U.S. Department of
Homeland Security

**United States
Coast Guard**

Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 202-493-6839
E-mail: [redacted]@uscg.mil
Fax: 202-493-6937

5890
3/28/2011

Mr. Lewis McGonagle
c/o Ms. Maria Starczewski
[redacted]

RE: Claim Number: A08003-0018

Dear Mr. McGonagle:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number A08003-0018 involving COSCO BUSAN. Please see the attached Claim Summary / Determination Form for the rationale regarding the denial.

You may make a written request for reconsideration of the claim. The reconsideration must be received by the NPFC within 60 days of the date of the letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request. Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number A08003-0018.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

[redacted]

Claims Manager
U.S. Coast Guard

Encl: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Date	: 3/28/2011
Claim Number	: A08003-0018
Claimant	: Mr. Lewis McGonagle
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: Alyssa Lombardi
Amount Requested	: $9,528.75

FACTS

At approximately 1251 local time on Wednesday, 07 November 2007, the container ship COSCO BUSAN allided with the fender system of the Delta Tower of the San Francisco-Oakland Bay Bridge, causing a breach in the port side shell.[1] As a result of the breach, approximately 53,570 to 58,000 gallons of medium grade fuel oil (MFO) were discharged from fuel oil tank #4 into the San Francisco Bay, a navigable waterway of the United States.[2] The Coast Guard designated Regal Stone Limited (Regal) as the responsible party (RP) for the discharge. Regal accepted the designation and advertised its OPA claims process. Hudson Marine Management Services (HMMS) accepted and adjudicated claims on behalf of the RP, compensating claimants.[3]

CLAIM AND CLAIMANT

On 26 October 2011, Ms. Marja Starczewski submitted a loss of profits & earnings claim for her client, Mr. Lewis McGonagle (Claimant), a licensed fisherman in northern California (District 9), in the amount of $9,528.75 to the National Pollution Funds Center (NPFC) for reimbursement. Prior to that, in early December 2008, the claim had been submitted to the RP for consideration, but was denied on or about 10 March 2010.[4] Claimant asserts he lost wages due to the oil spill, because fishermen who usually fished in central California (District 10-including the San Francisco Bay) moved their fishing operations to northern California (District 9 – including the Eureka, Trinidad and Crescent City areas), and this influx of fishermen caused overfishing and decreased the amount of crab he would have normally caught.

APPLICABLE LAW

The Oil Pollution Act of 1990 (OPA) provides that each responsible party for a vessel or facility from which oil is discharged into or upon the navigable waters or adjoining shorelines or exclusive economic zone is liable for removal costs and damages. 33 U.S.C. § 2702(a). Damages include the loss of profits or impairment of earning capacity due to the injury,

[1] See USCG National Response Center Case # 853865 and USCG Sector San Francisco Case Report # 381733, both dated 11/07/2007.

[2] See USCG SITREPS/POLREPS 1 through 56 for Federal Project Number A08003.

[3] See letter from Joe Walsh, attorney representative for the RP, to Ms. Alyssa Lombardi, NPFC, dated and sent via email on 12/15/2010.

[4] See cover letter for additional documentation, dated 01/17/2011, and submitted via email to the NPFC by HMMS for the RP on 1/17/2011.

destruction or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant. 33 U.S.C. § 2702(b)(2)(E).

The OSLTF, which is administered by the NPFC, is available to pay claims for uncompensated damages pursuant to 33 U.S.C. §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136. With certain exceptions a claim must first be presented to the responsible party. 33 U.S.C. § 2713(a). If the claim is either denied or not settled by any person by payment within 90 days after the date on which it was presented, the claimant may elect to commence an action in court or present the claim to the OSLTF. 33 U.S.C. § 2713(c).

Pursuant to the claims regulations, 33 C.F.R. § 136.233, a claimant must establish the following to prove loss of profits or impairment of earning capacity:

(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 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 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.

Under 33 C.F.R. § 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 C.F.R. § 136.235, the amount of compensation allowable for a claim involving loss of profits or impairment of earning capacity 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.

DETERMINATION OF LOSS:

Claimant's Submission

To support his claim, Claimant submitted: a cover letter; a copy of the Optional OSLTF Claim Form; a copy of the denial letter from HMMS to Mr. Anthony Urie, dated 8/26/2010; a copy of a

letter from Mr. Anthony Urie to HMMS, dated 7/29/2010; copies of the California Department of Fish and Game (CA DFG) Fishing License Renewal for Claimant, approved 3/07/2007; copies of the OR Department of Fish and Wildlife (OR DFW) Limited Entry Dungeness Crab permit and Individual Commercial Fishing and Commercial Fishing Boat licenses; a copy of the Attorney Authorization forms; copies of the State of Oregon Driver License for Claimant and Mrs. Elma McGonagle; copies of the OR DFW Landing Records for 2004-2008; a copy of the USCG Vessel certification for the F/V Takli, dated 1/16/2007; a copy of the claim submission package sent to HMMS; a copy of Judge Holland's Order Number 187, *in re the Exxon Valdez*; a copy of Judge Holland's Order Number 188, *in re the Exxon Valdez*; a copy of the study by Humboldt State University Professor Steven C. Hackett, Ph.D.; a copy of the Crab Summary of Non District 10 Fishermen list; and a copy of the List of Potential Witnesses to Damages Suffered by All Claimants.

NPFC Determination

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. Under 33 CFR § 136.233, a claimant must establish loss of profits or impairment of earning capacity. The NPFC considered all the documentation submitted by Claimant, as well as the documentation submitted by HMMS and reviewed publically available State of California statistics on the subject fishery.

In 2007, the District 9 Commercial Dungeness crabbing season was originally scheduled to open on 01 December 2007. However, because of the oil spill (approximately 250 miles south) and resulting District 10 closure, it actually opened early on 28 November 2007 at 0800, 64 hours in advance of the scheduled start.[5] District 10 (San Francisco Bay area) fishing operations, which were scheduled to open between 15 November and 01 December 2007, were closed by Executive Order S-14-07 of California Governor Arnold Schwarzenegger on 13 November 2007.[6] However, on 29 November 2007, which was two days before the originally scheduled opening, the District 10 Dungeness crabbing area re-opened until the end of the season on June 30, 2008, after assessment by the California Department of Fish and Game (CA DFG) in consultation with the California Office of Environmental Health Hazard Assessment, as it posed no significant health risk to human consumption.[7]

The evidence provided by Claimant included a statistical landing analysis to support a six percent reduction in pounds of crab landed by a select 25 District 9 fishing vessels, comparing the first two weeks of both December 2006 and December 2007.[8] The analysis does not address any trends, issues or time periods other than reported figures from 25 vessels and their catch data for the first 15 days of December. An additional ten vessels were included on the list with varying degrees of information (to make 35 vessels total), but those vessels were not included in

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[5] See CA DFG Notice to All Interested and Affected Parties, signed by Mr. John McCamman, CA DFG, on 11/26/2007.

[6] See State of California Executive Order S-14-07, signed by Gov. Arnold Schwarzenegger on 11/13/2007.

[7] See CA DFG Memorandum Re: Fisheries Suspension Lift for the 2007-2008 Season, written by Mr. John McCamman, Director, CA DFG, on 11/29/2007.

[8] See Study by Preeminent Economist, Professor Steven C. Hackett, Ph.D., submitted with the claim to the NPFC by the claimant on 10/26/2010.

the analysis because eight did not have usable data and two were considered outliers. Claimant's name is not on this list, so an analysis could not be made.

In order to more fully consider the arguments of Claimant, the NPFC looked at the broader data comparison between years and between areas of landings; specifically, the NPFC reviewed Dungeness crab catch data for 2007 from District 10, where the oil spill occurred, and District 9, where the claimant argues a loss of earnings.

The CA DFG reports that Dungeness crab landings in both District 9 and District 10 increased in December 2007 over the poundage landed in 2006.[9] Additionally, though it also shows the amount of landings in pounds were more than double in District 9 in the 2006-2007 season (7,029,287 lbs) from the 2007-2008 season (4,083,712 lbs), it is important to point out that this decrease was seen in both districts—the oil-affected District 10 (from 3,744,773 lbs to 1,998,610 lbs), and the non-oiled District 9.[10] District 9 saw an approximate drop of 42% in landings from 2006-2007 season to 2007-2008 season, while District 10 saw an approximate drop of 53% in landings. Claimant's Dungeness crab landings from 2006 to 2007 follow this same pattern: he landed 27,471 lbs in the 2006-2007 season and only 20,322 lbs in 2007-2008 season, an approximate loss of 40%.[11] Thus, Claimant has not provided that he lost income, overall, compared to the general trend found in the State of California for the two seasons.

The CA DFG reports that Dungeness crab landings in both District 9 and District 10 increased in December 2007 over the poundage landed in 2006.[12] Additionally, though it also shows the amount of landings in pounds were more than double in the 2006-2007 season from the 2007-2008 season, it is important to point out that this decrease was seen in both districts—the oil-affected District 10, and the non-oiled District 9.[13] CA DFG published information also reports that the number of resident Dungeness Crab Vessel Permits for District 9 declined from 106 in 2006 to 105 in 2007,[14] and that statewide, the number of these permits declined from 518 in 2006 to 505 in 2007.[15] The state reports also shows that, overall, District 9 and District 10, as well as the state as a whole, had comparable relative changes to the overall Dungeness crab landings for the December through June 2007 season, again seeming to indicate little or no regional impacts.

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[9] From 2,275,836 in 2006 to 2,750,790 in 2007 for District 9; from 447,982 in 2006 to 647,543 in District 10. Information retrieved on 3/09/2011 from CA DFG website: http://www.dfg.ca.gov/marine/landings06.asp and http://www.dfg.ca.gov/marine/landings07.asp.

[10] Information retrieved on 3/09/2011 from CA DFG website: http://www.dfg.ca.gov/marine/landings06.asp, http://www.dfg.ca.gov/marine/landings07.asp and http://www.dfg.ca.gov/marine/landings08.asp.

[11] See OR DFW Landing Records for 2004-2008, submitted with the claim to the NPFC by the claimant on 10/26/2010.

[12] From 2,275,836 in 2006 to 2,750,790 in 2007 for District 9; from 447,982 in 2006 to 647,543 in District 10. Information retrieved on 3/09/2011 from CA DFG website: http://www.dfg.ca.gov/marine/landings06.asp and http://www.dfg.ca.gov/marine/landings07.asp.

[13] Information retrieved on 3/09/2011 from CA DFG website: http://www.dfg.ca.gov/marine/landings06.asp, http://www.dfg.ca.gov/marine/landings07.asp and http://www.dfg.ca.gov/marine/landings08.asp.

[14] See CA DFG District Landing spreadsheet, as provided HMMS by Ms. Deborah Manes, CA FCG, on 1/05/2009, submitted to the NPFC by Mr. Bill Bernard, HMMS, via email, on 2/18/2011.

[15] "Commercial Fishing Licenses and Permits" PDF retrieved on 3/08/2011from CA DFG website: http://www.dfg.ca.gov/licensing/pdffiles/cf_items_10yr.pdf.

For this claim to be considered OPA-compensable, Claimant would not only need to provide documentation to show that he lost profits (i.e. his own personal landing logs showing a loss in the 2007-2008 crabbing season), but also the documentation to quantify his alleged loss of profits and earnings totaling $9,528.75 (i.e., W2s, copies of canceled checks, bank statements, etc.). Unless a Claimant is able to quantify this alleged loss, the claimant has not met the requirement of 33 C.F.R. § 136.233 (with emphasis on subparagraph "b" of the same regulation).

The claim is denied. Claimant has not established that his income was reduced as a consequence of injury to, destruction of or loss of property or natural resources, nor the amount of that reduction. 33 CFR 136.233(b). Additionally, Claimant has failed to establish the amount of the claimant's profits and 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. 33CFR136.233(c).

Determination amount: $0.00 Amount denied: $9,528.75

Claim Supervisor: [redacted]
Date of Supervisor's review: 3/28/11
Supervisor Action: Denial affirmed
Supervisor's Comments: