

## CLAIM SUMMARY / RECONSIDERATION DETERMINATION

<b>Claim Number:</b>	S12020-0001
<b>Claimant:</b>	Penn Cove Shellfish LLC
<b>Type of Claimant:</b>	Commercial Business
<b>Type of Claim:</b>	Loss of Profits and Earnings
<b>Claim Manager:</b>	[REDACTED]
<b>Amount Requested:</b>	\$598,371.95

### **I. FACTS:**

#### ***A. Oil Spill Incident:***

At approximately 2345 on Saturday, May 12, 2012, the F/V DEEP SEA caught fire in Penn Cove in the vicinity of Coupeville, Washington.<sup>1</sup> Central Whidbey Fire and Rescue arrived and attempted to extinguish the fire.<sup>2</sup> During firefighting efforts on Sunday, May 13, the vessel sank. Diesel fuel and other oils discharged from the F/V DEEP SEA were sheening into Penn Cove, a navigable waterway of the United States. [REDACTED] is the vessel's owner and is the responsible party (RP) for the incident.<sup>3</sup>

#### ***B. Claimant***

Penn Cove Shellfish LLC operates as a joint venture between Penn Cove Mussels, Inc. and Coast Seafoods Company. Penn Cove Shellfish, LLC (PCS), a large commercial mussel farm, is located in Coupeville, Washington. It cultivates mussels, clams, and more than 27 types of oysters.<sup>4</sup> The company has two farming sites: Penn Cove located in Coupeville, and Quilcene Bay, located in the upper Hood Canal. Growing and harvesting operations occur regularly within both locations. Penn Cove Shellfish also wet-stores and distributes Manila clams, Kumamoto oysters, and 26 varieties of Pacific oysters.

Claimant operates its Penn Cove mussel farm, located on state-owned aquaculture property in Penn Cove, under a lease agreement with the Washington State Department of Natural Resources. The farm has rafts in Penn Cove where mussels are grown and harvested.

#### ***C. Claim History:***

On February 7, 2013 [REDACTED] General Manager of Penn Cove Shellfish, LLC (PCS), submitted a claim to the Fund asserting a loss of profits and impairment of earning capacity in the amount of \$1,167,709.76. According to [REDACTED] the Washington State Department of

<sup>1</sup> See, USCG Pollution Report 1, dated May 14, 2012.

<sup>2</sup> See, USCG Pollution Report 1, dated May 14, 2012, and [REDACTED] letter dated February 7, 2013.

<sup>3</sup> A responsible party is liable for removal costs and damages. 33 USC § 2702(a). With certain exceptions all claims for removal costs and damages shall be presented first to the responsible party or guarantor of the source designated under section 2714. 33 USC § 2713(a). If the claim is presented to the responsible party and the claim is not settled by any person by payment within 90 days of presentment or advertising begun pursuant to section 2714(b) of this title, whichever is later, the claimant may elect to commence an action in court or present the claim to the Fund. 33 USC 2713(c). In this case the NPFC's attempts to designate Mr. [REDACTED] as the responsible party were not successful. In an e-mail dated June 14, 2012, the NPFC notified the Claimant that it could submit its claim to the Fund without first presenting the claim to Mr. [REDACTED]

<sup>4</sup> See, Penn Cove Shellfish, LLC website, "About Us".

Health (WDOH) closed Penn Cove to shellfish harvest on May 15, 2012, when oil discharged from the F/V DEEP SEA migrated into Penn Cove and impacted the rafts holding the mussels.<sup>5</sup> The WDOH reopened Penn Cove on June 8, 2012.<sup>6</sup> Claimant asserted that the company lost profits and incurred increased expenses due to the incident. Claimant originally itemized its claimed losses into the following components:

May 14-15, 2012 lost profit sales:	\$ 22,311.66
Direct expenses and losses:	\$ 31,180.30
Quilcene Mussel Yield Loss	\$231,476.25
Sales impact	\$128,083.54
Quilcene recall loss	\$ 3,364.44
Salaried wages lost	\$ 32,964.78
Lost June mussel seed	\$718,328.79

## **1. Initial Decision**

On September 12, 2014, the NPFC issued its initial determination offering the Claimant \$71,096.01 for its claimed losses, which represented \$70,932.62 for yield loss at its Quilcene farm due to premature harvesting and \$163.39 in extraordinary expenses. The NPFC denied the remaining direct expenses because Claimant provided computer printouts or invoices with certain expenses highlighted but no supporting documentation or explanation as to why they were extraordinary expenses. The NPFC also denied the claimed costs in the remaining components: lost profit sales, sales impact, lost June mussel seed and salaried wages because Claimant failed to fully explain or evidence the losses. In its denial the NPFC clearly articulated that should Claimant seek reconsideration it must provide additional information and explanation for each of the denied components.

## **2. Request for Reconsideration**

Via letter dated November 3, 2014 and email the same date, PCS requested reconsideration of the claim. In its request, PCS no longer seeks all the originally claimed losses and reduced its claimed amount to **\$598,371.95**. This new amount is based on the following remaining components of its claim:

1. Lost June 2012 Mussel Seed set for 2013 crop	\$322,924.14
2. Yield Loss from harvesting juvenile Quilcene crop	\$231,476.25
3. Direct Expenses and losses	\$ 21,659.90
4. May 14-15 Lost Sales Profit	\$ 22,311.66

In support of the request for reconsideration Claimant provided the following:

- Declaration of [REDACTED] dated November 3, 2014
- Mussel inventories as of December 31, 2013, June 30, 2014, July 31, 2014 and August 31, 2014
- Financial statements for August 31, 2014, and December 31, 2014
- In the cover letter to the request for reconsideration Mr. [REDACTED] provided some limited additional information for the claimed losses.

<sup>5</sup> See, Washington State Department of Health News Release, Attachment 9 to Claimant's Original Submission, dated May 15, 2012.

<sup>6</sup> Id., at paragraph 14.



After review of the information provided in support with the request for reconsideration, the NPFC requested additional information regarding Claimant's claimed wage labor costs and May 14 and 15, 2012 lost sales profits.

## **II. DETERMINATION on RECONSIDERATION:**

The Director, NPFC, upon proper written request of the claimant reconsiders any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 C.F.R. 136.115(d).

The NPFC, in its analysis on reconsideration performs a *de novo* of the entire claim submission, including new information provided by the claimant in support of the request for reconsideration. As a fact finder, the NPFC considers all relevant evidence and weighs its probative value when determining the facts of the claim as part of its adjudication process. If there is conflicting evidence, the NPFC will make a determination as to what evidence is more credible or deserves greater weight.

While Claimant presented some limited information and explanations in its request for reconsideration, most of the information was duplicative of the information provided in its initial claim submittal. Because Claimant presented its loss of profits claim in multiple components the NPFC addresses and analyzes each component of Claimant's submission separately below.

### Lost June 2012 Mussel Seed Set

Claimant's alleged lost 2012 mussel seed set is the component that addresses PCS's claimed loss of profits for 2013.<sup>7</sup> According to [REDACTED] mussel seeds set in May/June of one year and the mussels grow and are harvested in the following year. Claimant argues that its alleged lost May/June 2012 mussel set resulted in a loss of profits for 2013. Claimant acknowledges that its initial claimed loss of profits (\$718,328.79) submitted in early 2013, was based on forecasted and expected losses for that year and now explains it has a concrete understanding of those losses.<sup>8</sup> Because the 2013 profits are now known Claimant reduced its claimed loss of profits due to the alleged lost May/June 2012 mussel set from \$718,328.79 to **\$322,924.14**.

Claimant continues to argue on reconsideration that the claimed lost profits were due to the incident because its Penn Cove collector lines, (which, as noted above, allegedly collect mussel seed in May or June each year) failed to obtain a seed set in May/June 2012. [REDACTED] asserts that there has never been a failure for a mussel set in May or June in the past 37 years; therefore, the failure was due to the impact of the diesel oil sheen on the collector lines.

Claimant's argument that the failure for the May-June seed set in 2012 was due to the incident is not supported by the credible evidence in the administrative record, most of which was provided by [REDACTED]. In a letter to its customers, PCS stated that the oil sheen on the surface of the water disappeared by May 16, 2013 (three days after the incident) and that since the mussels were submerged in four feet of water it was doubtful that they were contaminated with oil from

<sup>7</sup> With the exception of the Quilcene mussel yield loss and sales loss, which are discussed later, all other components are claimed extraordinary expenses.

[REDACTED] Letter dated November 3, 2014.

<sup>8</sup> Claimant acknowledges that a smaller seed set was achieved in August 2012.



the DEEP SEA.<sup>10</sup> Further, Claimant provided no scientific or expert evidence that supports his argument that the diesel oil from the F/V DEEP SEA impacted the collector lines or mussel seed set. The more credible evidence is provided in the LSU lab test results for the mussel samples and the conclusions stated by them. On May 20, 2013 LSU emailed PCS regarding samples of mussels received on May 19 and determined there was no evidence of gross diesel contamination in any of the samples.<sup>11</sup> A May 23, 2012 LSU Laboratory Report concluded that samples it received on May 19, 2012 evidenced low levels of fuel exposure in the tissue samples but it was unclear whether the contamination was from the fire and spill, or from residual background fuels in the area's waters. Since the collector lines are submerged in water, where the mussel seeds attach and eventually set, there is no convincing evidence in the record that there was oil or sheen below the surface water at the time the mussel set was predicted to occur or that the failure of the mussel set was due to the incident.<sup>12</sup>

Further, the claimed loss of profits is also refuted by credible financial evidence in the administrative record. The Penn Cove federal tax returns for 2013 reflect that the 2013 sales of livestock raised were \$2,745,300 with a net profit of \$1,450,231.<sup>13</sup> This profit was nearly \$550,000 more than the profits realized in 2012 (\$901,254) and about \$480,000 more than profits in 2011 (\$972,034). In fact, 2013 was the company's most profitable year at the time this component was denied by the NPFC in September 2014.

In an effort to refute the increased profits reflected in the 2013 tax return Claimant provided its 2014 inventories, asserting that its 2014 yield shows the impact the 2012 lost seed set had on 2013 yields and profits, i.e., the 2013 profits were lower than they would have been if the incident had not occurred. For instance, Claimant argues that the average yield for Penn Cove mussels in 2014 was 45 pounds as compared to the delayed 2012 mussel seed set average yield of 36 pounds; therefore, PCS would have realized more profits in 2013 because of the higher yield. Further, Mr. [REDACTED] argues that "the market demand in 2013 for the Penn Cove mussels was sufficiently strong that we would have sold these additional mussels had they been available."<sup>14</sup> The NPFC is not convinced by this argument because it is speculative and Claimant provides no supporting evidence. Claimant has not established that it suffered a loss of profits due to a failure of mussel seed set in 2013.

Thus, the credible evidence in the record does not establish a seed set failure, or if there was a failure of the mussel set in May-June 2012, that it was due to the incident. The NPFC denies the \$322,924.14 in lost profits for 2013.

#### Yield Loss from Harvest of Juvenile Quilcene Crop

Claimant seeks **\$231,476.25** in yield loss, which resulted from the premature harvesting of juvenile Quilcene Bay crop from May – June 2012. Claimant reiterated that it mitigated its damages by harvesting the juvenile or less mature mussels at Quilcene while Penn Cove was closed and this resulted in the Quilcene mussels producing a lower yield than the yield would

<sup>10</sup> See attachment 30, initial submission.

<sup>11</sup> The May 21, 2012 LSU Lab results report for Penn Cove Mussel samples received on May 18, 2012, states as its first conclusion, "There is no evidence of significant or high level diesel contamination in any of the tissue samples as would be expected from exposure during a spill."

<sup>12</sup> Additionally, a July 18, 2012, e-mail from [REDACTED], senior scientist at NOAA states that "it is possible that mussels have not "set" anywhere in the Whidby/Gardiner/Susan basins region."

<sup>13</sup> 2013 U.S. Return of Partnership Income Form 1065

<sup>14</sup> [REDACTED] Declaration, paragraph 7.

have been if the Quilcene Bay mussels would have been harvested at full maturity.<sup>15</sup> Thus, according to Mr. [REDACTED] it required more inventory to be harvested to satisfy orders.

As more thoroughly discussed in the initial determination Claimant calculated its Quilcene yield loss by applying the May 2012 Penn Cove average mussel yield of 47 lbs per line as the comparable yield substitute for what the Quilcene Bay (20.43 lbs per line) crop would have been at maturity. Claimant then claims the difference (26.57 lbs) and multiplies that by the 4,922 lines pulled to satisfy orders during the closure of Penn Cove, resulting in 130,777.54 pounds of lost yield during the closure. Claimant then multiplied that total by the average price of \$2.37 per pound during the closure and subtracted \$0.60 per pound for costs.<sup>16</sup> This resulted in a claimed loss of yield in Quilcene Bay totaling \$231,476.25.<sup>17</sup>

In its initial determination offering \$70,932.62 as reimbursement of the Quilcene harvest yield loss, the NPFC, while accepting Claimant's method of calculation, did not agree to use the 2012 Penn Cove yields because Claimant in this component seeks only the Quilcene yield loss due to the early harvest. Thus, it is appropriate to use the Quilcene average yield in the calculation. The NPFC applied the best evidence of comparable yields in the administrative record (the July yields at Quilcene Bay provided by the Claimant<sup>18</sup>) to estimate the lost difference in value of the crop that was harvested prior to maturity and the value had it reached full maturity.<sup>19</sup> Claimant states at page 3 of its May 31, 2013 letter that it would have let the Quilcene crop grow until July 2012.<sup>20</sup> Based on this information, the NPFC applied the difference between the actual July yield (34 lbs/line) and the premature yield (20.43 lbs/line) in May/June to calculate the lost yield, which calculated to be \$118,221.03 (13.57 lbs/line X 4,922 lines X \$1.77 per lb). In its initial determination the NPFC understood that harvesting was conducted at Quilcene two days per week (40% of the week); therefore, multiplying the \$118,221.03 by 60% of the harvest, the NPFC determined that the loss of Quilcene yield was \$70,932.62.<sup>21</sup>

On reconsideration the NPFC continues to use the Quilcene yield as calculated in the initial determination. However, Claimant clarified on reconsideration that at the time of the incident PCS was harvesting exclusively from Penn Cove and not Quilcene Bay.<sup>22</sup> Claimant's harvest records confirm this statement. For this reason, NPFC will offer the Claimant compensation based on harvesting going from zero days per week in Quilcene to a full five days per week rather than deducting 40% as it initially did, based on the original finding that harvesting in

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<sup>15</sup> Claimant asserts that the Quilcene mussels would have provided a higher yield if harvested in July 2012, which would have been 6-8 weeks later than the actual harvest in May and June 2012.

<sup>16</sup> Claimant explained how he arrived at the price and cost in his May 31, 2013 letter on page 9 at numbers 18 & 19. The \$0.60 is made up of two costs related to the mussels. \$0.30 for capitalized expenses related to the farming and \$0.30 related to the harvest and packing costs. The harvest and packing cost is the average for time outside the spill period where Claimant states costs were higher due to using Quilcene instead of Penn Cove crop. The capitalized amount is based on an annual average.

<sup>17</sup> The Penn Cove crop was available for harvest and sale once Penn Cove was reopened.

<sup>18</sup> Claimant provided July 2012 Quilcene yield data establishing 34 lbs per line.

<sup>19</sup> The NPFC did not apply the August 2012 yield data, even though it was later because it reflected lower yields.

<sup>20</sup> See also emails dated May 24, 2012 from [REDACTED] discussing beginning harvesting at Quilcene until "next month" at tab 11.

<sup>21</sup> [REDACTED] in requesting reconsideration, again argued that the NPFC should apply his estimation of 47 lbs per line from the Penn Cove yield. This time, he attempted to justify his estimated 47 lbs yield by providing the 2014 Quilcene harvest data, which averaged 47 pounds per line, as confirmation that his number was the most appropriate. The NPFC rejects [REDACTED] calculated value using 47 lbs per line yield because it is not comparable data.

<sup>22</sup> Penn Cove Shellfish letter dated November 3, 2014, p.5

Quilcene increased from two days per week to five days per week. Thus, the NPFC will offer \$118,221.03 for lost profit on yield loss of Quilcene mussels.

NPFC finds that **\$118,221.03** is the proven compensable amount for Claimant's yield loss suffered by prematurely harvesting from its juvenile Quilcene crop of mussels due to the oil spill and closure of Penn Cove.

**Direct Expenses and Losses:**

The Claimant seeks reimbursement of additional expenses it allegedly incurred as a direct result of the oil spill. Extraordinary expenses incurred as a result of an incident may, in some instances, be reimbursable from the Fund if Claimant establishes that they were incurred due to the incident, that they are damages as defined by OPA (i.e. reduced Claimant's profits or impaired its earning capacity), and if they are adequately documented. Thus, if Claimant incurred a new expense or increased ordinary expenses due to the incident, that increase could result in a loss of profits because an increase in expenses will reduce profits if there is no corresponding increase in revenue.

Claimant detailed the claimed additional expense costs in a spreadsheet. In requesting reconsideration Claimant has reduced his claimed Direct Expenses and Losses to **\$21,659.90** as follows:

- \$3,761.00 in ferry fares for travel to and from Quilcene Bay,
- \$2,705.13 in fuel expenses for traveling to and from Quilcene Bay,
- \$42.67 in phone calls,
- \$267.72 for shipping mussel tissue samples for testing,
- \$2,973.16 for refrigerated truck rentals,
- \$139.96 for supplies to re-hang in Quilcene Bay,
- \$120.99 for hotel expenses
- \$11,004.12 in spill-related wage labor costs, and
- \$645.15 for shellfish mortality

As specifically outlined in the September 12, 2014 initial determination the NPFC explained that if the Claimant sought reconsideration it must provide additional information and explanation to support each of the claimed direct extraordinary expenses. On reconsideration Claimant failed to provide additional supporting documentation or explanation as to why the expenses are extraordinary, i.e., it did not adequately explain expenses that would be incurred during normal operations in order to establish that the claimed expenses were extraordinary and incurred due to the incident.

Despite Claimant's failure to provide new or additional evidence for its claimed extraordinary expenses, the NPFC's review on reconsideration allowed it to identify corroborating evidence of some of the expenses and now determines that three of the claimed expenses are increased, extraordinary expenses that PCS incurred due to the spill.

First, Claimant seeks reimbursement of hotel charges for [REDACTED] totaling **\$120.99**. Claimant provided an invoice for the Harborside Inn in Port Townsend, Washington for arrival on May 13, 2012 (the day after the incident). Claimant states that the charge was for a hotel stay after "boat delivery to Quilcene". In the reconsideration request, the Claimant explains that the harvest vessel, Mytilus, was sent to Quilcene Bay because PCS decided to transfer harvesting

operations to Quilcene Bay that day in anticipation that Penn Cove would be closed to harvesting. Claimant instructed [REDACTED] to transfer the Mytilus to Quilcene immediately. He states that the hotel charge was incurred because the ferry for his return trip home was no longer running by the time Mr. [REDACTED] finished transferring the boat.

The evidence supports the finding that the \$120.99 hotel charge on May 13, 2012, for the PCS employee who transported the Mytilus to Quilcene was extraordinary. PCS made an emergency decision to transfer harvest operations to Quilcene to mitigate damages. The hotel stay was necessitated by the fact that the ferry had stopped running by the time the employee completed transferring the vessel to Quilcene late in the night. The WSDOT May invoice to PCS shows only one ferry fare for a single passenger for May 13. With the hotel invoice provided, the record shows that Mr. [REDACTED] did not return on that date. There is credible evidence in the record establishing that the **\$120.99** is an extraordinary expense.

Second, Claimant seeks reimbursement of ferry fares in the amount of **\$3,761.00** for employee travel to Quilcene Bay during the Penn Cove harvest closure. As evidence Claimant provided computer printouts from Washington State Department of Transportation (WSDOT) for May and June 2012. The printouts evidence that employees, during normal operations, travel to and from Penn Cove to Quilcene Bay every day. Claimant highlighted and made written notations on the printouts as an attempt to identify spill-related fares.

While Claimant did not provide additional information or explanation in support of the increased ferry fares, the NPFC reviewed the WSDOT ferry invoices provided by the Claimant and finds that the Claimant's records show an increase in ferry fares over May and June of 2012 that appears extraordinary. The WSDOT ferry invoices for May and June 2012 provide the ferry route, rate and total charge per transit. NPFC evaluated the charges for the Port Townsend to Coupeville route, which is the applicable route for PCS employees to reach the Quilcene farm. For the period of May 1 through May 12 (before the spill) PCS incurred \$543.30 for the ferry transit between farms. This would be the "normal" expense over about two weeks. The cost for this route from May 13 to May 26 was \$2,421.85 and from May 27 to June 8 was \$2,351.75. The increases from the normal expense, then were \$1,878.55 and \$1,808.45, respectively. Because PCS employees traveled to Quilcene Bay to harvest during the Penn Cove closure, the evidence (based on comparables during normal operations) reflects that the increase in ferry charges was due to the incident. This total increase of **\$3,687.00** is the compensable increased, extraordinary expense that decreased profits for PCS due to the spill.

Third, Claimant seeks reimbursement of **\$267.72** in Fedex charges for shipping mussel tissue samples to the LSU Department of Environmental Sciences lab for testing for diesel contamination.<sup>23</sup> Claimant provided an invoice dated May 25, 2012 that included shipping charges incurred on May 18, 2012 (\$163.39) and a second invoice dated July 6, 2012 that included shipping charges incurred on July 2, 2012 (\$104.33). Claimant states that the May sample sent to LSU tested for diesel contamination from the oil spill. In its November 3, 2014, reconsideration request letter Claimant states that the July samples were not simply done for a science experiment, contrary to NPFC's initial finding. He states that NOAA specifically requested the second sample to confirm that the mussel tissue had returned to normal pre-spill condition.<sup>24,25</sup> Further, with his reconsideration request, Mr. [REDACTED] provided a copy of a June

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<sup>23</sup>Tab 11 emails and LSU testing report

<sup>24</sup>See November 3, 2014 reconsideration request.

15, 2012 email from NOAA asking for another sample. The second samples were not shipped until July, well after PCS was harvesting mussels in Penn Cove again.

The evidence for the claimed Fedex shipping charges on \$163.39 reflects that this was the cost to ship samples on May 18, 2012, for testing for contamination was an extraordinary charge due to the incident. Claimant provided May 2012 emails and the LSU testing report which both directly tie the cost to the spill and are credible evidence that this shipping charge was a result of the discharge. The NPFC will offer **\$163.39** expended to ship one set of samples. However, the second charge incurred on July 6, 2012 is denied because Claimant's assertion that NOAA requested a second sample to confirm that the mussel tissue had returned to pre-spill conditions is not convincing in light of the fact that WDOH reopened the Penn Cove farm on June 6 and PCS restarted harvesting there a month earlier than the July 6, 2012 shipping charges.

The other claimed direct expenses: fuel expenses, phone calls, refrigerated truck rentals, and supplies are denied on reconsideration because Claimant did not provide documentation of these expenses during normal operations in order that a comparison could be made to determine that they were extraordinary expenses incurred due to the incident. In most instances Claimant only provided documents or expense sheets with highlighted dates that coincided with the Penn Cove closure dates.

First, Claimant seeks reimbursement of fuel expenses of **\$2,705.13** for "truck fuel for Quilcene transport". As evidence Claimant provided a computer printout of fuel costs incurred at Corey Oil & Propane, LLC from April 25, 2012 through June 25, 2012 and Shell Fleet invoices dated May 30 and June 29, 2012.<sup>26</sup> Certain charges for diesel and gasoline are highlighted for dates from May 13, 2012 through June 6, 2012. In his original affidavit Mr. [REDACTED] explained that the wet stored clams and oysters were removed from Penn Cove and moved by truck to Quilcene Bay on or about May 16, 2012, thus incurring extraordinary fuel expenses for the trucks. In his reconsideration letter, Mr. [REDACTED] now explains that the fuel was also related to taking harvest crews back and forth between Penn Cove and Quilcene Bay and for hauling water for the wet storage of clams and oysters. Notwithstanding that the NPFC requested further documentation with a reconsideration request, Claimant provided no additional documentation or truck fuel expenses incurred during normal operations that could establish that the claimed truck fuel charges were extraordinary.

Second, Claimant seeks reimbursement of Sprint phone charges totaling **\$42.67**. Claimant submitted a single page of a Sprint computer printout dated May 21, 2012 that listed telephone charges from May 11, 2012 through May 20, 2012.<sup>27</sup> Claimant highlighted 42 phone calls made on May 13, 2012. In his reconsideration request letter, Mr. [REDACTED] explained that the calls were made on the day of the spill, which was a Sunday when he doesn't normally work. He explained that he called various people "with knowledge regarding oil spill response strategies and agency representatives in order to understand the potential impacts on Penn Cove Shellfish's farming operations and develop mitigation strategies."<sup>28</sup> However, Claimant provided no comparable documentation or information to show what normal phone charges are or to show that the claimed charges were extraordinary. The short period of the phone call listing does not provide

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<sup>25</sup> Claimant does not deny the statement in the LSU Lab report that the samples were requested for the science experiment. Also, see Claimant's tab 37, LSU testing report.

<sup>26</sup> See Attachment 24 to initial claim submission.

<sup>27</sup> See Attachment 24 to initial claim submission.

<sup>28</sup> See November 3, 2014 letter.



insight into what normal charges PCS incurs for telephone calls; therefore, there is no credible evidence to establish that these costs were extraordinary.

Third, Claimant seeks reimbursement of refrigerated truck rental charges totaling **\$2,973.16** paid to International Leasing Co. Inc. for a three week period from May 15 through June 15, 2012. Claimant provided five invoices from International Leasing Co., Inc. for the following rental periods: (1) May 15-21, 2012; (2) May 22-28, 2012; (3) May 29 – June 4, 2012; (4) June 5-11, 2012, and (5) June 6-15, 2012. There was a sixth invoice for a rental period from May 15-June 15, 2012. On the spreadsheet submitted with Attachment 24, Claimant states that the charges were for a “refer [sic] truck to replace wet storage with cold storage”. In his request for reconsideration, Claimant now states that PCS rented the truck to cold store clams and oysters because the refrigerated warehouse ran out of room and that it does not normally rent trucks; however, he provided no comparable records with information regarding truck rental costs during normal operations. Claimant provided no documentation or information to show that the rental was extraordinary. In fact a review of Claimant’s income statements reflect that PCS’ vehicle lease expenses remained the same from January 2011 through June 2012. Thus there is no credible evidence that the Claimant incurred extraordinary truck rental expenses due to the oil-pollution incident and Penn Cove closure.

In requesting reconsideration, Claimant withdrew the cost claimed for purchased water tanks. Thus, Claimant now only seeks reimbursement for the purchase of rope and clips (**\$139.96**). Claimant provided a \$139.96 receipt from Seattle Marine & Fishing Supply.<sup>29</sup> Claimant explains that the purchase was necessitated by the incident because PCS did not have the equipment to re-hang product in Quilcene since the ropes in Penn Cove were already oiled. He also states that the ropes are no longer in use because PCS doesn’t hang clams and oysters in Quilcene Bay. Claimant provided no comparable records such as monthly farm expense reports to show the absence of these types of expenditures in other periods. Doing so might have shown what normal expenses were and whether these supplies were extraordinary.<sup>30</sup> Further, the ledger pages provided by PCS regarding the clam mortality claimed show pre-printed column headers for clams in Quilcene. The evidence is more convincing that PCS does hang clams in Quilcene and the expense has not been shown to be extraordinary.

Fourth, Claimant seeks **\$11,004.12** in spill-related wage labor costs. In support of this claimed cost Claimant presented time records for its employees with certain days/times highlighted. Claimant argues that it paid many of its hourly employees to conduct activities outside their regular responsibilities, including moving wet-stored oysters and clams to Quilcene Bay.<sup>31</sup> Claimant argues that these spill-related activities diverted productive work hours away from normal company work,<sup>32</sup> thereby costing the company to pay for nonproductive labor. Claimant presented employee time sheets for the period from May1 through June 15, 2012. On reconsideration, [REDACTED] claims that the employees had to work more by pulling more lines at Quilcene due to the immaturity of the crop; and that the majority of the claimed extra labor was for travel to and from Quilcene by employees normally working at the Penn Cove location. He states that the Quilcene location is two hours each way for travel time and that the time sheets were notated with “2+2” and “travel”.

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<sup>29</sup> See Attachment 24.

<sup>30</sup> Claimant has not shown why the ropes and clips could not have been reused back in Penn Cove either.

<sup>31</sup> See initial claim submission letter.

<sup>32</sup> Claimant’s business includes shellfish farming and sales, plus construction and sales of shellfish vessels and harvest equipment.

The evidence does not demonstrate that PCS incurred **uncompensated** labor costs due to the incident. Claimant provided no credible evidence showing that it incurred extra wage costs due to the spill; i.e., that it paid these employees overtime or more than normal wages, or that it hired outside labor to perform the normal responsibilities of its employees while they were conducting activities outside their regular activities. Claimant did not provide payroll records or any other evidence that might show normal wages, rates and time worked. Generally, the timesheets do not demonstrate extra labor hours over the period presented. Claimant has not provided evidence of what his normal hourly wage labor costs are, nor that he paid more than what was "normal"; and, Claimant has not provided the documentary basis for the wage rates upon which the employees' compensation is calculated. The Claimant did not provide enough documentation for the NPFC to properly calculate employee pay or determine whether the claimed costs were extraordinary and a result of the incident.

Finally, Claimant seeks reimbursement of **\$645.15** worth of Rockpoint and Superfresh clams that it states died when they were removed from Penn Cove wet storage, held in cold storage and transported and re-hung in Quilcene Bay after the spill. Claimant asserts that on May 23, 2012, it lost 170 lbs of Rockpoint clams at a cost of \$1.95 per pound (\$331.50) and 153 lbs of Superfresh clams at a cost of \$2.05 per pound (\$313.65). Claimant provided a two-page ledger with handwritten notations on the dates of death and the number of dead clams.<sup>33</sup> The ledger shows handwritten notations of Rockpoint clams being dead on May 23, 2012 and Superfresh clams being dead on May 24. The Rockpoint clams are listed in a column with Rock Point at the header for a location that is North Dabob Bay. The Superfresh clams are listed in a column with a header of Super Fresh for a location of Quilcene Bay. These column headers appear to be pre-printed. In requesting reconsideration, Claimant states that the products were quarantined in their warehouse for three days until May 16 when WDOH authorized PCS to re-hang the products in Quilcene. Claimant now states that WDOH asked PCS to hang the product in Quilcene for a week as a safety precaution. Mr. [REDACTED] states that all the clams and oysters would have been lost to the oil spill had they not been pulled from the water. He argues that the multiple transports and storage caused the deaths. He also states that PCS normally only leaves the product in the water for a few days because longer storage can result in mortality. Mr. [REDACTED] admits that PCS occasionally experiences some mortality in wet storage.<sup>34</sup> The NPFC cannot determine the cause of the mortality or that mortality is unusual. The records do not show what normal conditions for the clams and oysters are, what normal mortality occurs, or what causes mortality. Further, with the pre-printed column headers it appears that mortality is a normally contemplated part of the business. North Dabob Bay<sup>35</sup> is not Quilcene Bay where Mr. [REDACTED] states the clams were taken. Additionally, Mr. [REDACTED] stated that PCS hadn't before and doesn't normally hang clams in Quilcene, but his own document appears to conflict with that argument. NPFC believes the pre-printing on the ledger document itself to be the more credible evidence regarding mortality. Claimant has provided no information or documentation to prove that the incident caused the mortality claimed.

NPFC finds that **\$3,971.38** of the claimed expenses represent proven increased expenses that resulted in a reduction in profits to PCS due to the oil-spill incident. All other claimed expenses are denied.

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<sup>33</sup>See Attachment 24.

<sup>34</sup>See November 3, 2014 PCS letter, p.11.

<sup>35</sup>Claimant has not referenced North Dabob Bay to NPFC during the claim process.

### May 14-15 Lost Sales Profit

The Claimant seeks **\$22,311.66** in lost profits for its unfulfilled invoiced sales for two days: \$15,019.16 is for alleged unrealized invoiced sales of mussels that were to be harvested on May 13 and to be delivered on May 14, and \$7,292.50 is alleged for the inability to sell wet-stored clams and oysters on May 15. Claimant argues that it forever lost the May 14 and May 15 sales because it halted harvest operations at Penn Cove on May 13 due to the Deep Sea incident.

In PCS's original claim submittal the NPFC interpreted the claimed \$22,311.66 in lost sales profits for May 14-15 as representative of those two sales only. Claimant acknowledged that it later sold these mussels, clams and oysters to fulfill different orders; the NPFC initially denied this component because Claimant failed to provide information as to the actual sales price realized for these products. If the actual sales price was less than the \$22,311.66 Claimant would be entitled to the difference between the original sales price and the actual price.

On reconsideration Claimant provided no additional sales data for the \$22,311.66 but argued that it forever lost the profits from all the May 14 and 15 sales that it could have made and could not fulfill due to the incident. It argues that while it did in fact sell the products originally scheduled to be delivered on May 15 at a later date the products were not sold on that Tuesday to the same customers to fulfill the same orders. They were sold for different orders that it would have fulfilled with different products in its inventory. Stated another way, Claimant argues that if not for the DEEP SEA it would have made sales and delivered product for the May 15 orders in addition to the later orders.<sup>36</sup>

Claimant ignores the fact that when Penn Cove closed on May 13 it immediately began harvesting mussels at its Quilcene Bay farm. Claimant provided no evidence that it could not fulfill its later orders. Claimant states that at the time of the incident it was not harvesting at Quilcene Bay; therefore, there was no evidence that the Penn Cove closure/Quilcene Bay harvest hindered the capacity of PCS to make additional sales and fulfill its orders during this period. As noted above, the NPFC is offering **\$118,221.03** in loss of profits for the three-week Penn Cove closure, thus it is providing compensation for the loss period.

### ***Conclusion***

Claimant seeks more than \$590,000 in lost profits. Importantly, PCS immediately began harvesting at Quilcene Bay in order to maintain its customer base and to fulfill its orders. Because the Quilcene Bay mussels were harvested six to eight weeks early there is evidence that PSC did suffer a yield loss that resulted in some loss of profits.

While the Penn Cove closure lasted about three weeks (which is just less than a month), an analysis of Claimant's annual profits for 2011, 2012 and 2013 provide probative evidence of its comparable monthly profits. PCS's annual profit for 2011 was \$972,034, which equals a monthly


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<sup>36</sup> Claimant cites two cases in support of this argument, neither of which is apposite in this claim: *Precision Pine & Timber, Inc. v. U.S.*, 72, Fed. Cl. 460 (Fed. Cl. 2006) and *R.E. Davis Chemical Corp. v. Diasonics, Inc.*, 924 F. 2d 709 (C.A. 7 (Ill.) 1991). In both cases plaintiffs were lost volume sellers who suffered lost profits when the defendants breached contracts for the sale of goods and plaintiffs argued that it was inadequate to calculate a seller's loss by only taking into account whether seller was able to sell the product at a later time but was also entitled to the profits from subsequent sales as well. In this case the NPFC is offering \$118,221.03 to compensate Claimant for lost profits it suffered for the three week-closure.



average of **\$81,002**; in 2012 PCS made a net farm profit of \$901,254, with a monthly average of **\$75,105**. In 2013, PCS made a net farm profit of \$1,450,231, which equals a monthly average profit of **\$120,852**.

In summary and based on the evidence in the record the NPFC determines that it will offer **\$118,221.03** for lost yield profits and **\$3,971.38** in extraordinary expenses for a total of **\$122,192.41** for Claimant's 2012 loss of profits due to the incident. This is based on credible evidence in the administrative record which was provided by Claimant.

Claim Supervisor: 

Date of Supervisor's review: 4/22/15

Supervisor Action: *Approved*

Supervisor's Comments: