

U.S. Department of
Homeland Security
United States
Coast Guard



Director
National Pollution Funds Center
United States Coast Guard

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16480

December 9, 2009

CERTIFIED MAIL Number: 7006 2760 0003 6206 8597

Mr. [REDACTED]
Chair, Port Gamble S'Klallam Tribe
31912 Little Boston Rd NE
Kingston, WA 98346

RE: Port Gamble S'Klallam Tribe Subsistence Claim (M/V *Active* oil spill)
Claim Number S06004-002

Dear Mr. [REDACTED]:

The National Pollution Funds Center (NPFC) has reviewed the claim submitted by the Port Gamble S'Klallam Tribe for lost cultural and traditional subsistence use of natural resources following the October 17, 2005 M/V *Active* oil spill. We have determined that the Tribe has not met its burden of proving a loss under the subsistence use and natural resource damage (NRD) provisions of the Oil Pollution Act (OPA, 33 U.S.C. §§2701 *et seq.*) and the claims regulations (33 C.F.R. §136). Accordingly, the NPFC denies payment of the claim. The basis of our determination follows.

Background

On October 17, 2005, two tug boats, the M/V *Active* and M/V *Legacy*, tied together at the commercial dock opposite the tribal beach, marsh, and fish hatchery at Point Julia, sank to the bottom of Port Gamble Bay in Puget Sound, Washington. The U.S. Coast Guard (USCG) reported that 175-200 gallons of marine diesel spilled from the M/V *Active* into Port Gamble Bay and Hood Canal. In response, boom was placed around nearby shellfish beds and the Tribe's governing body issued a health advisory and closed fishing areas, which affected the ability of residents to harvest and participate in traditions associated with shellfish and salmon.

The Port Gamble S'Klallam Tribe submitted a claim to the NPFC on October 21, 2008 for lost cultural and traditional subsistence use of natural resources following the M/V *Active* spill. The claim totaled \$162,204.00, presented as the costs to assess lost use (\$27,996.38) and compensate for losses by conducting post-spill environmental sampling and evaluation, subsistence resource use research, and subsistence consumer outreach and education (\$134,208).

The NPFC reviewed the Tribe's claim under both the subsistence use (33 C.F.R. §§219-223) and NRD (33 C.F.R. §136.207) provisions of OPA. We determined that the: (1) claimed loss for the cultural value of subsistence resources is not subsistence use loss under OPA, and (2) claim does not meet the requirements for a NRD claim. The remainder of this determination presents the NPFC findings with respect to the claim and the claims requirements under OPA.

General Claim Requirements

Under OPA, the Oil Spill Liability Trust Fund (OSLTF) is available to pay claims for uncompensated damages resulting from the discharge, or threat of discharge, of oil into or upon navigable waters after August 18, 1990 (33 U.S.C. §2702(a)). Claims must be: (1) in writing for a sum certain, (2) submitted to the NPFC within three years of the date that the injury and its connection with the incident were reasonably discoverable (33 C.F.R. §136.101), and (3) first presented to the RP or guarantor before submission to the NPFC for payment (33 C.F.R. §136.103) (except as noted in 33 C.F.R. §136.103(b)).

The NPFC finds that the *M/V Active* incident involved a discharge of oil into navigable waters of the United States that began on October 17, 2005, thereby meeting the requirement at 33 U.S.C. §2702(a). The NPFC received this claim in writing with a sum certain on October 16, 2008¹, within three years of the date that the injury and its connection with the incident was discovered, meeting the statute of limitation established by OPA. The Tribe also submitted this claim to the owner and operator of the *M/V Active* (██████████, Passage Tug and Barge, LLC), as the designated RP for this incident, and the record includes a letter from the RP denying payment. Thus, the NPFC finds that the claimant has met the requirement under 33 C.F.R. §136.103 to present their claim to the RP.

Subsistence Use Loss Claim Requirements and Claim Evaluation

The OPA (33 U.S.C. §§2701 *et seq.*) and the claims regulations (33 C.F.R. §136) require that claims for loss of subsistence use of natural resources:

- 1) Be for lost subsistence use and submitted by an eligible claimant (33 C.F.R. §§136.219-223);
- (2) Identify and describe the actual subsistence use of each specific natural resource for which compensation is being claimed (33 C.F.R. §§136.221(a) and (b));
- (3) Describe how and to what extent the subsistence use was affected by injury to or loss of each specific natural resource (33 C.F.R. §136.221(c));
- (4) Describe efforts to mitigate the subsistence use loss and each alternative source or means of subsistence available to the claimant during the period of time for which loss of subsistence is claimed, and any compensation available to the claimant for loss of subsistence (33 C.F.R. §§136.221(d) and (e));

¹ The NPFC received the claim by Federal Express on October 16, 2008. It was date stamped at the NPFC on October 21, 2008.

- (5) Seek compensation based upon the reasonable replacement cost of the subsistence loss suffered by the claimant, if during the period of time for which subsistence is claimed, there was no alternative source or means of subsistence available (33 C.F.R. §136.223); and
- (6) Be reduced by the following (33 C.F.R. §136.223 (b)):
 - (a) All compensation made available to the claimant to compensate for the subsistence loss;
 - (b) All income derived during the time which otherwise would have been used to obtain natural resources for subsistence use; and
 - (c) Overheads or other normal expenses of subsistence use not incurred as a result of the incident.

The claim must be for lost subsistence use and submitted by an eligible claimant.

Under OPA, the OSLTF is available to pay individuals for uncompensated damages resulting from the loss of subsistence use of natural resources (33 C.F.R. §§136.219-223). These claims are distinct from claims for lost use of natural resources (33 C.F.R. §§136.207-211) (i.e., NRD claims, which include the value of the lost services provided by the injured natural resources) that are only recoverable by a United States trustee, a State trustee, an Indian Tribe trustee, or a foreign trustee (33 U.S.C. §2702 (b)(2)(A)).

OPA does not define the term “subsistence”. However, the case law², legislative history for subsistence use claims³, and the term’s plain meaning⁴, all support subsistence use of natural resources under OPA as activities necessary to obtain food, shelter and other minimum necessities of life. Thus, to establish a claim for lost subsistence use of natural resources, the claimant needs to demonstrate that the resource use in question was required for food, shelter, clothing, medicinal purposes, *etc.*

The Tribe claims damages of \$162,553.38⁵, based on their calculated value of lost cultural and traditional use of subsistence resources (*i.e.*, salmon and shellfish) that were not harvested because of health advisories and fishing areas closures issued following the incident. Damages are determined as:

- (1) the “direct” discounted value of 870 lost fish and shellfish meals and four lost ceremonial fishing trips (\$20,701), plus

² Matter of Cleveland Tankers, Inc. held that subsistence under OPA “relates to use of a natural resource, such as water to obtain the minimum necessities of life” 791 F.Supp. 669, 678-79 (E.D. Mich. 1992) See also, Sekco Energy, Inc. v. M/V MARGARET CHOUEST, 820 F.Supp. 1008, 1015 (E.D. La. 1993)(quoting Cleveland Tankers and holding that a loss of subsistence claim will not be established under OPA unless the natural resources are used for the minimum necessities for life)

³ See, Statement of Cong. Young of Alaska in the House discussion of the OPA 90 Conference Report on Friday, August 3, 1990, at 136 Cong.Rec. H6933-02 [“I would also like to state unequivocally that, in the event of a future catastrophic oil spill, this legislation should result in prompt compensation for the subsistence fishermen who rely on their catch for consumption and survival.”]

⁴ Merriam-Webster dictionary definition: Subsistence: 1a(2): the condition of remaining in existence; 2: means of subsisting; as a: the minimum (as of food and shelter) necessary to support life; b: a source or means of obtaining the necessities of life.

⁵ Total claimed damages (\$165,553.38) are more than total claimed for compensation (\$162,204.00).

