

CLAIM SUMMARY / DETERMINATION

Claim Number:	J13014-0012
Claimant:	Trident Seafoods Corporation
Type of Claimant:	Corporate
Type of Claim:	Lost Profits
Claim Manager:	(b) (6)
Amount Requested:	\$381,553.26

FACTS:

Incident:

On June 30, 2013, the F/V LONE STAR sank and discharged oil into the Igushik River, a navigable water of the United States. Because the F/V LONE STAR carried an estimated 14,500 gallons of diesel and gasoline and hydraulic and lubricating oil it posed a substantial threat to Bristol Bay, Alaska.

After the sinking and subsequent discharge of oil on June 30, 2013 the Alaska Department of Fish and Game (ADF&G) closed a six mile radius from the LONE STAR, near the mouth of the Igushik River. The fishery reopened at 12:30 PM on July 1, 2013 and remained open until 1 PM, July 5, 2013 when the fishery remained closed until July 22, 2013.¹

Responsible Parties (RP) for the incident are (b) (6) and (b) (6) and Burrece Fisheries, Inc., as owners and operators of the F/V LONE STAR and their subrogated insurance carriers, The Great American Insurance Company of New York and Ship Owners Mutual Protection & Indemnity Association (Luxembourg).

Claimant:

The Claimant is Trident Seafoods Corporation (Trident) of Seattle, Washington. Claimant has had a long standing business relationship with Mr. (b) (6) and Burrece Fisheries, Inc. At the time of the incident Trident was under a time charter with the F/V LONE STAR from June 14, 2013 to July 20, 2013.² The charter agreement specified that the LONE STAR will serve on behalf of Claimant to purchase, store and deliver salmon caught by set-net fishermen along the banks of the Igushik River.

Claim Background:

On October 31, 2013, Claimant submitted a notice of claim, under Section 2713(a) of the OPA, to The Meredith Management Group, Inc., (Meredith) representing the RP and its insurers the Great American Insurance Group and The Ship Owners Club Mutual Insurance³ alleging lost

¹ See Sitreps from the ADF&G

² See a copy of February 14, 2013 signed Salmon Tender Charter Agreement with Burrece Fisheries, Inc.,

³ See claim submission page 4 paragraph 9 Great American Insurance Group, Ocean Marine Policy OMH 314481901

profits of \$390,497.01. A claim representative from The Ship Owner's Club informed Claimant that all the insurance money had been assigned to the removal and salvage costs and that there were no funds to compensate Claimant or its independent set-net fishermen.⁴ Claimant ends its discussion of its claim against the RP stating, "Trident Seafoods only recourse was to submit our claim to the vessel insurers and our cargo insurer for a portion of the claim."⁵

Claim to the Fund:

On July 23, 2015 the NPFC received Trident's claim alleging lost profits of \$381,553.26 due to the sinking of the LONE STAR and subsequent closure of the Igushik River. Claimant presents three categories of lost profits. First, Claimant alleges projected lost profits of \$255,443.76 from foregone pounds of salmon after the closure of the fishery. Second, Claimant asserts that it had to pay \$85,500 in charter day rates for two other salmon tenders that could not work due to the fishery closures. Third, Claimant asserts that it lost \$40,609.50 because it purchased salmon that was contaminated by oil that had to be destroyed. ($\$255,443.76 + \$85,500 + \$40,609.50 = \$381,553.26$)

APPLICABLE LAW:

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages.

33 U.S.C. §2713(d) provides that "If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund.

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 CFR 136.233 (b) the claimant must prove that its income was reduced as a consequence of the injury to, destruction of, or loss of the property or natural resources and the amount of that reduction. 33 CFR 136.233(c) also requires the amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered be 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. Finally, 33 CFR 136.233(d) requires claimant to provide whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant received as a result of the incident

⁴ See claim submission page 4, under Explanation

⁵ See claim submission page 5, paragraph 11 Descriptions of Actions Taken.

must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.

The amount of compensation allowable is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for—(a) All income resulting from the incident; (b) All income from alternative employment or business undertaken; (c) Potential income from alternative employment or business not undertaken, but reasonably available; (d) Any saved overhead or normal expenses not incurred as a result of the incident; and (e) State, local, and Federal taxes. 33 CFR 136.235

Rights of subrogation – “Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.” 33 U.S.C. § 2712(f)

Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law. 33 U.S.C. § 2715(a)

DETERMINATION:

The NPFC cannot compensate Claimant for any costs it may have related to this spill incident. The NPFC finds Claimant has released its subrogable rights under its charter agreement with the responsible party (RP). Additionally, the lost profits claimed from lost catch inside the LONE STAR are due to the sinking of the vessel and not the oil spill. These and other issues will be discussed in more detail below.

Claimant did not Retain its Subrogable Rights Against the RP:

In order to ensure that the OSLTF can pursue cost recovery against responsible parties, the OPA imposes several requirements that must be satisfied before a claim may be paid. Of relevance here, 33 U.S.C. § 2712 (f) provides: “Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.” Based on this requirement, a claim must be denied if the claimant’s right of recovery against a responsible party has been prejudiced. The NPFC finds that Claimant has waived its subrogable rights for this claim.

Specifically, Claimant entered into a Salmon Tender Charter Agreement with Burrece Fisheries, the Owner of the LONE STAR and responsible party (RP / Burrece) for the incident on February 14, 2013. Under the terms of the Charter Agreement, Burrece was guaranteed 35 days hire commencing June 16, 2013 and terminating on July 20, 2013. A portion of that Charter Agreement reads, “CHARTERER, on behalf of its insurers, agents, subsidiaries and affiliates, waives any right to subrogation against OWNER or the VESSEL for claims that are covered by insurance and that may arise from the operation of the VESSEL during the term of this Charter.”⁶ And, the Charter Agreement required that the “Owner shall, at its own expense fully

⁶ See Charter Agreement, number 9, first paragraph

insure and keep insured the vessel during the term of the charter...and cause Charterer to be listed during the term of this Charter as an additional assured on all insurance policies.”⁷

The responsible party held two insurance policies in effect during the charter. One was a Fishing Vessel Liability Insurance policy issued by Shipowners’ Mutual Protection and Indemnity Association (Luxembourg).⁸ This policy reads in part, under “What is not covered...2. Charterers - If you make your vessel available for hire or reward to other parties your liabilities are covered. However, the liabilities of your charterer are not covered unless we have agreed to insure them and this is shown on your Certificate of Insurance or covered by way of a separate insurance policy.” Claimant was not named on the Certificate of Insurance but, Burrece’s second insurance policy with The Great American Insurance Company of New York provided a Marine Insurance Policy - Vessel Owner Pollution Coverage (B). This policy states: “We will indemnify You up to the Amount of Insurance for a scheduled Vessel for an accidental discharge of the substantial threat of an accidental discharge into the navigable waters of the United States for the following: 1. OPA90 (Federal) Removal costs and expenses paid by You for which You are designated liable under Section 1002 of OPA90 (33 U.S.C. Section 2702)...”⁹ These two policies show that Burrece Fisheries had liability insurance for the vessel and another policy for pollution liabilities relating to OPA90. Additionally, the NPFC finds that Claimant’s charter agreement with Burrece Fisheries reads, “Not, withstanding the forgoing and absent gross negligence or intentional misconduct by Owner or its employees, Charterer shall be solely liable for all risk of loss or damage as may occur to any of the Charterer’s cargo, including fish, including but not limited to, spoilage or diminution in market value while that cargo is aboard the Vessel or is being transferred to or from the Vessel.”¹⁰ The NPFC finds that the charter agreement wording means that Claimant could not hold the Owner, Burrece Fisheries (RP) liable for the spoilage or damage to the fish aboard the LONE STAR. The NPFC denies this portion of the claim because the hold harmless clause in the charter agreement precludes Claimant from holding the RP liable for the loss of its cargo. The NPFC granted the RP a limit to liability meaning that the Oil Spill Liability Trust Fund (Fund) stands in for the liabilities in excess of the RP’s limit. The hold harmless clause in the charter agreement that precludes Claimant from presenting its claim to the RP also applies to claims made to the Fund.

Given the wording of the charter agreement and the fact that this claim is covered under the RP’s Marine Insurance Policy, the Oil Spill Liability Trust Fund (Fund) cannot compensate Claimant because Claimant waived its subrogable rights. Therefore, this claim must be denied.

The NPFC finds that if Claimant chooses to request reconsideration, it would have to prove that it retained all subrogable rights against the RP as required by 33 U.S.C. §§ 2715 and 2712(f).

If subrogable rights were not an issue in this claim, the only claimed cost that may have been compensable would be the \$40,609.50 for contaminated salmon onboard the CAPE ST. JOHN. Claimant asserts that it purchased 27,073 pounds of salmon that were found contaminated by the ADF&G and had to be destroyed. Claimant submits an ADF&G shore side inspection that notes the pounds of salmon that were contaminated and that a permit had to be obtained to dispose of

⁷ See Charter Agreement number 9, second paragraph

⁸ See copy of The Shipowners’ Club Fishing Vessel Liability Insurance Policy Certificate of Insurance # 772209

⁹ See copy of Great American Insurance Company Marine Insurance Policy Vessel Owner Pollution Coverage (B) OMH 3144819 01 that was in effect from 12/23 2012 to 12/23/2013

¹⁰ See Charter Agreement Number 9

them. However, the NPFC finds that Claimant signed away its subrogation rights under the charter agreement with Burrece Seafood Corporation in June 2013. Therefore, this portion of the claim must be denied. Were the Claimant to overcome the subrogation rights issue, we would need the Claimant to provide any contract between Trident and the CAPE ST. John along with any cargo policy in place at the time of the incident between Trident and this vessel.

Other Deficiencies With Claimed Assertions

The basis for determining Claimants lost profits is deficient in several areas. If the claimant requests reconsideration and can address and successfully resolve the subrogable rights deficiency noted above, there are several other deficiencies which Claimant will have to be resolve or address before compensation could be determined or offered.

Claimed Margin on Foregone Pounds of Salmon:

Claimant seeks \$255,443.76 in compensation for 396,313 round pounds of foregone salmon.. This includes 338,794 round pounds of salmon Trident could not purchase because of the fishery closures, 30,446 pounds of salmon lost onboard the LONE STAR and 27, 073 pounds of salmon onboard the CAPE ST. JOHN that had to be destroyed due to oil contamination.

Causation

In order for Claimant to be compensated, it must prove that its income was reduced as a consequence of the injury to, destruction of, or loss of the property or natural resources and the amount of that reduction. 33 CFR 136.233 (b). Claimant chartered the LONE STAR to purchase salmon from set-net fishermen on the Igushik River. After the LONE STAR capsized and sank, Claimant lost the use of the vessel, thereby reducing its ability to produce revenue and possible profits. The NPFC finds that the capsizing and subsequent sinking of the LONE STAR, not the oil spill incident, is the cause of some of Claimant's alleged loss of profits. Claimant failed to demonstrate that the 338,794 pounds of alleged lost catch and 30,446 pounds lost onboard the LONE STAR are a consequence of the injury to, destruction of, or loss of natural resources. For example, Claimant has not clearly documented how much catch the LONE STAR would have provided during the claimed period, versus the CAPE ST. JOHN or the F/V TRADITION. Also, the evidence provided in the record shows that the fish in the hold of the LONE STAR spoiled when the vessel capsized and sank, shutting down its refrigeration of the salmon. If Claimant comes back in on reconsideration it would have to provide convincing documentation that clearly explains its alleged losses caused by the oil spill against losses caused by the sinking of the LONE STAR.

Financial Requirements Under OPA

In addition to failure to prove causation, Claimant needs to provide comparable financials. OPA claims regulations require the amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered be 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. 33 CFR 136.233(c).

Instead of providing comparable financials to prove its loss, Claimant used Igushik River ADF&G tower counts to project its loss of profits. Claimant states that ADF&G's historical data shows that about 50% of the Igushik River salmon are harvested each season. From that harvest rate, Claimant asserts that it historically purchases 87.5% of the fish. Claimant uses ADF&G fish counts to project the number of fish that it would have caught, if the oil spill had not closed the Igushik River fishery.

Claimant's spreadsheet (Attachment 2), entitled "Projected Trident Round Pounds Lost" has columns with tower counts of salmon. Claimant includes its actual purchases of Igushik River salmon from June 15, 2013 through July 5, 2013. After July 5, Claimant did not purchase Igushik River salmon because the fishery was closed till July 22, 2013. Claimant states that in 2013, the ADF&G projected landing 626,548 pounds of Igushik River salmon. Of that projected amount, Claimant states it purchased 548,380 pounds of salmon or approximately 87.5% of the catch until the fishery closed after July 5.¹¹¹² To convert fish to pounds, Claimant uses the ADF&G average of six pounds per fish times the number of fish.

The NPFC finds Claimant's spreadsheet raises several questions. First, it does not identify which dates provide the 548,380 pounds of salmon it purchased. Second, Claimant shows a number that represents 50% of the ADF&G counts but Claimant does not show its calculation. Third, the spreadsheet shows "50% Projected Igushik Fish Catch" plus "10% Intercept Fish Catch." Claimant adds these two columns together without explaining what an Intercept Fish Catch is or why it is added to the projected catch. Also, Claimant presents "Margin of foregone pounds of salmon" at 396,313 "Round pounds" converted to 300,243 "Finished pounds" at .851cents per pound, but these numbers do not calculate out to the claimed loss of \$255,443.76.

Additionally, the NPFC does not find Claimant's method of valuing its loss by using projected pounds of salmon based on ADF&W's fish escapement data to be accurate. The ADF&G, Division of Commercial Fisheries issued a report which documents that in general, for the whole Bristol Bay area, the 2013 inshore Bristol Bay sockeye run of 23.0 million fish was 36% below the 36.0 million average run over a 20 year period. Also the 2013 Bristol Bay sockeye run was 12% below the preseason inshore forecast of 26.0 million fish.¹³ This would help explain lower catch rates for 2013. Claimant would have to factor these actual statistics into its claimed loss. ADF&G did note that the sinking of the LONE STAR in the mouth of the Igushik River reduced harvest in that area of the district and allowed increased escapement into the Igushik River that exceeded the upper end of the escapement goal range by 29% (Table 5). Claimant has not provided evidence to show what the catch rates were for the CAPE ST. JOHN and the F/V TRADITION, and if these vessels worked in the Igushik area. The report goes on to say that "the 2013 Bristol Bay sockeye salmon run was slightly under forecast and generally early to very early depending on the river system".¹⁴ This brings into question the impact of the oil spill on claimant's alleged losses. Claimant's calculations do not use actual data. Claimant would have to revise its projected losses based on the ADF&G actual data report and compare that to its actual financial data to prove that it lost profits.

¹¹ See Claimant Attachment 2, page 2 in the administrative record

¹² Claimant's Attachment 2, Page 2, Column 14 does not add- up to Claimant's total projected pounds

¹³ See ADF&G 2013 Bristol Bay Salmon Season Summary News Release. The 20 year period is 1993-2012.

¹⁴ See ADF&G 2013 Bristol Bay Salmon Season Summary News Release, page 4.

The NPFC does not find these claimed costs compensable. First, the \$255,443.76 represents an alleged gross operating profit, not net.¹⁵ Second, the claimed 396,313 round pound loss includes 338,794 round pounds of *projected* lost fish due to the fishing closures, not actual losses. Third, 30,446 pounds of the total claimed fish lost were aboard the LONE STAR when it sank. Claimant has been compensated for this loss by its insurer. Claimant states it submitted a claim to its cargo insurer and received a payment of \$54,467.89 for the value of the fish onboard the LONE STAR.¹⁶ Although Claimant states that these costs are not part of this claim, this 30,446 pounds of salmon is part of the total 396,313 pounds loss claimed.¹⁷ Therefore, Claimant would have to further explain this portion of the claim if it seeks reconsideration and overcomes the issues stated above. Finally, 27,073 pounds of this total claimed cost were for fish contaminated by oil onboard the CAPE ST JOHN which were also claimed as a separate cost elsewhere in this claim¹⁸ (338,794 lbs + 30,446 lbs + 27,073 lbs = 396,313 lbs).

Conclusion on Claimed Margin on Forgone Loss of Salmon

If Claimant comes back on reconsideration the NPFC requires Claimant to clearly distinguish what portion of its alleged loss of profits under margin of forgone pound of lost catch was due the oil spill fishery closures and what portion is attributable to the sinking of the LONE STAR. Additionally, Claimant needs to provide actual comparable purchase data from at least 2011, 2012, 2013 and 2014 as required by OPA regulations. Without comparative purchase data from these years it is difficult to see how Claimant's projected loss based on tower counts is the best measure of Claimant's loss profits. Additionally, Claimant's needs to answer the deficiencies noted above with regards to its spreadsheet.

Alleged Loss of Profits - Tender Day Rates:

Claimant alleges that it lost profits of \$85,500 after it chartered two vessels for the 2013 salmon season that could not work because of the oil spill related fishery closures. A chart of closure dates and charter rates shows Claimant chartered the F/V TRADITION at a daily rate of \$3,400 and the F/V CAPE ST JOHN at a daily rate of \$3,500. The vessel charters total \$6,900 per day or \$287.50 per hour. Claimant submits a spreadsheet showing partial fishery closures on June 30, July 1 and July 5, 2013. Partial closures total 40.5 hours. These show 12 days of full closure or 288 hours, from July 6 through July 17, 2013 for a total of 328.5 hours of fishery closures (40.5hrs + 288hrs = 328.5hrs). Claimant multiplied 328.5 total hours by the vessels hourly rate of \$287.50 to arrive at \$94,444¹⁹ (328.5 x \$287.50 = \$94,443.75). However, Claimant asserts \$85,500 for this portion of its lost profits claim.

¹⁵ See Claimant's original submission, Attachment 2, page 4. And the 300,243 finished pounds multiplied by .851 per pound does not equal claimant's total of \$255,443.76 (300,243 x .851=\$255,506.79).

¹⁶ See Email from (b) (6) to (b) (6) dated 10/7/2015.

¹⁷ See Claimant letter dated July 14, 2015, page 3 and Claim Attachment 2, Projected Trident Round Pounds Lost spreadsheet.

¹⁸ See Claimant letter dated July 14, 2015, page 3 and Claim Attachment 2, Projected Trident Round Pounds Lost spreadsheet. Claimant claims the 27,073 pounds from the CAPE ST JOHN as part of the 396,313 pounds of foregone fish, while also claiming it as a separate claimed cost; 27,073 lbs x the "Ground price * 1.5" = \$40,609.50. Claimant fails to explain why this is included in the total loss at two different price calculations.

¹⁹ Claimant rounds hours up .05% to the next whole number

The NPFC finds that Claimant fails to explain how the cost of hiring these two vessels relates to the oil spill and how these costs relate to a loss of profits. Since profits equal revenue minus expenses, Claimant would have to demonstrate that it lost profits by showing these are an increased expense that was not offset by an increase in revenues, or that this expense decreased revenue. In addition, Claimant would have to show that any expense was not offset by a decrease in expenses (saved expenses) due to the oil spill. The NPFC finds that Claimant fails to demonstrate how the cost of these charters is either an increased cost or decrease in revenue due to the oil spill. Therefore, Claimant has not demonstrated that it lost profits. This portion of the claim is denied.

If Claimant overcomes the overarching subrogable rights issue stated above and requests reconsideration, Claimant must provide contract/charter agreements for these two vessels along with vessel logs to prove that these vessels routinely operated in the Igushik River section of the Bristol Bay area and that there was no alternative work or locations available to purchase salmon.

SUMMARY:

The NPFC finds that Claimant has failed to retain its subrogable rights against the RP. Additionally, it appears the sinking of the LONE STAR, not the subsequent oil spill, resulted in most of claimant's alleged loss of profits. If Claimant chooses to request reconsideration, it must prove that it retained all subrogable rights against the RP, while also providing additional information to support each claim component as noted above. This claim is denied.

Claim Supervisor: (b) (6)

(b) (6)

Date of Supervisor's review: 10/22/2015

Supervisor Action: *Denial Approved*

Supervisor's Comments: