

U.S. Department of
Homeland Security

**United States
Coast Guard**



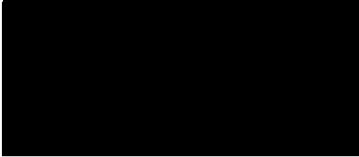
Director
National Pollution Funds Center
United States Coast Guard

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 7872

5890
25 June 2012

B&E Seafood, Inc.



RE: Claim Number: N10036-1763

Dear Ms. Edmunds:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on the claim number N10036-1763 involving Deepwater Horizon. Please see the attached Claim Summary / Determination Form for further explanation.

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 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 N10036-1763.

Mail reconsideration requests to:

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



Claims Adjudication Division
National Pollution Funds Center
U.S. Coast Guard

Enclosure: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1763
Claimant	: B&E Seafood, Inc.
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$120,507.54

FACTS

On or about 20 April 2010, the Mobile Offshore Drilling Unit Deepwater Horizon (Deepwater Horizon) exploded and sank in the Gulf of Mexico. As a result of the explosion and sinking, oil was discharged. The Coast Guard designated the source of the discharge and identified BP as a responsible party (RP). BP accepted the designation and advertised its OPA claims process. On 23 August 2010, the Gulf Coast Claims Facility (GCCF) began accepting and adjudicating certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT

On 13 April 2012, Walter M. Beckham and Kenneth A. Edmunds, on behalf of B&E Seafood, Inc. (jointly referred to as 'the Claimant') presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$120,507.54 for loss of profits and impairment of earning capacity resulting from the Deepwater Horizon oil spill. The Claimant is a wholesaler of hard clams that are raised in aquaculture 'farms' in the Gulf of Mexico, near Cedar Key, Florida. The Claimant asserts that it lost income resulting from customer fears of tainted seafood and potential health hazards.¹

APPLICABLE LAW

Under the Oil Pollution Act of 1990 (OPA), at 33 U.S.C. § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into or upon the navigable waters or adjoining shorelines or the exclusive economic zone, as described in § 2702(b) of OPA.

The OSLTF which is administered by the NPFC, is available, pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, to pay claims for uncompensated damages. One type of damages available pursuant to 33 C.F.R. § 136.231 is a claim for loss of profits or impairment of earning capacity due to injury to or destruction of natural resources.

Under 33 C.F.R. § 136.233 a claimant must 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 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

¹ B&E Seafood, Inc. letter to the NPFC, dated 13 February 2012 and received 13 April 2012. This letter also assigned Vanessa Edmunds as the Contact for the claim.

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 the OSLTF

To support this claim, the Claimant presented the following documentation:

- Submission letter to NPFC dated 13 February 2012 and received on 13 April 2012.
- 2010 Corporate Tax Return, Form 1120S with Schedules.
- 2010 For Profit Corporation Annual Report (Florida) filed 26 March 2010.
- 2011 For Profit Corporation Annual Report (Florida) filed 4 April 2011.
- 22 November 2010 letter to the GCCF (Aquaculture Background).
- Letter from Florida Department of Agriculture to the GCCF dated 15 November 2010.
- B&E Seafood, Inc. letter, "To Whom It May Concern", dated 25 October 2011.
- GCCF Interim Payment Claim Form dated 26 October 2011.
- B&E Seafood, Inc. undated List of Attachments.
- B&E Seafood, Inc. Sales by Customer Summary, April 2006 through March 2010.
- B&E Seafood, Inc. Sales by Customer Summary, April 2010 through September 2011.
- B&E Seafood, Inc. P&L Statement for April 2008 through March 2009.
- B&E Seafood, Inc. P&L Statement for April 2009 through March 2010.
- B&E Seafood, Inc. P&L Statement for April 2010 through March 2011.

- Letter from Two Cousins Fish Market, Inc., “To Whom It May Concern”, dated 18 March 2011.
- Letter from All Shores Seafood, “To Whom It May Concern”, dated 18 March 2011.
- Florida License to Wholesale Saltwater Products Pursuant to Chapter 370, F.S., issued 4-23-2007.
- Florida License to Wholesale Saltwater Products Pursuant to Chapter 370, F.S., issued 6-10-2008.
- Florida License to Wholesale Saltwater Products Pursuant to Chapter 370, F.S., issued 6-29-2009.
- Florida License to Wholesale Saltwater Products Pursuant to Chapter 370, F.S., issued 3-1-2011.

On 13 April 2012, the Claimant presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$120,507.54 for loss of profits and impairment of earning capacity resulting from the Deepwater Horizon oil spill. The Claimant is a wholesaler of hard clams that are raised in aquaculture ‘farms’ in the Gulf of Mexico, near Cedar Key, Florida. The Claimant asserts losing income from the date of the oil spill through October 2011 due to a drop in demand resulting from customer fears of tainted seafood and potential health hazards.

The Claimant indicated that an Emergency Advance Payment (EAP) Claim was submitted to the GCCF in November 2010, resulting in a payment of \$19,500. The Claimant also indicated that an Interim [Payment] Claim (IP Claim) was submitted to the GCCF on 31 October 2011. Further, the Claimant indicates that absolutely no action has been taken on the IP Claim.²

The NPFC conducted an independent investigation of claim presentation and payments. The NPFC confirmed presentment to the GCCF of an EAP Claim on 22 November 2010, assigned GCCF Claim No. 519463, and an IP Claim on 31 October 2011, assigned GCCF Claim No. 9530234. The NPFC also confirmed that the GCCF applied Claimant Identification No. 3396044 to both of those claims.³ The NPFC also reviewed the IP Claim presented to the GCCF and confirmed that the claim amount of \$120,507.54 had been presented to the GCCF.⁴

Although the EAP Claim was not provided, the NPFC also confirmed that the amount of the EAP Claim presented to the GCCF was \$211,086.00.⁵ Based upon the information provided and independent verification by the NPFC, this claim can be adjudicated in the full amount of damages presented to the NPFC, \$120,507.54 and is outcome determinative for both the Claimant’s EAP and IP Claims.

NPFC Determination

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.

² B&E Seafood, Inc. letter to the NPFC, dated 13 February 2012 and received 13 April 2012.

³ Transition Program – U.S. Coast Guard Report as of 1 May 2012.

⁴ GCCF Interim Payment Claim Form dated 26 October 2011.

⁵ Transition Program – U.S. Coast Guard Report as of 1 May 2012.

After an initial review, the NPFC sent the Claimant a letter requesting additional information to further evaluate the claim. The letter requested, among other things, additional financial documentation to support that the Claimant sustained lost profits & earnings, as well as other documentation supporting and explaining how the Deepwater Horizon oil spill caused the Claimant's losses. The Claimant was given 14 days to respond to the letter, dated 14 May 2012.⁶ To date, no response has been received.

The NPFC has considered all documentation and information presented by the Claimant.

This claim is denied because the Claimant failed to prove the amount of the alleged loss and failed to prove that the alleged loss was due to the Deepwater Horizon oil spill.

Failure to Prove Loss of Earnings

The Claimant asserts a loss of income from April 2010 through March 2011 due to the Deepwater Horizon oil spill.⁷ The Claimant provided the company's 2010 federal tax return; however, tax returns for the two previous years were requested but not provided for comparison.

The Claimant also provided 12-month Standard Profit & Loss Statements for April through March of 2008-2009, 2009-2010, and 2010-2011. Those dates are consistent with two 12-month periods before the oil spill and one 12-month period after the oil spill. However, the standard P&L statements do not show monthly changes, including when impacts of the oil spill may have begun, as well as possible impacts of other, non-oil spill events/impacts and seasonal variations.

To see those things, the NPFC requested monthly P&L Statements for 2008 through 2011 and 2012 to date, but those statements have not been provided. The NPFC also requested landing reports for the harvested clams for 2008 through 2011, which would indicate the amount of clams purchased, as well as the prices paid during those months. To date, those landing reports have not been provided.

The Claimant has not provided sufficient financial documentation on which the alleged loss can reasonably be measured and verified; therefore, the alleged losses are not proven. If the Claimant submits a Request for Reconsideration to the NPFC, additional financial evidence, such as federal tax returns, monthly P&L statements, and landing reports over the period from 2008 through 2011 must be submitted in order for this claim to be successful.

Failure to Prove Causation

The Claimant asserts that its alleged loss of income is due to the oil spill.⁸ The NPFC will not presume causation or lack thereof based upon business type or location. Causation is an element of every claim that must be proven the Claimant. Statements without supporting documentation are not satisfactory to prove that the alleged loss was caused by the oil spill.

⁶ NPFC letter to Claimant dated 14 May 2012.

⁷ B&E Seafood, Inc. letter to the NPFC, dated 13 February 2012 and received 13 April 2012 and GCCF Interim Payment Claim Form dated 26 October 2011.

⁸ B&E Seafood, Inc. letter to the NPFC, dated 13 February 2012 and received 13 April 2012 and GCCF Interim Payment Claim Form dated 26 October 2011.

The Claimant provided a letter of support from the Florida Commissioner of Agriculture, stating that the farm-raised hard clam industry has been threatened by the BP oil spill with demand for Florida clams having dropped 25 to 30 percent and that further effects will be realized in 2011 and 2012.⁹

The Claimant provided two letters from customers to whom it sells clams, one in New York and the other in California. According to the New York customer's letter of March 2011, demand for Florida farm-raised littleneck clams dropped about 55 – 65% comparing the January to March of 2010 to January to March of 2011. Further, they attribute that drop directly to customer apprehension to purchase seafood from the Gulf due to the Deepwater Horizon oil spill. It states, "We have constantly received requests not to provide Gulf seafood (not only shellfish, but finfish and shrimp as well)."¹⁰

According to the California customer's letter of March 2011, they had experienced a steady increase in year to year purchases from B&E Seafood over 9 years; however, over the last 12 months there has been a steady decline in orders of farm raised clams. This customer offers, "Year-to-date 2011 purchases from B&E Seafood are nearly 20% lower than 2010." The letter also states that they cannot provide documentation as proof, but they feel the drop in sales is possibly the direct result of lack of consumer confidence in the safety of Gulf Coast seafood as a consequence of the Deepwater Horizon oil spill.¹¹

According to customer sales summaries before and after the oil spill provided by the Claimant, sales to those two customers dropped measurably in the 18 months that followed the oil spill.¹² Sales to the California customer fell 24.4%¹³ and sales to the New York customer fell by 9.4%.¹⁴ The California customer alone had historically purchased 47.7% of the Claimant's gross sales.¹⁵

The Claimant has not provided documentation of sales that supports the summaries provided and the NPFC notes that one of the two letters provided is attributed neither to an owner nor a manager and is not signed. Additionally, the NPFC requested that the Claimant provide information on any cancelled sales with a connection to the oil spill and other documentation that evidences impacts of the oil spill, as well as an explanation of how other factors might be differentiated from any oil spill effects. Finally, the NPFC asked for a contact list of wholesalers or other clients to whom the Claimant sells. To date, the requested information has not been received.

⁹ Letter from Charles H. Bronson, Florida Commissioner of Agriculture to the GCCF dated 15 November 2010.

¹⁰ Two Cousins Fish Market, Inc.(Freeport, NY, on Long Island), letter to B&E Seafood, Inc. dated 18 March 2011.

¹¹ All Shores Seafood (San Bruno, CA, San Francisco Bay Area) letter to B&E Seafood, Inc. dated 18 March 2011.

¹² B&E Seafood, Inc. Sales by Customer Summaries, April 2006 through March 2010 and April 2010 through September 2011, both dated 25 October 2011.

¹³ Based on 48-month pre-spill sales to All Shores Seafood of \$2,242,971.65 and 18-month post-spill sales of \$635,815.92.

¹⁴ Based on 48-month pre-spill sales to Two Cousins Fish Market, Inc.'s of \$285,119.21 and 18-month post-spill sales of \$96,880.70.

¹⁵ Based on 48-month pre-spill sales to All Shores Seafood of \$2,242,971.65 and all customer sales during 48 months before the spill of \$4,702,451.74.

The Claimant has not proven that the Deepwater Horizon oil spill was the cause of its alleged losses. If the Claimant submits a request for Reconsideration to the NPFC, evidence linking its loss to the Deepwater Horizon oil spill must be submitted in order for his claim to be successful.

This claim is denied because (1) the Claimant has failed to demonstrate its alleged loss through financial documentation; and (2) the Claimant has failed to demonstrate that their alleged loss is due to injury or destruction or loss of real or personal property or a natural resource as a result of a discharge or a substantial threat of a discharge of oil (i.e., the Deepwater Horizon oil spill).

Claim Supervisor: *NPFC Claims Acquisition Division*

Date of Supervisor's Review: *6/25/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments: