

CLAIM SUMMARY / DETERMINATION FORM

Date	: 12/4/2008
Claim Number	: G08005-001
Claimant	: Stan's Dock
Type of Claimant	: Corporate (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: Eric Bunin
Amount Requested	: \$10,000.00

FACTS:

Incident Summary:

On March 21, 2008, Coast Guard SFO Grand Haven received a report of a tribal commercial fishing vessel sinking at the dock in Pere Marquette Lake at Ludington, MI. The F/V Mercury, owned by Larry Smith, contained approximately 100 gallons of diesel. A small amount of diesel discharged into the lake, a navigable water of the United States. As owner of the source of the discharge, Mr. Smith is the responsible party (RP) for the incident. Mr. Smith was not responsive, so the Coast Guard took control of the response and hired American Waste DBA Northern A1 to clean up the spill.

Claimant:

The claimant is a business with an agricultural lime dock on the Pere Marquette Bayou. It is owned by Stan and Helen Carey.

Claim:

The claimant alleges that it lost profits due to the oil spill when the barge that was to deliver its supply of agricultural lime could not get to its dock. The claimant alleges that it lost sales of the lime to its customers. The NPFC received the claim on June 9, 2008. At that time, the NPFC determined that the claimant had not properly presented its claim to the RP, so it instructed the claimant to do so, and held the claim for 90 days. The claimant sent a claim to the RP on June 18, 2008, but to date the RP has not settled it.

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:

To prove entitlement to payment for loss of profits or impairment of earning capacity, a claimant must show that the discharge or the substantial threat of discharge of oil into a navigable water of the U.S. resulted in the damages claimed. A key element of this issue is that the oil pollution must have caused the claimed loss. The loss cannot be the result of something other than the oil. In this case, it is clear that the inability of the barge, containing the claimant's agricultural lime, to reach the dock was not caused by the oil pollution incident. In an effort to prove that the oil pollution incident caused it to lose a shipment of agricultural lime, the claimant provided a faxed statement from the Pere Marquette Shipping Company. The statement does not bolster the claimant's assertion because the June 4, 2008 fax merely states, "If dock space would have been available in Ludington, MI it was Pere Marquette Shipping's intent to deliver the product for S & H Dock Co." There is no indication that the oil pollution quashed this intent. The reason given for the failure to deliver is that dock space was unavailable. Additionally, the Coast Guard (CG) situation reports for the pollution incident, SITREP-POL three on March 28, 2008 and SITREP-

POL four on April 4, 2008, both state, "Waterway remains open to all traffic." There is no indication from the CG that the waterway was closed to any traffic.

The NPFC contacted the local Coast Guard office to gain an understanding of the incident facts and the circumstances in the area around the sunken vessel and the claimant's dock. Petty Officer Blanchard from Coast Guard SFO Grand Haven, Michigan confirmed via email that the barge did not deliver the claimant's product because of the concern that the submerged vessel posed a hazard to navigation. It was the submerged vessel's presence alone and not pollution that prevented the barge from reaching the claimant's dock. Even if there had been no oil aboard the vessel, the barge still would not have delivered to the claimant's facility. Therefore, the oil pollution did not cause the claimant any losses.

Because the claim does not satisfy the threshold requirement that oil must have caused any losses for them to be compensable, we withhold judgment on whether the claimant actually lost profits and, if so, the amount of those losses. The claim must regrettably be denied.

AMOUNT: \$0.00

DETERMINATION:

The claim is denied for failure to prove that the claimed lost profits were caused by a discharge or substantial threat of the discharge of oil into a navigable water of the U.S. Any potential losses were the result of other causes such as the hazard to navigation posed by the submerged vessel.



Claim Supervisor: Thomas S. Morrison
Date of Supervisor's review: 12/9/08
Supervisor Action: DENIAL APPROVED
Supervisor's Comments:

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center
United States Coast Guard

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5890
12/9/2008

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Number: 7003 3110 0000 0018 9272

Stan's Dock
ATTN: Stan and Helen Carey
P O Box 216
Morley, MI 49336

RE: Claim Number: G08005-001

Dear Stan and Helen Carey:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number G08005-001 involving the sunken F/V Mercury. Compensation is denied for the reasons stated in the enclosed Claim Summary/Determination Form.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter or within 30 days of the date you receive this letter, whichever date is earlier, 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 G08005-001.

Mail reconsideration requests to:

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

Sincerely,


Eric D. Bunin
Claims Manager
U.S. Coast Guard

Encl.: Claim Summary/Determination Form