

## CLAIM SUMMARY / DETERMINATION FORM

|                  |                                        |
|------------------|----------------------------------------|
| Date             | : 10/6/2008                            |
| Claim Number     | : M06027-001                           |
| Claimant         | : Michael Brian Anderson               |
| Type of Claimant | : Private (US)                         |
| Type of Claim    | : Loss of Profits and Earning Capacity |
| Claim Manager    | : [REDACTED]                           |
| Amount Requested | : \$27,000.00                          |

### **FACTS:**

#### **Oil Spill Incident:**

On July 17, 2006, USCG Marine Safety Unit Savannah received a report of oil in the water in the Savannah River, a navigable water of the U.S. Initially, no responsible party (RP) was identified. The MSU initiated the response to the spill. Sometime later the CG designated the M/V CMA CGM VERNET owned and/or operated by N.S.B. Niederelbe Schiffahrtsgesellschaft MBH & Co. to be the source of the discharge.

#### **Claimant:**

The claimant is a commercial shrimp fisherman who operates in the Savannah, Georgia area.

#### **Claim Description:**

Mr. [REDACTED] claims that he lost profits because he had a decline in shrimp catch of about 33,000 pounds in 2006. He alleges that he had to find fishing grounds further offshore due to oil contamination in the Savannah River. He alleges that shrimp production was lower offshore, but the shrimp were bigger. The claimant submitted his claim to the NPFC on April 16, 2008 without first presenting it to the RP. On April 29, 2008, the NPFC forwarded the submission to the RP. It is now more than 90 days since the claim was presented to the RP and the claimant has not received any compensation. Therefore, the claim is now properly before the NPFC.

The claimant has already been compensated by the NPFC for property damages, which included a contaminated load of shrimp and damage to his equipment. This compensation was paid under claim number M06027-002.

### **APPLICABLE LAW:**

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90.

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

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.

Compensable damage types are natural resource damages, damage to real or personal property, loss of subsistence use of natural resources, lost government revenues, lost profits or impairment of earning capacity, and increased costs of public services. See 33 U.S.C. 2702(b)(2).

The provisions of 33 CFR 136.231-136.235 provide the details for claims for profits and earning capacity. To substantiate a claim for lost profits, a claimant is required to 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 also 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 CFR 136.233 (a) – (d)

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

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 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident.

#### **DETERMINATION OF LOSS:**

The claimant seeks reimbursement for profits he allegedly lost due to the oil spill in the Savannah River. He alleges that the oil in the river forced him to fish for shrimp offshore which resulted in smaller catches, but also a higher price for bigger shrimp. As evidence, the claimant provided handwritten monthly catch totals for the months of June through December 2005 and 2006. He also provided handwritten catch logs for the same months. Additionally, the claimant provided copies of his licenses and permits, and his 2005 and 2006 tax returns.

The claimant proved that he was affected by the oil spill in the property damage claim. He has been compensated for that damage. As for lost profits, the claimant has not shown that the oil spill caused him to lose any money beyond the load of shrimp he lost because it was contaminated with oil. Since the claimant's profits are based on the sale of shrimp, the only loss

he has shown is for the lost load of shrimp. However, he was compensated for these as property damage loss. The other problem with the claim is that, according to his tax returns, the claimant's 2006 (spill year) total sales were \$439,681 compared to his 2005 (a normal year) total sales of \$381,221. The spill year proved more lucrative to the claimant and the returns don't show loss of sales caused by the oil spill.

The claimant's handwritten document showing monthly and total season pounds sold does not help his claim. First, in the spill month of July 2006, he shows 4816 pounds sold. When checking his handwritten log for July 2006, we found that he shows a total catch of 9608 minus 4792 which amounts to his total of 4816. The rejection catch receipt accounts for the 4792 pounds in the contaminated load of shrimp for which the claimant was already compensated in his property damage claim. The only other possible oil effects are shown in the log which states two days were lost for decontaminating his boat and changing nets; time which could have been made up. There are no other details on this log.

Also, he claims that in July 2005 he sold 11366 pounds. The daily catch totals for July over the two years seem random. There is no evident decline in daily catch. Even if a decline were evident, there is no evidence that the oil spill caused a decline. Second, the claimant states that his season total for 2005 was 109435 pounds sold versus 76603 pounds sold in 2006. The NPFC finds that the claimant has not met his burden of showing that the oil spill caused him to lose profits. Other than the tax returns, the documentation he provided is un-audited and handwritten. And, it appears that the spill year was actually a more successful year than the previous year. Therefore, his claim for lost profits is denied.

**AMOUNT:** \$0.00

**DETERMINATION:**

The claimant failed to meet his burden to prove that the oil spill caused him to lose profits.

Claim Supervisor: Thomas S. Morrison

Date of Supervisor's review: 10/31/08

Supervisor Action: Denial Approved

Supervisor's Comments: