U.S. Department of Homeland Security

United States Coast Guard

Director
National Pollution Funds Center

4200 Wilson Blvd Stop 7100
Arlington VA 20598-7100
Staff Symbol: Ca
Toll-Free: 1-800-280-7118
Fax: 703-872-6113
Email: ARL-PF-NPFCCLAIMSINFO@uscg.mil

5890
May 2, 2014

[redacted]

RE: J05003-0005

IMC Shipping Co. Pte. Ltd., Ayu Navigation Sdn Bhd
[redacted]

Dear Mr. Davis:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number J05003-0005 involving third party claims paid related to the closure of the Makushin Bay/Skan Bay fishery due to the M/V SELENDANG AYU spill. This determination is based on an analysis of the information submitted by the Claimant and information gathered by the NPFC. Please see the attached determination for further details regarding the rationale for this decision.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request. Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number J05003-0005.

Mail reconsideration request to:
Director
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Boulevard
Arlington, VA 20598-7100

Sincerely,

[redacted]

Claims Manager
U.S. Coast Guard
By direction

Enclosures: Claim Summary / Determination
NPFC Spreadsheet

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: J05003-005
Claimant	: IMC Shipping Co Pte Ltd.; Ayu Navigation Sdn Bhd; The Swedish Club
Type of Claimant	: Corporate Responsible Party
Type of Claim	: Payments to third party Loss of Profits and Earnings Capacity claimants
Claim Manager	: Eric Bunin
Amount Requested	: $378,938.62

INCIDENT

The M/V SELENDANG AYU (SELENDANG or vessel) was on a voyage from Seattle to China on December 06, 2004. While operating in adverse weather conditions, the crew shut down the main engine as a result of a casualty to the No. 3 cylinder. While attempting to repair the engine, the vessel drifted and eventually grounded on December 08, 2004 on a rocky shelf on the north shore of Unalaska Island, northeast of Spray Cape. The grounding ruptured the vessel's hull and bottom tanks, causing a discharge of approximately 330,000 gallons of bunkers into the waters off Unalaska Island.

CLAIMANT AND CLAIM

Claimants

Ayu Navigation Sdn Bhd (Ayu), IMC Shipping Co. Pte. Ltd. (IMC), Sveriges Angfartygs Assurans Forening (The Swedish Club), and International Group of Protection and Indemnity Clubs (International Group) (collectively "the Claimants") are the responsible parties under the Oil Pollution Act of 1990 (OPA) and their insurers. Ayu owned the vessel, and IMC operated it. The Swedish Club, International Group, and the International Group's reinsurers were the subrogated underwriters.

Pursuant to 33 U.S.C. § 2708(a)(2), the Claimants presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) via the National Pollution Funds Center (NPFC) on December 07, 2007, asserting entitlement to a limit on its liability for oil removal costs and damages resulting from the incident. The Claimants sought reimbursement for incurred removal costs and for damages paid to third parties above their statutory limit on liability. On January 27, 2012, the NPFC determined that the Claimants' were entitled to their statutory limit of liability, $23,853,000.

Claim

Claimants assert that, in accordance with OPA, they paid $378,938.62 in loss of profits or impairment of earning capacity damages to 43 fishermen fishing for Tanner Crabs, deckhands, and seafood processors/fishing companies (collectively referred to as Crabbers) as a result of the closure of the Makushin Bay/Skan Bay (MB) fishery due to the oil pollution incident. In exchange for payment from the Claimant each Crabber executed a Settlement Agreement and Release, releasing and discharging the Claimant from all causes of action and claims arising from, or related to, the closure by the Alaska Department of Fish and Game (ADFG) of the portion of the 2005 EAD Tanner crab fishery scheduled for the Makushin/Skan Bay area

beginning January 15, 2005. Claimants now seek reimbursement of the $378,938.62 Claimants paid to the Crabbers[1] from the Fund.

In support of its claim to the Fund Claimants provided separate information packets for each Crabber that included MR & Associates (MRA) forms[2] that had been filled out by each Crabber. These forms, MRA loss calculations sheets, a copy of the check and the settlement and release agreement executed by MRA and each Crabber, were the sole basis provided by the Claimant seeking reimbursement from the Fund. These packets are discussed further below.

Background

The Fisheries

According to ADFG, Tanner Crab fisheries offshore of Unalaska Island include the Eastern Aleutian District Tanner Crab Fishery (EAD), which includes the Skan Bay and Makushin Bay (MB) Areas, and Unalaska Bay. The Skan Bay and Makushin Bay areas are located just north of the Selendang discharge area; the Unalaska Bay area is northeast of the discharge area and was not affected by the oil. Prior to the incident, the MB fishery had been scheduled to open on January 15, 2005, with a harvest quota level set at 171,453 lbs.[3] The MB fishery had been scheduled to close either March 31, 2005 or when the quota was reached, whichever was first.[4]

On December 27, 2004,[5] as a result of the Selendang oil spill, the ADFG closed the 2005 Eastern Aleutian District (EAD) Tanner Crab Fishery in the Makushin/Skan Bay area (MB fishery) and did not open it that season.[6] Oil was present and posed a threat of contamination to fishing gear, fishery resources, and potential harvests.[7] The Unalaska Bay fishery opened on January 15, 2005 and the 35,304 lbs quota was reached on January 18, 2005, thereby ending the season that day.

ADFG requires that vessels acquire permits when fishing in Alaska fisheries. The 55 permits that were issued covering Makushin Bay/Skan Bay and Unalaska Bay were identified as T09O for pot gear vessels under 60 feet in length, Dutch Harbor, and T91O for pot gear vessels over 60 feet in length, Dutch Harbor.[8] Fishing was limited to crab pots; and each boat was limited to five pots in the EAD Fishery.[9] The ADFG designated December 27, 2004 as the registration deadline for the EAD fishery.[10] It was not unusual for fishermen, including the Crabbers in this claim, to fish multiple species during the Tanner Crab season.

---

[1] The Crabbers presented loss of profits claims to the Claimants totaling $1,157,100.52; Claimants denied payment of $778,260.90 to the Crabbers.
[2] MR & Associates was the Claimants' claims adjuster for the Crabbers claims.
[3] See An Overview of the Major Commercial Fisheries in the Unalaska Area that may be Impacted by the M/V Selendang Ayu Oil Spill, prepared by Nuka Research & Planning Group, LLC., April 15, 2005.
[4] Fishery fact sheet #1 attached to Nuka Research Overview dated April 15, 2005.
[5] See An Overview of the Major Commercial Fisheries in the Unalaska Area that may be Impacted by the M/V Selendang Ayu Oil Spill, prepared by Nuka Research & Planning Group, LLC., April 15, 2005.
[6] See An Overview of the Major Commercial Fisheries in the Unalaska Area that may be Impacted by the M/V Selendang Ayu Oil Spill, prepared by Nuka Research & Planning Group, LLC., April 15, 2005. The EAD includes the Unalaska Bay and Makushin Bay areas.
[7] ADF&G Commercial Fisheries News Release 12/27/2004.
[8] http://www.cfec.state.ak.us/misc/FshyDesC.htm
[9] MR & Associates letter to Michael Alfieri dated September 20, 2005.
[10] ADF&G Commercial Fisheries News Release 12/27/2004.

APPLICABLE LAW

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

Pursuant to the provisions of 33 C.F.R. § 136.231, claims for loss of profits or impairment of earning capacity damages due to injury to, destruction of, or loss of real or personal property or natural resources as a result of an oil spill incident, may be presented to the Fund by the claimant sustaining the loss or impairment, or by the party subrogated to the rights of the claim.

A subrogee must support a claim in the same manner as any other claimant. 33 CFR 136.107.

"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 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 C.F.R. § 136.233(a)-(d).

If a third party claimant establishes a loss of profits, compensation may be provided from the OSLTF. The amount of compensation allowable is actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for the following: all income resulting from the incident; 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 C.F.R. § 136.235(a)-(e).

NPFC ANALYSIS

Claimants' submittals to the Fund

As noted above Claimants provided separate information packets for each Crabber. The packets typically included MRA-produced forms, including Claimant Loss Information Form, Loss Information/Calculation Form and a Mitigation of Damages Form, all filled out by the Crabber. The Claimant Loss Information Form asked for personal information, amount and type of damage claimed, and a description of how the incident caused the damage. The Loss Information/Calculation Form asked the Crabber to describe how he/she calculated his/her loss.

It provided instructions for calculating losses. For instance the instructions asked the Crabber to include the number of days he *expected* to fish and his *expected* catch per day in each location he intended to fish and an *estimate* of total pounds of Tanner Crab he *expected* to catch. The Form also instructed the Crabber to provide *expected* costs per day of intended fishing. Finally, the Form sought information on deckhands, if any, and the percentage of catch that would be paid to them. The forms did not instruct the Crabbers to support their information with any documentation. The Crabbers were asked to execute a Request for Release of Fish Ticket Data to a Third Party, so that MRA could seek such information from the State.

The packet included MRA's Loss Calculations Form in which MRA quantified each Crabber's alleged losses.[11] MRA estimated losses using (1) *estimated* pounds of catch; (2) *estimated* price per pound of Tanner Crab during the closed season; (3) taxes; (4) crew percentage; (5) *estimated* expenses of fuel, food, oil, and bait; and (6) mitigation efforts. Finally, the packet for each Crabber included a copy of the check issued to each Crabber and an executed Settlement and Release Form. According to some letters accompanying the checks, Claimants noted that some of the payments they issued were for "the spirit of compromise," or based on allegations of losses due to "increased competition" in the Unalaska Bay Tanner Crab Fishery.

Claimants paid the 43 claims and obtained all rights and causes of action via the executed Settlement and Release form; therefore, they are subrogees and must provide information to support their claims as any claimant. Pursuant to the claims regulations Claimants must prove (1) that each Crabber suffered a loss or reduction in profits or earning capacity, and (2) that the proven financial loss was caused by injury to or destruction of property or natural resources, resulting from the oil-spill incident. The evidence must include records of comparable periods and the period when the claimed loss or impairment was allegedly suffered. 33 C.F.R. § 136.233(c). Claimants must also provide evidence showing that each Crabber was capable, legally permitted, and actually prepared to fish in waters closed as a result of the oil spill.

The NPFC prepared a spreadsheet compiling the information submitted by the claimants for each crabber. This spreadsheet, which is attached to the determination, reflects both information in the packet and certain information or documentation that was not provided to the NPFC by the Claimants.

Claimants failed to provide to the NPFC pertinent documentation to support each alleged loss for which it compensated a Crabber. For instance only 25 of the Crabber claimants had fishing permits; however, Claimants paid all of them some amount of compensation. Without a permit there is no evidence that some Crabbers would have fished MB if the fishery would have opened on January 15, 2005. (Some Crabbers noted in their Loss Calculation Forms that they only intended to fish MB although their permits may have allowed them to fish other fisheries that were not impacted by the incident. In fact, some Crabbers stated that they intended to do so.) While eleven of the Crabbers were deckhands that probably did not require a permit to fish, there is no information supporting the percentage of catch each deckhand asserted as entitlement from the boat owner or captain, i.e., there are no agreements or contracts with the boat owner or captain.

Claimants calculated each loss of profits based on the price/pound of Tanner Crabs in 2005 multiplied by some estimated daily catch multiplied by some number of days the Crabber might

[11] Loss calculations were provided for most but not all Crabbers.

have fished MB. In most cases the catch in pounds listed in the MRA calculation sheets did not comport with the intended or estimated pounds on the Crabbers' Forms. The other numbers used by MRA to calculate loss of profits (expenses or costs) for each Crabber also do not necessarily comport with the Crabbers' numbers on their Loss Information/Calculation Form. Claimants provided no explanation or supporting documentation to show how either the Crabbers or Claimants obtained their numbers. In some instances Claimants paid Crabbers who alleged that they lost catch in Unalaska Bay, based on the theory that the closure of the Makushin/Skan Bays fishery forced more vessels into Unalaska Bay, thereby reducing the portion of the catch available to each vessel already there.

The Claims Regulations require that Claimants must provide comparable income tax records or other financial documentation to support a loss of profits. Claimants must demonstrate 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*." 33 C.F.R. 136.233(c). (emphasis added). Most Crabbers provided no tax returns or financial statements. Claimants did not request, and Crabbers did not provide, income tax records or other comparable financial records that might reflect that the Crabbers suffered a loss of profits.

In sum, Claimants failed to provide evidence sufficient to explain and prove (1) that each of the Crabbers sustained a loss of profits, (2) the value of any alleged loss of profits, or (3) that each of the Crabbers would have fished the closed fishery if the fishery had not closed. The NPFC's review of supplied documentation results in a finding that not one of the Crabber claims provided even a minimum of proof to support the payments made by the Claimants.

Therefore, the claim is denied.

Claim Supervisor: ***Robert Rioux*** [redacted]

Date of Supervisor's review: 5/2/2014

Supervisor Action:

Supervisor's Comments: