 - $1,195,020	$239,004 - $1,314,522	$776,763	
Discounted Estimate of Lost Value[3]			
Cultural Premium Range (1 to 10 x "direct loss")	Total Trip Value Range ("Direct Loss" + "Cultural Premium)	Total Value of Lost Cultural Trips (Mean Value)	
$134,500 - 1,344,995	$268,999 - 1,479,494	$874,246	
[3]Calculated through application of a three percent annual discount rate for four years, based on the claimant's estimate of a four year time lag between injury and restoration.			
Cultural Center "Replacement" Costs			
Estimated Renovation/Operating Costs for 2 Years	$936,532		
Assessment Costs			
Contractor (LTCI) Costs for Assessment Development	$108,372		
Summary of Claimed Damages			
Cultural Center "Replacement Costs" + Past Assessment Costs	$1,044,904		