- (2) a “cultural premium”⁶ value, determined as the midpoint of a range between one to ten times the direct loss value (\$113,855), plus
- (3) past costs to assess the claimed damages (\$27,996.38).

Based on a review of the claim, the NPFC finds that the Tribe is eligible to submit a claim for subsistence use. However, while the cover letter and OSLTF claim form submitted by the Tribe indicate that this is a lost subsistence use claim, the claim itself states that the Tribe is not claiming for the loss of subsistence resources⁷. Rather, the Tribe determines a cultural loss associated with shellfish and salmon from an estimated value of lost fish and shellfish meals. Claimed cultural losses are therefore not for subsistence under OPA (*i.e.*, required for food, shelter, clothing, medicinal purposes, *etc*). Accordingly, the NPFC finds that the claimant has not met the requirements for subsistence use claims (33 C.F.R. §§136.219-223).

The claim must identify and describe the actual subsistence use of each specific natural resource for which compensation is being claimed.

The claims regulations require claimants to identify and describe the actual subsistence use of each specific natural resource for which subsistence use is being claimed (33 C.F.R. §§136.221(a) and (b)). Subsistence use loss claims should provide a detailed description of the type of resources regularly collected by the claimant during the period of loss claimed and the subsistence use(s) made of those resources during the period in question. Supporting information (*e.g.*, photographs, published accounts or written records documenting resource use for subsistence purposes) should be provided if available.

The Tribe claims lost subsistence use of fish and shellfish. The NPFC finds that the Tribe has demonstrated that it traditionally gathers shellfish from Tribal beaches and catches salmon caught in nearby waters, both of which are used as subsistence foods. However, as stated above, the NPFC finds that the Tribe has not requested compensation for the loss of these resources and, therefore, cannot be compensated for them.

The claim must describe how and to what extent the claimant’s subsistence use was affected by injury to or loss of each specific natural resource.

The claims regulations require that claimants identify how and to what extent subsistence use was affected by the injury to or loss of each specific natural resource (33 C.F.R. §136.221(c)). To show that a subsistence use loss has occurred, claimants must:

⁶ Claim (page 5), the cultural premium value range represents “lost opportunities to practice traditional methods in a place of cultural importance, and pass (this) culture on the younger generations”.

⁷ Claim, Page 6: “this claim is not for the specific subsistence use loss”, but instead “the dollar value of each lost subsistence meal . . . is used to quantify the cultural losses described in the claim”.

- 1) Demonstrate that it was reasonable to change subsistence use behavior given observed effects of the spill; and
- 2) Provide a reasonable measure and basis of the spill-related subsistence use loss being claimed.

The first condition confirms a connection between the spill and subsistence use impacts. For example, it might be reasonable for subsistence users of fish to change their subsistence use in response to fish consumption advisories or access restrictions in areas they regularly fish. In cases where the claimant has to make subsistence use decisions in the absence of consumption advisories, access restrictions or other clear, reliable information about the level of risk associated with resource use, the claimant should demonstrate that his/her actions were consistent with those of a cautious, reasonable individual.

The USCG Pollution Reports for the M/V *Active* spill indicate that oil spilled into waters, marsh, and shorelines where the Tribe asserts that they fish and gather shellfish. The Tribe provided photos of oil in the marsh and along the beach ten days after the spill to support their decision to restrict harvest of these resources. The record includes a copy of the shellfish closure and advisory issued by the Tribe (Claim Attachment 2) and USCG Pollution Reports confirm that boom was in the water until November 11, 2005. Given this information, the NPFC finds that it was reasonable for the Tribe to change their subsistence use behavior in the areas affected by the spill.

The second condition requires that claimants provide a measure of a subsistence use loss (e.g., meals, numbers or weight of resource), along with an explanation and documentation of how these losses were determined. Identification of the claimant's "regular" level of resource use (i.e., the amount of resource typically gathered over a given period of time), the period of time that the claimant was reasonably unable to collect the resource due to the spill, and the level of reduced use, if any (i.e., the amount of resource that was able to be gathered), is sufficient to meet this requirement.

As described above, the Tribe's measure of cultural subsistence damage is presented as the dollar value of 870 lost fish and shellfish meals and four lost ceremonial fishing trips, plus a "cultural premium". While the direct loss of 870 fish and shellfish meals could potentially be subsistence use losses under OPA (i.e., necessary for food), the Tribe explicitly excludes such consideration (see footnote 9). Further, the Tribe did not submit any documentation to support and explain the basis for the dollar values of the lost meals and fishing trips used to determine claimed losses. The Tribe also did not quantify the loss of salmon or other fish used for subsistence purposes lost due to the M/V *Active* spill. Accordingly, the NPFC finds that the Tribe has not provide a reasonable measure and basis of the spill-related subsistence use loss being claimed.

The claim must describe efforts to mitigate the subsistence use loss.

The claim regulations require that claimants describe efforts to mitigate the loss of subsistence use (33 C.F.R. §136.221(d)) (i.e., find reasonable alternatives in place of the lost resources, such as collecting similar resources from nearby areas unaffected by the spill or

making use of substitute resources as circumstances allow). Therefore, claim materials must:

- 1) Describe the mitigation efforts and any offsets to potential subsistence use losses achieved; or
- 2) Describe why mitigation was not feasible (*e.g.*, due to a lack of comparable substitute resources in nearby areas, an inability to travel to or access alternate locations, a lack of information about viable alternate sites, *etc.*).

The Tribe's claim discusses mitigation efforts to limit the extent of the spill and assess the damage to the Tribe's resources⁸. The Tribe does not, however, describe any attempts to minimize claimed subsistence use losses, to the extent that they may have occurred. Accordingly, the NPFC finds that the efforts described to mitigate damage to the Tribe's natural resources during the response, while useful in the response effort to assist in public health and safety, do not meet the condition of 33 CFR 136.221(d).

The claim must be based on the reasonable cost to replace the lost subsistence use of natural resources.

OPA allows compensation for the reasonable costs to: (1) replace a lost subsistence use (33 C.F.R §136.223), and (2) assess damages claimed (33 C.F.R §136.105(e)(8)). Resource replacement can occur in a number of ways, including, but not necessarily limited to, the cost of purchasing substitute resources or the additional, incremental costs associated with traveling farther and/or spending more time collecting resources from areas unaffected by the spill.

The claims regulations specify replacement cost as the measure of compensation for lost subsistence use, less: (1) any compensation received by the claimant to compensate for the subsistence loss; (2) all income derived by using the time that otherwise would have been used to obtain natural resources for subsistence use; and (3) overheads or other normal expenses of subsistence use not incurred as a result of the incident (33 C.F.R. §136.223(b)). To meet this requirement, claimants must adjust their estimate of subsistence use loss to account for compensation received, mitigation, income from spill-related or replacement activities, and avoided costs.

The Tribe's claim does seek the cost to replace natural resources used by the claimant for subsistence or otherwise. Instead, the Tribe proposes to use the claimed cultural use damages to fund environmental sampling and PAH analyses, research on cultural use of subsistence resources, and education and outreach to subsistence users. The claim also does not indicate whether the Tribe received any spill-related compensation, derived income during time not spent participating in subsistence use activities, and/or avoided expenses that would have been incurred as part of subsistence use activities. Accordingly, the NPFC finds

⁸ Claim, Page 8 the Tribe asserts that they spent "90 hours in cleaning up and protecting against the spill, including deploying a boom around the Coho salmon hatchery at Point Julia." The Tribe also states that shellfish samples were sent for analysis to determine the risk to subsistence users.

the trustees claim is not based on the reasonable cost to replace the lost subsistence use of natural and has not appropriately addressed the requirements of 33 C.F.R. §136.223 (b).

As part of its claim, the Tribe also seeks \$27,996.38 for costs incurred to assess the claimed subsistence use loss. While the claims regulation allows compensation of the reasonable costs incurred by a claimant assessing the damages claimed (33 C.F.R. §136(105)(e)(8)), the claimant has the burden of demonstrating that the underlying damages are, in fact, OPA damages (except as provided under 15 C.F.R. Part 990). Because the NPFC has determined that the Tribe has not demonstrated a subsistence use loss, payment of the claimed assessment costs is denied.

NRD Claim Requirements and Claim Evaluation

As stated above, the Tribe's claim for the value of lost cultural and traditional use of subsistence resources is not compensable under the subsistence use provisions of OPA. The value of the lost services provided by the injured natural resources, however, may be compensable under the NRD provisions of OPA, provided that it is claimed pursuant to the general claim requirements and is:

- (1) Submitted by an eligible claimant (33 U.S.C. §2702(b)(2));
- (2) Based on a publicly reviewed plan (33 U.S.C. §2702(c); and
- (3) For the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources (33 U.S.C. §2706).

Accordingly, authorized trustees may submit NRD claims for assessment and/or restoration based on a plan to restore, rehabilitate, replace, or acquire the equivalent of the lost resources. In this case, for example, the Tribe could submit a claim for costs to assess natural resource damages resulting from the incident (e.g., injury to shellfish, fish, and aquatic habitat under their trusteeship). Quantification of natural resource injuries determined by such an assessment could then be used to determine the appropriate type and scale of restoration necessary to compensate for such losses.

Unfortunately, the Tribe's submission to the OSLTF does not meet the requirements for a natural resource damage claim. Specifically, there is no evidence that the claim was based on a publically reviewed Plan. Further, the Tribes's approach to quantifying and scaling the claimed lost cultural value appears arbitrary and does not meet the burden of showing by a preponderance of the credible evidence that this approach is valid. Accordingly, the Tribe's claim does not meet the OPA requirements for a natural resource damage claim.

Conclusion

The NPFC has reviewed the claim submitted by the Port Gamble S'Klallam Tribe for lost cultural use of subsistence resources following the M/V *Active* oil spill. We have determined that the claimant has not met its burden of proving a subsistence use loss under OPA (33 U.S.C. §§2701 *et seq.*) and the implementing claims regulations (33 C.F.R. §136). Claim materials do not: (1) identify and describe an actual subsistence use of specific natural

resources for which compensation is being claimed; (2) describe how and to what extent the claimant's subsistence use was affected by injury to or loss of a specific natural resource; (3) describe efforts to mitigate the claimed subsistence use loss; or (4) calculate the reasonable cost to replace the lost subsistence use resource. The NPFC further finds that claimed past assessment costs are not reasonable because the underlying damages are not subsistence use damages, and the claimant has failed to show that it has actually incurred any such costs. Accordingly, this claim to compensate for lost cultural value of beach subsistence gathering and ceremonial fishing trips following the M/V *Active* oil spill and past assessment costs is denied.

The NPFC also reviewed this claim under the NRDA provisions of OPA. The NPFC finds that the Tribe has not submitted this claim in accordance with the NRDA claims requirements. Specifically, the claim does not appear to be based on a publically reviewed plan and the methods used by the Tribe to quantifying and scale cultural use losses are not appropriately justified.

Under OPA, you may ask the NPFC to reconsider this determination. Reconsideration requests must be received by the NPFC in writing within 60 days of the date of this letter, and will be based upon the additional factual or legal information that you provide with your request. A claim may be reconsidered only once, and written disposition of a reconsideration request constitutes final agency action. If the NPFC fails to issue a written decision within 90 days after receipt of a request for reconsideration, this determination, at the option of the claimant, shall be deemed final agency action.

Should you choose to request NPFC reconsideration of this determination, please mail the request with the appropriate claim number (S06004-002) to:

Chief (Cn)
National Pollution Funds Center
U.S. Coast Guard
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100

If you have any questions about this determination, please feel free to contact me at the above address or by phone at [REDACTED].

Sincerely,

[REDACTED]