

CLAIM SUMMARY / RECONSIDERATION DETERMINATION

Claim Number:	J13014-0012
Claimant:	Trident Seafoods Corporation
Type of Claimant:	Commercial Business
Type of Claim:	Loss of Profits and Earnings
Claim Manager:	[REDACTED]
Amount Requested:	\$709,777.67

I. INTRODUCTION:

1. *Incident:*

On June 30, 2013, at 0700L (local time),¹ the F/V LONE STAR sank and discharged oil into the Igushik River, Alaska, posing a substantial threat of a discharge of oil into Bristol Bay, a navigable water of the United States. There were approximately 14,500 gallons of diesel, hydraulic and lube oil, and gasoline on board the vessel. The Alaska Department of Fish and Game (ADF&G) closed the fishing grounds at 9:00 a.m. June 30th and reopened it at noon on July 1, 2015. After discovering contaminated fish, it closed the river again on July 5th and remained closed until after July 17th, the date in which Claimant ceased operations on the Igushik River. [REDACTED] owned the vessel and Burrece Fisheries, Inc. operated the vessel.

2. *Claimant:*

The Claimant is Trident Seafoods Corporation (Claimant) of Seattle, Washington as represented by Keesal, Young & Logan (KYL). Since 2010, Trident has been purchasing salmon from the same group of Igushik River commercial set gillnet fishermen who deploy their nets upstream of the mouth of the Igushik River.² During the 2013 fishing season, Claimant provided three different tender boats that purchased Igushik River salmon; the F/V LONE STAR, F/V CAPE ST JOHN and F/V TRADITION. Claimant time chartered the F/V LONE STAR³ and F/V TRADITION⁴ from Burrece Fisheries; the F/V CAPE ST JOHN was owned by Claimant.⁵ Claimant also operated a shore-based fish processing plant on the eastern shore of Bristol Bay, and a fish-processing vessel, the ALEUTIAN FALCON, which was, at all relevant times, anchored in the Nushagak River and was receiving fish from tender vessels operating in the Nushagak, Wood and Igushik Rivers.

3. *Responsible Party:*

The responsible parties (RP) for the incident are [REDACTED] 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).

¹ POLREP One

² See spreadsheets and associated 2010-2014 Igushik River fish tickets submitted by claimant dated 25 Nov 2015.

³ See Trident's Salmon Tender Charter Agreement with Burrece Fisheries, Inc. dated February 14, 2013.

⁴ See Trident's Salmon Tender Charter Agreement with [REDACTED] dated January 28, 2013.

⁵ See Claimant's request for reconsideration pages 12-13 dated November 25, 2015.

Claimant had a long standing business relationship with [REDACTED] and Burrece Fisheries, Inc. Claimant time chartered the F/V LONE STAR from June 14, 2013 to July 20, 2013 to purchase, store and deliver salmon caught by set gillnet fishermen along the banks of the Igushik River.⁶ On October 31, 2013, Claimant submitted a notice of claim to The Meredith Management Group, Inc., (Meredith) representing the RP and its insurers the Great American Insurance Group and The Ship Owners Club Mutual Insurance⁷ alleging lost 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 available to compensate Claimant or its independent set-net fishermen.⁸

II. THE CLAIM AND PROCEDURAL POSTURE:

In July 2015, Claimant presented its claim to the Fund, seeking lost profits, reimbursement for tender day rates for two vessels that it was unable to use due to the river closure, and reimbursement for the purchase of contaminated fish. The NPFC initially denied the claim and Claimant sought reconsideration of that denial. The NPFC issued a determination on reconsideration, reversing the denial in part. Claimant then opined that the NPFC erred when considering their lost profits for June 30 – 1 July 2013 as well as the costs associated with the purchase of oiled salmon from the F/V CAPE ST JOHN. After several months of correspondence and communications, and after extensively reviewing Claimant's calculations, the corrections to those calculations, and additional arguments, the NPFC revoked its determination on reconsideration based on a factual error. Today, the NPFC issues an amended offer in its corrected determination on reconsideration.

For background purposes, a brief summation of the procedural history follows. Due to the long, complicated history of this claim, the specific details of the NPFC's initial denial, and its first determination on reconsideration, which has now been revoked, will not be rearticulated herein.

1. Initial Claim

On July 14, 2015, Claimant sought compensation in the amount of \$381,553.26, representing the value of its losses incurred as a result of the oil spill and river closure. Claimant included the following description as the cause of its damages:

When the Lone Star sank in the Igushik River it leaked several thousand gallons of diesel and petroleum products into the river. The Alaska Fish & Game authorities closed the river to commercial fishing due to contamination of the fish stocks and visible oil sheens.

Due to the nature of the Igushik fishery, 52 set net fishermen were unable to complete their commercial fishery. Trident Seafood's was not able to purchase or process the Igushik river salmon run that it has historically done since 2010. These fish were lost and clearly would have been available to harvest, purchase and process.⁹

⁶ See Trident's Salmon Tender Charter Agreement with Burrece Fisheries, Inc. dated February 14, 2013.

⁷ See claim submission page 4 paragraph 9 Great American Insurance Group, Ocean Marine Policy OMH 314481901

⁸ See claim submission page 4, under Explanation

⁹ Claim submission letter dated July 14, 2015 at ¶10.

Claimant separated the \$381,553.26 into the following components:

Lost profit margin on 396,313 ¹⁰ lbs of salmon at \$.851 ¹¹ per lb:	\$255,443.76
Tender Day Rates for CAPE ST JOHN & TRADITION:	\$ 85,500.00
Oil contaminated fish lost on CAPE ST JOHN:	\$ 40,609.50

Claimant's lost profit margin calculation included 338,794 pounds of salmon it could not purchase due to the closure, 30,446 pounds that sank with the LONE STAR, and 27,073 pounds that were onboard the CAPE ST JOHN but had to be destroyed due to oil contamination.

Claimant's tender day rate calculation was comprised of \$3,400 per day for the TRADITION, and \$3,500 per day for the CAPE ST JOHN, the total of which was \$6,900 per day or \$287.50 per hour (24 hour basis). Claimant submitted a spreadsheet showing partial fishery closures on June 30, July 1 and July 5, 2013 totaling 40.5 hours. An additional 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 \$94,444. However, Claimant only asserted \$85,500 for this portion of its lost profits claim

Finally, Claimant's calculation of oiled salmon was a simple calculation of 27,073 pounds multiplied by \$1.50, the average per pound price paid in 2013 to the Igushik River fishermen.

2. NPFC denial

On October 22, 2015, the NPFC denied the claim. In short, the NPFC determined Claimant had waived its subrogable rights under the terms of the charter agreement with Burrece;¹² that the Claimant's claimed losses were based on gross operating losses and not net operating losses;¹³ and that the claimed loss of salmon was based on projected versus actual fish losses. Claimant's fish loss also included 30,446 pounds of salmon onboard the LONE STAR when it sank, which the NPFC determined was caused by the vessel sinking, not by the oil spill. The NPFC ultimately concluded that Claimant failed to provide adequate documentation such as comparable financials. Claimant also failed to explain how the cost of hiring the F/V TRADITION and F/V CAPE ST JOHN related to a loss of profit due to the oil spill. Lastly, the Claimant failed to show how losses were offset by a decrease in expenses (i.e. saved expenses) due to the oil spill. The NPFC found that Claimant's evidence raised many questions. The only claimed costs that appeared to be compensable were the \$40,609.50 for contaminated salmon onboard the CAPE ST. JOHN but those costs were denied pending the subrogation issues identified between the Claimant and Burrece Fisheries.

3. Request for Reconsideration

On November 25, 2015, Claimant requested reconsideration of the claim. In its request, Claimant raised its loss of foregone salmon from \$255,443.76 to \$658,056.00, asserting that

¹⁰ Total includes 338,794 pounds of salmon not purchased by Claimant based upon the 2013 projected Igushik River inshore run + 30,446 pounds of salmon lost when the F/V LONE STAR sank + 27,073 pounds of oiled salmon disposed of on the F/V CAPE ST JOHN.

¹¹ Trident's claimed profit per pound after purchasing and processing cost.

¹² See Charter Agreement, number 9, first paragraph.

¹³ See Claimant's original submission, Attachment 2, page 4.

actual fish counts, rather than the pre-season estimation, was the better method. In addition, it no longer sought the tender day rate for the F/V CAPE ST JOHN because Claimant owned that vessel. Claimant also reduced the day rate for the F/V TRADITION from twelve to seven days. The claimed amount is itemized by the following components:

Lost profit margin on 561,474 raw pounds of fish lost: ^{14 15}	\$ 658,056.00
Tender day rate for the F/V TRADITION: ¹⁶	\$ 23,800.00
Oil contaminated fish lost on CAPE ST JOHN: ¹⁷	<u>\$ 40,609.00</u>
Total Claimed	\$ 722,465.00

In its request for reconsideration, Claimant provided the following additional information:

Evidence of Trident Salmon Purchases in Bristol Bay for years 2010 - 2014
Spreadsheet calculating the Pounds of Salmon Lost due to 2013 Igushik River Closure
Attachment 10b - Workbook for Lost Profits Calculation
Alaska Business Fisheries Annual Tax Return for the F/V ALEUTIAN FALCON 2011-2014
Maps of Geographic Areas for Alaska Fisheries
F/V ALEUTIAN FALCON Deck Log for June 2013 and July 2013
F/V TRADITION Fish Tickets & Tender Log for June 30, 2013 – July 5, 2013
F/V TRADITION Fish Tickets & Tender Log for July 12, 2013 – July 15, 2013
F/V CAPE ST JOHN Fish Tickets & Tender Log for July 2, 2013 – July 5, 2013
F/V CAPE ST JOHN Fish Tickets & Tender Log for July 12, 2013 – July 13, 2013
F/V ALEUTIAN FALCON Sales data (2010-2015), Financial Data and Production Data
2013 Bristol Bay Fish Ticket spreadsheet
F/V TRADITION and CAPE ST JOHN fuel costs

4. NPFC Determination on Reconsideration (November 10, 2016)

The NPFC conducted a *de novo* review of all information incorporated with the Claimant's initial determination as well as information provided in the request for reconsideration. The NPFC agreed with Claimant that it had not waived its subrogable rights. It also issued a determination offering Claimant \$199,303.55 in settlement of their claim. In this determination, the NPFC offered settlement for losses resulting from the Igushik River fishery closure from July 5 – July 12, 2013, which included the profit per raw pound for salmon that were found to be oiled. The NPFC denied the tender day rate claim and the claim for purchased oiled salmon. The NPFC provided the Claimant 60 days from the date of their offer to accept the settlement or the offer would become void.¹⁸

5. Claimant's response to the NPFC's determination.

On January 5, 2017, the Claimant responded stating that the NPFC's settlement offer overlooked and failed to compensate Trident for its losses for the June 30 — July 1, 2013 date.

¹⁴ Total includes 534,401 pounds of salmon not purchased by Claimant based upon 2013 actual Igushik River inshore run + 27,073 pounds of oiled salmon destroyed on the F/V CAPE ST JOHN.

¹⁵ Lost margin determined by subtracting 2013 Claimant's revenue from fish cost, packaging cost, processing costs and saved fuel costs.

¹⁶ F/V TRADITION daily charter rate of \$3,400.00 per day x 7 days (July 5, 2013 – July 12, 2013).

¹⁷ 27,073 pounds of oil contaminated fish onboard the F/V CAPE ST JOHN x \$1.50 average price paid to Igushik River fishermen for salmon in 2013.

¹⁸ See NPFC Determination on Reconsideration to Trident Seafoods, Inc dated 10 Nov 2016.

Claimant did not contest the NPFC's methodology for calculating the lost fish profits, however, and at least implicitly agreed with the NPFC's calculation of lost fish profits from July 5-12th.

In addition, the Claimant asserted that the purchase price of the oil contaminated salmon should also have been reimbursed. Claimant also requested an extension of time to submit additional evidence.

On January 6, 2017, the NPFC acknowledged and granted the Claimant's request for an extension of time based upon their assertion that the NPFC had erred in analysis and/or in fact relating to their claim. Claimant was informed that the NPFC would keep their offer open until February 6, 2017, during which time the NPFC would review the points and arguments made in the Claimant's letter which could result in follow-up questions and/or a request for additional information.¹⁹

6. The revocation and Claimant's additional information

On February 6, 2017, by way of letter to Claimant, the NPFC revoked their offer of November 10, 2016, citing a factual error when it denied compensation for the oil contaminated salmon that had to be destroyed.²⁰ That decision was based upon the information in the administrative record and clarification of information provided by Claimant on January 5, 2017.²¹ However, regarding the claimed losses resulting from the Igushik River fishery closure on June 30-July 1, 2013, the NPFC informed Claimant that it failed to provide additional evidence with their letter to establish either estimated or actual loss of profits. As the NPFC had revoked their offer of November 10, 2016 and in an effort to properly evaluate all information cited by Claimant, the NPFC requested additional information to support the claimed losses incurred as a result of the Igushik River fishery closure on June 30-July 1, 2013.²²

In support of the NPFC's request for additional information, the Claimant provided the following information:

Third declaration of [REDACTED], Director of Risk Management Trident Seafoods
Declaration of [REDACTED], Captain and owner of the F/V LONE STAR
Declaration of [REDACTED], Vessel Manager Trident Seafoods
Second declaration of [REDACTED], Fleet Manager Trident Seafoods
Exhibit 1 to [REDACTED] declaration – Wheel house logs for the F/V TRADITION
Exhibit A – F/V CAPE ST JOHN delivery logs
Exhibit B – Fuel and grocery sales receipts for the F/V CAPE ST JOHN
Exhibit C – Fuel and grocery sales receipts for the F/V TRADITION
Exhibit D – Charters for the F/V ALEUTIAN BEAUTY, KAREN EVICH and TRADITION
Exhibit E – Fish tickets documenting salmon sales to the F/V TRADITION
Exhibit F – Fish tickets documenting salmon sales to the F/V LONE STAR
Exhibit G – Fish tickets documenting 2012 Igushik River salmon sales to the F/V ALASKAN BEAUTY
Exhibit H – Fish tickets documenting 2010 Igushik River salmon sales to the F/V KAREN EVICH
Exhibit I – Wheel house logs for the F/V PACIFIC VIKING

¹⁹ See letter from Mr. [REDACTED], NPFC to Mr. [REDACTED] KYL, dated 6 Jan 2017.

²⁰ See letter from Mr. [REDACTED], NPFC to Mr. [REDACTED] KYL, dated 6 Feb 2017.

²¹ See letter from Mr. [REDACTED], NPFC to Mr. [REDACTED] KYL, dated 6 Feb 2017.

²² See email from Mr. [REDACTED], NPFC to Mr. [REDACTED] KYL, dated 7 Feb 2017

Exhibit J – Wheel house logs for the F/V COLUMBIA

Exhibit K – Fuel and grocery sales receipts from tenders working on the Nushagak Bay_

Exhibit L – Fish tickets documenting salmon sales to tenders working on the Nushagak Bay

Exhibit M – Vessel’s crew list for Trident owned tenders working on Nushagak Bay in 2013

Exhibit N – Vessel statistics for Trident owned tenders working on Nushagak Bay in 2013

Exhibit O – Wheel house logs for the F/V VIKING EXPLORER²³

The NPFC now adjudicates Claimant’s request for reconsideration as follows.

III. FACTS

1. Overview of the Igushik River fishery.

The Bristol Bay management area involves several major river systems, including the Igushik River, and is divided into management districts that correspond to these river systems. Collectively, these rivers are home to the largest commercial sockeye salmon fishery in the world. Sockeye salmon are by far the most abundant salmon species that return to Bristol Bay each year.²⁴ As of 2013, the ADF&G had been managing and tracking the salmon in the Bristol Bay for 52 years. The 2013 Bristol Bay Area Management Report, relied extensively upon by Claimant, was the 52nd annual publication reporting on the management activities of the ADF&G in the Bristol Bay area.²⁵ The report describes information, decisions, and rationale used to manage the annual Bristol Bay commercial salmon and herring run, and outline ADF&G’s basic management objectives and procedures. The basic management objective for each river is to “achieve salmon escapements²⁶ within established ranges while harvesting fish in excess of those ranges through orderly fisheries.”²⁷ Because the Bristol Bay report is peer-reviewed and utilizes objective data, the NPFC determines that the report is credible evidence and has incorporated much of that data in the current decision.

Management of the commercial fishery in Bristol Bay is focused on discrete stocks with harvests directed at terminal areas around the mouths of major river systems. Each stock is managed to achieve a spawning escapement goal based on sustained yield. Escapement goals are achieved by regulating fishing time and area by emergency order (EO) and/or adjusting weekly fishing schedules. Legal gear for the commercial salmon fishery includes both drift and set gillnets.²⁸

In order to manage its fish stocks from year to year, the ADF&G monitor salmon escapement by counting the fish that pass through a “tower”. The Igushik River tower is located on the Igushik River; approximately 50 miles upstream from the river’s mouth, where the commercial harvest area is located and the set gillnet fishermen fish. Once the salmon swim past the commercial harvest area, they can no longer be fished. There are no commercial fisheries upstream of the commercial harvest area.²⁹ The salmon take approximately five days to swim from the mouth of the river to the tower.

²³ See letter with attachments from Mr. [REDACTED], KYL, to Mr. [REDACTED], NPFC dated 9 Mar 2017

²⁴ Alaska Department of Fish and Game, Fishery Management Report No. 14-23, May 2014.

²⁵ Alaska Department of Fish and Game, Fishery Management Report No. 14-23, May 2014, p. 1

²⁶ “Salmon escapement” refers to the salmon population that is not recreationally or commercially harvested and that return to their freshwater spawning habitats. https://en.wikipedia.org/wiki/Salmon_escapement

²⁷ ADF&G Report No. 14-23 at p. 1

²⁸ Alaska Department of Fish and Game Fishery Management, Report No. 14-23, May 2014.

²⁹ Decl. [REDACTED].

The Bristol Bay report indicates that the total salmon count for the 2013 Igushik run totaled 708,000, but that 66% of the salmon had already run on June 30th, when the ADF&G first closed the river, and 85% had run by July 5th, when the ADF&G closed the river for the second time. This left only a small portion of the salmon for the balance of the 2013 run.³⁰

Notwithstanding, the Igushik River escapement resulted in an overall increase due to the river closure. The final escapement of 387,744 exceeded the upper end of the escapement goal range of 150,000 to 300,000 fish—i.e. an excess of 29%.^{31 32 33} The late opening for the season, the limited fishing hours early on and the early salmon run all contributed to the season's escapement figures.

2. The ex-vessel value and average salmon sale.

The Bristol Bay 2013 harvest of all salmon species was 16.4 million fish with a preliminary ex-vessel value³⁴ of \$141 million which is 26% above the 20-year average and ranks 7th over that same period. The weights, harvests, and prices listed in Table 1³⁵ were used to estimate ex-vessel value. This estimate does not include future price adjustments, loyalty bonuses, and differential prices for refrigerated versus non-refrigerated fish. Although the harvest was below the historical average, the increased price per pound caused the value to be above average.³⁶

Overall 15,376,432 salmon were harvested in the Bristol Bay 2013 season at an average weight of six pounds per fish. These fish were sold at an average of \$1.50/lb to 34 different companies. The Igushik fishing area accounted for 321K of the fish harvested. The State reported that this harvest for the Igushik was 29 percent higher than forecasted while the overall Bristol Bay Sockeye harvest was reported to be about 30% below the 20-year average.³⁷

3. Claimant's operations and the Igushik River closure.

Since 2010, Claimant has purchased salmon from 52-53 commercial set gillnet fishermen who fish via set gillnets along the river banks upstream from the mouth of the Igushik River.³⁸ Although there are other companies that purchase salmon caught on the Igushik River, Claimant

³⁰ See Alaska Department of Fish and Game, Fishery Management Report No. 14-23, May 2014, Table 16 – Commercial fishing emergency orders, by district and statistical area, Bristol Bay Westside, 2013, p. 45.

³¹ Alaska Department of Fish and Game, Fishery Management Report No. 14-23, May 2014, Appendix A1 – Escapement goal ranges and actual counts of sockeye salmon by river system, in thousands of fish, Bristol Bay 1993 – 2013, p. 66 -67.

³² The river closure reduced harvest in that area of the district and allowed increased escapement into the Igushik River.

³³ Alaska Department of Fish and Game Division of Commercial Fisheries, News Release, 2013 Bristol Bay Salmon Season Summary, p.1. Table 5, Bristol Bay sockeye salmon goals and escapement, 2013, p. 3.

³⁴ Ex-Vessel value: The post-season adjusted price per pound for the first purchase of commercial harvest. The ex-vessel value is usually established by determining the average price for an individual species, harvested by a specific gear, in a specific area. The delivery condition of the product is usually taken into consideration when the average price is established.

³⁵ Alaska Department of Fish and Game Division of Commercial Fisheries, News Release, 2013 Bristol Bay Salmon Season Summary, Table 1 – Average price, weight, and value of salmon harvest in Bristol Bay, 2013, p. 2.

³⁶ Alaska Department of Fish and Game Division of Commercial Fisheries, News Release, 2013 Bristol Bay Salmon Season Summary, pgs. 1 – 2.

³⁷ Alaska Department of Fish and Game Division of Commercial Fisheries.

³⁸ Claimant's req. for recon. Dated November 25, 2015.

has consistently purchased all salmon from its commercial set gillnet fishermen during the years 2010-2014.³⁹

The ADF&G closed the Igushik River fishing grounds at approximately 9:00 a.m. on June 30th until noon on July 1, 2013. During this time, Claimant directed its tender boats to stop buying salmon. Once the fishery was reopened, Claimant commenced buying salmon until July 5th, after a two mile long sheen was spotted emanating from the LONE STAR wreck, and after contaminated fish were discovered in the hold of the CAPE ST JOHN.⁴⁰ On July 13th the ADF&G announced that the fishery would remain closed until the LONE STAR was completely removed from the river.⁴¹ Claimant has asserted that but for the closure; it would have continued purchasing salmon until July 17, 2013.⁴²

IV. NPFC'S DETERMINATION ON RECONSIDERATION

1. *Adjudication of Claims Against the OSLTF*

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.⁴³ As a result, 5 U.S.C. § 555 (e) requires the NPFC to provide a brief statement explaining the basis for a denial. This determination is issued to satisfy that requirement.

The claims adjudication process is also subject to the regulations at 33 C.F.R. Part 136. As the last decision was an offer on reconsideration, the Claimant has 60 days to accept this offer. If the Claimant fails to accept this offer within 60 days, the claim is denied as final agency action. The NPFC reserves the right to revoke this settlement offer at any time.⁴⁴

During the adjudication of claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence and weighs its probative value when determining the facts of the claim. The NPFC's review of the evidence is *de novo*, and the NPFC is not bound by the findings of fact and conclusions reached by other entities.⁴⁵ If there is conflicting evidence in the record, the NPFC will make a determination as to what evidence is more credible or deserves greater weight, and finds facts based on the preponderance of the credible evidence.

2. *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

³⁹ Claimant's req. for recon. Dated November 25, 2015.

⁴⁰ Decl. [REDACTED]; ADF&G emergency orders.

⁴¹ Claimant Letter to NPFC dated November 25, 2015.

⁴² *Id.*

⁴³ The court in *Bean Dredging, LLC v. United States*, 773 F. Supp. 2d 63, 75 (D.D.C. 2011), characterized the informal adjudication process for OSLTF claims with the following: "[W]hile the OPA allows responsible parties to present a claim for reimbursement to the NPFC, they do not confer upon such parties a right to a formal hearing, a right to present rebuttal evidence or argument, or really any procedural rights at all, see 33 U.S.C. §§ 2704, 2708, 2713, an entirely unremarkable fact given that Congress' overarching intent in enacting the OPA was to 'streamline' the claims adjudication process"

⁴⁴ See, *Smith Property Holdings v. United States*, 311 F.Supp.2d 69, 83 (D.D.C. 2004).

⁴⁵ See, *Bean Dredging, LLC v. United States*, 699 F. Supp. 2d 118, 128-29 (D.D.C. 2010) (noting that the NPFC may consider a marine casualty investigation report but is not bound by it).

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. Damages include injury to real or personal property and loss of profits or impairment of earning capacity due to the injury, destruction of real property, personal property or natural resources. 33 U.S.C. § 2702(b)(2)(B) and (E). See also 33 CFR 136.213-.217.

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

With respect to income, the claimant must provide evidence 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). In addition, the claimant must establish the amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered by income tax returns, financial statements, and similar documents, and must establish comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident. 33 CFR 136.233(c). 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 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.

The NPFC reviews the claim on reconsideration *de novo* and incorporates the initial determination into the record. Thus, the analysis on reconsideration includes a review and consideration of the information submitted by the Claimant in its initial claim, in addition to the information submitted on reconsideration. Claimant presented its loss of profits claim in multiple components. The NPFC addresses and analyzes each component of Claimant's submission separately below.

3. Claimant's damages representing lost fish profits are \$271,567.35.

Based on Claimant's evidence, the NPFC agrees that Claimant has suffered damages as a result of the F/V LONE STAR oil spill because Claimant was unable to purchase salmon from its Igushik set gillnet fishermen in two discrete time frames: from June 30th – July 1st, and then from July 5th until the July 17, 2013.⁴⁶ Claimant does not dispute these dates are the relevant dates for purposes of calculating lost profits.

In addition, although Claimant initially used a different methodology in calculating lost profits, upon its request for reconsideration dated January 5, 2017, Claimant took no issue with the NPFC's methodology. The only issue raised by Claimant was that the NPFC failed to account for its lost profits for the June 30th-July 1st closure. The NPFC agrees that Claimant

⁴⁶ Technically the season ended July 17th, but because Claimant was unable to provide data for its losses July 13-17th, Claimant subsequently withdrew its claim for those days.

suffered losses due to the closure on June 30th –July 1st. Accordingly, the NPFC determines Claimant’s lost profits as set forth below.

a. Determining the lost pounds of salmon.

Claimant’s methodology in using the total Igushik fish count (708,000) is an improper starting point because 66% of the salmon had already run on June 30th and 85% had run by July 5th, leaving only a small portion of the salmon for the balance of the 2013 run. Claimant’s simplistic method of calculating its losses based on its percentage share of the total 708,000 fish results in an overstatement of loss. In order to precisely determine the actual amount of fish Claimant lost out on purchasing, it is important to use the actual tower count numbers (the count of the individual salmon that passed through the tower) for the specific dates in question. It is the actual tower count numbers on these dates that give a better indicator of the amount of salmon that could have been purchased, but for the river closure.

Based on this, the NPFC added the ADF&G tower counts for dates correlating to July 30-July 1 (43,212) and tower counts for dates correlating to July 5-July 12 (66,738) for a total of 109,950.⁴⁷ This figure represents the actual amount of salmon escapement—i.e. individual salmon that made it to the spawning grounds—for the dates in question. Claimant has not taken issue with the 66,738 calculation, but has maintained that its June 30-July 1 count should be 69,167 pounds.⁴⁸ However, the 69,167 was an average of pounds caught on the river for the days the river was open to commercial fishing on a 24 hour basis (June 24-29, and July 2-4).⁴⁹ The NPFC finds that it is a better practice to use the actual data when it is available.

Next, the NPFC converted the salmon escapement into pounds⁵⁰:

109,950 individuals x 6 pounds (average weight of 2013 salmon) =659,700 pounds.⁵¹

Third, the NPFC determined Claimant’s historical average share of Igushik River salmon purchases for the years of 2010, 2011, 2012 and 2014. That share was calculated to be 36 percent.⁵²

Finally, The NPFC calculated what portion of the escaped pounds belongs to Claimant:

659,700 (pounds escaped salmon) x .36075 (historic percentage share of run) = 237,986.78.

Thus, Claimant’s share of the salmon escapement is 237,986.78 pounds.^{53 54}

⁴⁷See Alaska Department of Fish and Game, Fishery Management Report No. 14-23, May 2014, Table 16 – Commercial fishing emergency orders, by district and statistical area, Bristol Bay Westside, 2013, p. 45. See also NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017 cell “X”.

⁴⁸ See Claimant letter dated January 5, 2017 and March 9, 2017.

⁴⁹ See Claimant letter dated January 5, 2017.

⁵⁰ The NPFC agrees with Claimant that the average weight of 2013 Igushik salmon was six pounds.

⁵¹ See NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017 cell “Y”

⁵² See NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017 cell “V”. Claimant performed a similar calculation, which resulted in a more conservative 32%.

⁵³ See NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017 cell “Z”.

⁵⁴ In the Claimant’s request for reconsideration (November 25, 2015), Claimant calculated the salmon they were prevented from purchasing in 2013 by applying historic purchase rates to actual 2013 purchases. That reasoning is flawed as it doesn’t consider the early salmon run of 2013 and the fact that their loss didn’t begin until the Igushik River was temporarily closed to fishing on 30 Jun 2013 and then permanently closed to fishing on 5 Jul 2013. In the

The analysis does not end there, however. When the Igushik River fishing season opened on June 15th, fishing was limited to 8 hours per day; as the salmon escapement increased, management allowed a corresponding increase in fishing hours. By June 23rd commercial fishing was allowed on a 24 hour basis due to the strong escapement.⁵⁵ Although the tower counts cannot establish the exact time in which each fish escaped the fishing grounds, it is clear that the counts for June 30th and July 1st encompass fish escapement on a 24 hour basis. In other words, they include those fish that escaped when the grounds were closed, *as well as*, when the grounds were open. The fishing grounds closed at 9:00 a.m. on June 30th and reopened on July 1st around noon. The administrative record shows that Claimant was able to purchase 40,431 pounds on June 30th and July 1st. Specifically, prior to the river closing at 9:00 a.m. on June 30th, the F/V LONE STAR purchased 7,884 pounds of salmon⁵⁶ and the F/V TRADITION purchased 4,445 pounds of salmon. The F/V TRADITION purchased another 28,102 pounds of salmon after the fishing grounds were re-opened on July 1, 2013.⁵⁷ Because Claimant was able to make these purchases on June 30th and July 1, the purchases must be removed from the 237,986.78 pounds. Without removing the amount, Claimant is awarded the fish that escaped prior to the grounds closing, and after they had opened. Accordingly, those salmon purchases are removed from the amount of salmon the Claimant was prevented from purchasing making the revised and correct amount to be 197,555.78 pounds.

In addition, Claimant had to dispose of 27,073 pounds of oiled fish that it had already purchased. Adding both together, Claimant lost a total of 224,628.78 pounds of fish as a result of the 2013 Igushik River set gillnet fishery closure.⁵⁸

b. Determining actual lost profit.

Next, the amount of pounds must be converted to actual lost profit. To do so, the NPFC then calculated the Claimant's 2013 Igushik River set gillnet fishery profit per raw pound to determine their actual loss. The NPFC calculated the Claimant's revenue per raw lb⁵⁹ and then subtracted the Claimant's fish⁶⁰, packaging⁶¹, supply⁶² and labor costs per raw pound⁶³. See NPFC Trident Lost Profits Spreadsheet dated 17 Jun 2016 for details. Claimant has not taken issue with the NPFC's methodology in calculating lost profit.

The NPFC finds Claimant's profit per raw pound after expenses is as shown below:

\$2.973 – Claimant's revenue per raw pound
(\$1.62) – Claimant's fish cost per raw pound

Claimant's letter to the NPFC (Jan. 5, 2017), Claimant calculated the salmon they were prevented from purchasing from 30 Jun – 1 Jul 2013 by averaging their salmon purchases on the days the Igushik River was open for fishing in 2013. And while this could be an appropriate means to calculate a loss, the NPFC remained consistent to all claimed losses by applying a historic .36075 purchase rate to the total salmon run for days Jun 30 – Jul 1 and Jul 5 – Jul 12, 2013, as a result of the Igushik River fishing grounds closure.

⁵⁵ Alaska Department of Fish and Game, Fishery Management Report No. 14-23, May 2014, at p. 14.

⁵⁶ See Exhibit F to Claimants letter to Mr. [REDACTED], NPFC dated 9 Mar 2017.

⁵⁷ See Exhibit E to Claimants letter to Mr. [REDACTED], NPFC dated 9 Mar 2017

⁵⁸ See NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017 cell "DD".

⁵⁹ See NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017 cells "H" and "I".

⁶⁰ See NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017 cells "N" and "O".

⁶¹ See NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017 cells "P" and "Q".

⁶² See NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017 cells "R" and "S".

⁶³ See NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017 cells "T" and "U".

(\$0.017) – Claimant’s packaging per raw pound
(\$0.006) – Claimant’s supplies per raw pound
(\$0.124) – Claimant’s labor per raw pound

\$1.209 Profit per raw pound⁶⁴

Multiplying the 224,628.78 pounds of fish lost to Claimant by their \$1.209 profit per raw pounds equals a total loss of profits of **\$271,567.35**.⁶⁵

4. Claimant’s reimbursable expense for contaminated fish is \$40,609.

In its decision on reconsideration dated November 10, 2016, the NPFC determined that Claimant was not entitled to reimbursement of the 27,073 pounds of contaminated fish on the basis that this was double recovery. Subsequent to the decision, Claimant further explained that this amount is not double recovery because they had already included this fish loss in their total raw pounds lost calculation, and more importantly from NPFC’s view, this payment was not an expense that could have been avoided.

On March 18, 2016, Claimant submitted evidence demonstrating its disposal efforts for the contaminated fish, and the US EPA directive that Claimant could dispose the fish offshore so long as they didn’t create a sheen. Claimant also provided ADEC Seafood Processing Spot Check Forms as well as ADEC Sitrep 4 dated 8 Jul 2013 in which it states “ADEC Seafood representative determined 27,109 pounds of salmon was oil contaminated and that an EPA permit for ocean dumping would be required.”⁶⁶ On July 7, 2013, the F/V CAPE ST JOHN disposed of the oil contaminated fish approximately 12 miles from shore. An ADEC Seafood Program representative on-board the vessel observed no sheen as the fish were dumped”.⁶⁷

On January 5, 2017, by way of letter, Claimant explained that in calculating lost profits for the salmon that it was prevented from purchasing, it deducted the price that it would have paid for the salmon that it was not able to purchase. As such, that deduction was appropriate because the purchase price was expense. However, because it did purchase contaminated salmon, it was not appropriate to deduct because that cost was not avoidable.⁶⁸ Claimant multiplies the 27,073 pounds of fish lost x \$1.50 average price paid to Igushik River fishermen per pound for salmon in 2013 which totals \$40,609.⁶⁹

On reconsideration, the NPFC agrees that the 27,073 pounds of oiled salmon purchased by the Claimant is appropriate for reimbursement as that was an incurred expense. As such, the NPFC approves the claimed \$40,609.00 for the purchase of oil contaminated fish.

5. Saved Expenses - Fuel

⁶⁴ See NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017 cells “H” through “M”.

⁶⁵ See NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017 cell “FF”.

⁶⁶ It’s unclear to the NPFC why the Claimant only claimed 27,073 pounds of oil contaminated salmon when ADEC confirmed that there were 27,109 pounds of oil contaminated salmon.

⁶⁷ See ADEC Situation Report #4 dated 8 Jul 2013.

⁶⁸ See letter from Mr. [REDACTED] KYL, to Mr. [REDACTED], NPFC dated 5 Jan 2017.

⁶⁹ See Claimants request for reconsideration page 9 dated 25 Nov 2015. Also, 27,073 pounds of salmon x \$1.50 equals \$40,609.50 but the Claimant only claimed \$40,609.00 in lost costs.

Any saved overhead or normal expenses not incurred as a result of the incident must be reduced from the award. 33 CFR 136.235. The Claimant calculated fuel savings by the amount of fuel that its tender boats would have consumed had they been purchasing fish from Igushik River fishermen and delivering the fish to their processing vessel/facilities from June 30 – July 1, 2013 and July 5 – July 17, 2013 (316.5 hours or 13.2 days). Specifically, the average daily fuel consumption of the F/V TRADITION was \$910.88 a day. The average daily fuel consumption of the F/V CAPE ST JOHN was \$570.30 a day.⁷⁰ Combining these averages, the Claimant calculated the average daily fuel cost of a tender servicing the Igushik River in 2013 was \$740.59 a day. Claimant had one tender boat purchasing salmon from the Igushik River for 11 days and two tender boats purchasing salmon from the Igushik River for 10 days. Claimant calculated their fuel saving by assuming 1.5 vessels would have purchased salmon from the Igushik River multiplied by the average daily fuel costs of a tender of \$740.59 multiplied by 13.2 days equaled a fuel savings of \$14,664.00.⁷¹

On December 22, 2015, the Claimant provided additional fuel receipts to support their fuel ledger for fuel purchased on the F/V CAPE ST JOHN, LONE STAR and TRADITION. They also explained a change to their saved fuel expenses for the F/V TRADITION and CAPE ST JOHN. Specific to the request for reconsideration, they had included gasoline purchases in their calculation of a daily average. However, when solely analyzing saved diesel fuel expenses, the average daily fuel consumption of the F/V TRADITION was \$451.34 a day. The average daily fuel consumption of the F/V CAPE ST JOHN was \$860.11 a day. Combining these averages, the Claimant calculated the average daily fuel cost of a tender servicing the Igushik River in 2013 was \$655.72 a day. Claimant had one tender boat purchasing salmon from the Igushik River for 11 days and two tender boats purchasing salmon from the Igushik River for 10 days. Claimant calculated their fuel saving by assuming 1.5 vessels would have purchased salmon from the Igushik River multiplied by the average daily fuel costs of a tender of \$655.72 multiplied by 13.2 days equaled a fuel savings of \$12,983.33.⁷²

Once the Claimant no longer claimed lost profits past July 12, 2013, it adjusted its calculation for fuel used by their tenders after July 12, 2013. Multiplying the amount of days being removed from their claim (5 days, Jul 13 – July 17, 2013) by the average daily fuel costs of a tender of \$655.72 equaled \$4,917.00. That amount was deducted by their previous fuel savings of \$12,983.33 which resulted in a new saved cost of \$8,066.33.⁷³

The NPFC will incorporate this saved expense when calculating the final offer below.

6. Tender day rate for the F/V TRADITION is denied.

In its request for reconsideration, Claimant removed the tender day rates previously claimed for the F/V CAPE ST JOHN from their claim submission. Claimant acknowledges that they owned the F/V CAPE ST JOHN and that claiming charter expenses that were never incurred overstated their loss. Claimant also reduced the tender day rate previously claimed for the F/V TRADITION from twelve days to seven days (specifically July 6, 2013, through July 12, 2013), which represents the days the F/V TRADITION was anchored in the Igushik River waiting for

⁷⁰ See Tab Fuel Ledger attachment 19a dated 25 Nov 2015.

⁷¹ See Claimants request for reconsideration pages 18-20 dated 25 Nov 2015.

⁷² See email from [REDACTED], KYL to Mr. [REDACTED], CG NPFC dated 22 Dec 2015.

⁷³ See email from [REDACTED], KYL to Ms. [REDACTED], CG NPFC dated 29 Jan 2016.

ADF&G to decide whether or not to reopen the commercial set gillnet fishery. Multiplying the F/V TRADITION's tender day rate of \$3,400 by seven days totals \$23,800.00.⁷⁴

The NPFC finds Claimant was bound by a signed charter agreement with the owner of the F/V TRADITION to purchase, store and deliver salmon caught by the Igushik set-net fishermen in 2013.⁷⁵ This was a fixed, set cost that the Claimant would have incurred regardless of the 2013 Igushik River set gillnet fishery closure. Therefore, the vessel charter costs in the amount of \$23,800.00 are denied.

V. CONCLUSION

The NPFC reviewed and considered all of the claimant's arguments and evidence that was provided on Reconsideration as well as the administrative record that was created during the initial claim adjudication. The NPFC's offer and Methodology correlates directly to the reported 2013 Bristol Bay Sockeye Salmon run that was based on State documented records as well as the evidence that Claimant provided. The Claimant was successful in purchasing salmon in 2013 from Igushik River set gillnet fishermen and was only prevented from purchasing additional salmon after the majority of salmon had already passed the fishing ground. To properly document that loss, the NPFC created a spreadsheet documenting the actual net lost profits of the Claimant totaling \$271,567.35⁷⁶, which will be an enclosure to this determination. In addition, the NPFC agrees that the 27,073 pounds of oiled salmon purchased by the Claimant is appropriate for reimbursement as an incurred cost and cost that couldn't have been avoided. As such, the NPFC approves the claimed \$40,609.00 for the purchase of oil contaminated fish.

The NPFC has determined that the Claimant's net lost profits resulting from the 2013 Igushik River oil spill incident and subsequent set gillnet fishery closure total \$312,176.35. Reducing this amount by the Claimant's saved fuel costs of \$8,066.33 results in a total offer of \$304,110.02.

Offered Amount on Reconsideration: \$304,110.02


Claim Supervisor: 

Date of Supervisor's review: *April 24, 2017*

Supervisor Action: *Approved*

Supervisor's Comments:

⁷⁴ See Claimants request for reconsideration page 7 dated 25 Nov 2015.

⁷⁵ See Trident's Salmon Tender Charter Agreement with  dated January 28, 2013.

⁷⁶ See NPFC Trident Lost Profits Spreadsheet dated 13 Mar 2017.