

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: A11023-0001
Claimant	: Pacific Marine Salvage, Inc.
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [REDACTED]
Amount Requested	: \$274,271.00

FACTS:

On March 11, 2011 at approximately 0713 hours, a tsunami surge impacted several areas of the California coast line: Santa Cruz, Del Norte and San Luis Obispo Counties. The tsunami surge resulted from a tsunami that was generated by the Japanese Tōhoku earthquake. US Coast Guard Sector San Francisco served as the Federal On-Scene Coordinator (FOSC) and was in charge of the oil removal and/or navigational hazard activities in these areas. The Coast Guard opened three federal project numbers (FPNs) to fund activities in these areas: FPN #A11023 for Santa Cruz County; FPN #A11024 for Del Norte County, and FPN #A11025 for San Luis Obispo County.

This claim is associated with A11023 for Santa Cruz County only. The FOSC closed the Santa Cruz Harbor for safety reasons due to navigational hazards.

THE CLAIMANT AND THE CLAIM:

The claimant, Pacific Marine Salvage Inc. (PMS), originally submitted its claim dated February 29, 2012, which was received by the NPFC on March 7, 2012, for \$274,271.00 for loss of profits and earning capacity due to the closing of Santa Cruz Harbor ("harbor").

PMS broke its claim down as follows:

Towing Services:	\$ 11,312.08
Lost Contracts:	\$257,959.00
Claim Prep Costs:	\$ 5,000.00
Total Claim Costs:	\$274,271.00¹

PMS conducts vessel salvage and spill response services in the harbor and alleges that it lost contracts to salvage 26 boats, three partially-executed contracts, six work sheets and one more contract in the works due to oil in the harbor. The FOSC hired Parker Diving Services (Parker) under a Basic Ordering Agreement (BOA) to conduct salvage operations in the harbor. PMS claimed that Sector San Francisco did not allow any other company except Parker to conduct these operations. Claimant argues that if it had a BOA it could have performed the work on its contracts. PMS stated that because of this, Sector San Francisco caused substantial economic injury and substantial losses to the company.

¹ The total of each individual cost amounts to \$274,271.08; however, the claimant has rounded down this amount and is only claiming \$274,271.00.

PMS also claims that, because the harbor was closed from March 11 through March 25, 2011, it lost towing jobs because its harbor patrons were unable to use their boats; thus they did not need PMS towing services. PMS argues that it incurred additional expenses because two of its vessels were outside of the harbor when the harbor closed the vessels had to be stored in a different port.²

On April 17, 2012, the NPFC issued its initial determination for this claim. The NPFC denied the claim on the premise that (1) losses associated with Towing Services in the amount of \$11,312.08 were due to navigational hazards posed by sunken vessels following the tsunami surge and not due to oil in the water; (2) losses associated with Lost Contracts in the amount of \$257,959.00 were due to the Captain of the Port (COTP) order to remove the PMS from within the safety zone as a result of unsafe operations and not due to the destruction or injury to natural resources caused by oil in the water, and (3) costs associated with Claim Preparation in the amount of \$5,000.00 were denied as they were not an OPA-compensable cost.

APPLICABLE LAW:

Under 33 CFR 136.115 (d) a request for reconsideration must be in writing and include the factual or legal grounds for the relief requested.

CLAIMANT'S REQUEST FOR RECONSIDERATION:

In a letter dated June 7, 2012, PMS submitted a request for reconsideration of its claim, which was received at the NPFC on June 15, 2012. In its request for reconsideration, PMS offered copies of three letters written by it to the Chief of Response, USCG Sector San Francisco ("Sector"), where it requested that the Sector confirm the following: (1) the FOSC identified the area as a "hot zone"; therefore, the harbor closure was due to an oil spill; (2) that the Sector ordered PMS to leave the area because its operations were unsafe, and (3) that a Sector FOSC representative (FOSCR) incorrectly determined that PMS was unqualified to conduct oil removal activities because of expired HAZWOPER training certifications.

In addition to the letters written to the Sector, PMS provided three affidavits with its reconsideration request to counter these statements, and also to provide character references. It also submitted a letter of interpretation from the Occupational Safety and Health Administration (OSHA), dated January 24, 2007, regarding annual training rules and regulations for employees.

A supplementary information package sent to the NPFC included an additional letter of explanation, dated August 17, 2012, as well as a list of HAZMAT and salvage services completed from March through August of 2012, another letter of interpretation from OSHA, dated March 12, 1993, photographs of the raising of the M/V Homegrown Tomato and the same affidavits as provided earlier to Sector San Francisco.

NPFC ANALYSIS ON RECONSIDERATION:

² The costs for storing the two vessels is included in the Towing Services component of the claim.

A. Analysis

The NPFC reviewed the claim *de novo*, including all information submitted by PMS in its original claim, on reconsideration. The original denial is incorporated by reference. The NPFC independently contacted the Sector seeking a response to the concerns and statements made by PMS in its reconsideration request. LCDR [REDACTED] provided responses in an e-mail dated September 4, 2012.³

The NPFC also reviewed a Memorandum dated July 30, 2012 from CAPT [REDACTED] to the Director, NPFC, regarding this claim.⁴ In the Memorandum CAPT [REDACTED] states that through her authority as COTP she ordered the establishment of an emergency safety zone in Santa Cruz Harbor from March 12, 2011 to March 24, 2011. The order was in support of on-going emergency operations in the harbor associated with substantial damage sustained during the tsunami. All operations within the safety zone had to be approved by the COTP. CAPT [REDACTED] also stated that initially PMS was permitted to work within the safety zone to conduct clean-up and salvage operations but after observing numerous unsafe evolutions by PMS, her staff determined that PMS lacked the proper expertise and resources to conduct salvage operations inside the safety zone and was ordered to cease operations.

Three FOSC Representatives (FOSCR)s submitted executed affidavits describing the actions they conducted within the safety zone.⁵ They noted that PMS was not coordinating vessel movements with the FOSCRs and was causing safety concerns for the divers in the water. They described their interactions with PMS, specifically with regards to the M/V Homegrown Tomato. According to one FOSCR affidavit PMS disagreed with Parker Diving on the best way to right the M/V Homegrown Tomato, remove its oil and lift the vessel and place it on land. Claimant ordered one lifting strap to be placed around the vessel to remove the vessel from the water, which was against the advice of her own employees. When the vessel could not be lifted from the water with one strap and diesel discharged the divers added a second strap. Diesel fuel continued to discharge from the vessel. Parker conducted the subsequent removal actions associated with the discharge from the vessel.

In its reconsideration request, PMS contended that the harbor was closed due to an oil spill in the water and argued that the FOSCR declared the harbor a "hot zone;" therefore, this is evidence that the oil in the water was the cause of the harbor closure. LCDR [REDACTED] states in her e-mail that neither the FOSC nor the COTP declared the Santa Cruz Harbor a hot zone. (She explained that "hot zone" is a term used mostly in HazMat releases to identify an area away from the contaminated area.) LCDR [REDACTED] states that the COTP issued a safety zone for the harbor in support of emergency operations associated with the damage sustained during the tsunami, which included 100+ vessels unaccounted for, a dozen vessels posed substantial threats of discharges of oil and large amounts of debris was floating throughout the harbor. Pieces of dock, sunken vessels, dock boxes and other loose items sunk and littered the bottom, which caused a hazard to navigation. The majority of the docks sustained substantial damage and were unsuitable for use until they could be inspected for structural and electrical integrity, or replaced

³ LCDR [REDACTED] email to [REDACTED] dated September 4, 2012.

⁴ CAPT [REDACTED] Memorandum to Director, NPFC, dated July 30, 2012.

⁵ Executed affidavits by three FOSCRs representing the FOSC during emergency operations at the Santa Cruz Harbor safety zone on March 11 and March 12, 2011.

all together by the Harbor. Further, as noted above, CAPT [REDACTED] ordered the establishment of a safety zone in the harbor from March 12, 2011 to March 24, 2011.

PMS also continued to argue that its operations were safe, that it had successfully salvaged five vessels from imminent danger and that the FOSCR ordered it to leave the area in error. Further, it asserted that, because of its removal from the area, PMS suffered lost profits due to the oil in the water. LCDR [REDACTED] states in her e-mail that the FOSCR, in a written statement, deemed PMS' actions a safety risk and that one of the problems was that PMS was not coordinating vessel movement with the Parker divers while attempting to fulfill its contracts in the harbor, which caused safety concerns for the divers in the water. In her e-mail responses LCDR [REDACTED] stated that she could not confirm that PMS salvaged five vessels from imminent danger.

Claimant also argued that the employees' HAZWOPER training certificates were not 72 hours out of date, relying on an OSHA letter of interpretation stating that the certificates do not need to be recertified exactly 365 days apart and only need to be "relatively close to the date." Claimant also argues that if this was not an OPA oil event, then it was unnecessary for its HAZWOPER training to be current. LCDR [REDACTED] states in her e-mail that the expired HAZWOPER certifications were discovered the day after PMS was ordered out of the safety zone and had no bearing on the decision to allow or disallow it to work within it. Further, CAPT [REDACTED] states in her Memorandum that OSHA's letter of interpretation provided by the Claimant clearly showed that OSHA's letter of interpretation was specific to the particular case being discussed. The OSHA letter indicated that if annual training cannot be completed by the anniversary date, the employer should maintain a record indicating why the training was delayed and when the training would be provided. At the time PMS operations were stopped, PMS did not show the Unified Command any documentation explaining the reasons for the absence of required training.

Finally, PMS alleged that LTJG [REDACTED] spoke with the harbormaster regarding the M/V Homegrown Tomato and told the harbormaster that PMS was putting Parker Diving Services personnel at risk. LCDR [REDACTED] stated in her e-mail that LTJG [REDACTED] was neither on-scene for the salvage of the M/V Homegrown Tomato nor the incident regarding Parker Diving Service personnel. The three FOSCR affidavits confirm that LTJG [REDACTED] was not on-scene during the raising of the M/V Homegrown Tomato.

In summary Claimant asserts that it lost profits because of oil in the water and that it could not conduct salvage operations for its contracts and because it did not have a BOA with the Coast Guard. The administrative record evidences that PMS was conducting salvage operations in the harbor until the FOSCRs ordered it removed for operating in an unsafe manner and did not have the expertise and resources required for these operations. Also, the administrative record reflects that the Santa Cruz Harbor was closed due to navigational hazards and not due to oil in the water.

The claim is denied upon reconsideration.

B. Determined Amount:

The NPFC hereby determines that the OSLTF will pay \$0.00 as full compensation for alleged damages incurred [REDACTED] Claim # A11023-0001.

Claim Supervisor [REDACTED]

Date of Supervisor's Review: 11/27/12

Supervisor Action: Review Alleged

Supervisor's Comments: