

U.S. Department of  
Homeland Security

United States  
Coast Guard



Director  
National Pollution Funds Center  
United States Coast Guard

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US COAST GUARD  
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5890/DWHZ  
31 May 2013

Infinite Energy, Inc.



Re: Claim Number: N10036-1932

Dear Mr. Adam Lee,

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 N10036-1932 involving the Deepwater Horizon oil spill. 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 N10036-1932.

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

## CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1932
Claimant	Infinite Energy, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$240,367.80

### ***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 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.

On 08 March 2012, the United States District Court, Eastern District of Louisiana issued a "Transition Order" (TO) limiting the GCCF's ability to accept, process, or pay claims except as provided in that order. The TO created a Transition Process (TP) to facilitate the transition of the claims process from the GCCF to a proposed Court Supervised Settlement Program (CSSP). The Court granted Preliminary Approval of the proposed settlement agreement on 02 May 2012, and the CSSP began processing claims on 04 June 2012.

### ***CLAIM AND CLAIMANT***

On 4 May 2013, Mr. Adam Lee, on behalf of Infinite Energy, Inc., (collectively "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$240,367.80 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.<sup>1</sup>

The Claimant is a supplier of natural gas throughout Florida, Georgia, New York, New Jersey and Texas. The Claimant alleged that following the oil spill, "many of its [Florida] customers either went out of business or burned less gas as a result of the oil spill."<sup>2</sup>

In order to calculate the extent of their alleged loss, the Claimant identified accounts with zip codes within fifty miles of the Florida gulf coast. The Claimant determined that it lost \$3,015,668.99 from these accounts from April 21, 2010 through October of 2010. This loss of revenue resulting in the Claimant sustaining a loss of profits of \$240,367.80, which the Claimant now seeks to recover from the NPFC.<sup>3</sup>

### ***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 water, adjoining shorelines, or the exclusive economic zone of the United States, as described in § 2702(b) of OPA.

<sup>1</sup> Optional OSLTF Claim Form, received on 4 May 2013.

<sup>2</sup> Optional OSLTF Claim Form, received on 4 May 2013.

<sup>3</sup> Claim methodology document.

The OSLTF 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. 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 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; and
- (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.

Under 33 U.S.C. § 2712(f), payment of any claim or obligation by the Fund under OPA shall be subject to the United States Government acquiring, by subrogation, all rights of the claimant or State to recover from the responsible party.

## ***DETERMINATION OF LOSS***

### **Claimant's Submission to the NPFC**

The Claimant submitted the following documentation in support of this claim:

- Optional OSLTF Claim Form, received on 14 May 2013;
- Monthly Income Statement, Comparative Condensed 2008 - 2012;
- Federal Income Tax Returns, 2008 – 2012;
- Methodology for obtaining data to support Infinite Energy's claim against BP.

The Claimant alleged that this claim was first presented to the responsible party on 11 July 2012. According to the Claimant, the responsible party denied payment on the claim on 28 March 2013.<sup>4</sup>

The Claimant submitted this claim to the NPFC on 4 May 2013. The NPFC does not have information sufficient to verify that the claim was indeed first presented to and denied by the responsible party. However, the NPFC will assume that OPA presentment requirements have been satisfied and shall adjudicate this claim to the extent that the claim before the NPFC is the same claim as was previously presented to and denied by the responsible party. If any damages subject of this claim were not included in a claim previously filed with and denied by the responsible party, these damages are denied for improper presentment.<sup>5</sup>

### **NPFC Determination**

Under 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136, a claimant must prove that any loss of income was due to injury, destruction or loss of real or personal property or of a natural resource as a result of a discharge or substantial threat of a discharge of oil. Under 33 C.F.R. § 136.105(a) and § 136.105(e)(6), the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

In order to prove a claim for loss of profits or impairment of earning capacity damages, a Claimant must provide evidence sufficient to prove (1) that the Claimant sustained a loss or reduction in income, and (2) that the financial loss was caused by damage to real property or natural resources resulting from the discharge or substantial threat of discharge of oil. This claim is denied as the Claimant has failed to provide evidence sufficient to meet either criterion.

#### **1. Failure to prove a financial loss.**

In order to prove a financial loss under OPA, a Claimant must provide evidence to indicate that the Claimant's income was reduced as evidenced by "the claimant's profits or earnings in comparable [unaffected] periods."<sup>6</sup> Furthermore, compensation is limited to "the actual net reduction or loss of earnings or profits suffered."<sup>7</sup>

An analysis of the Claimant's profit and loss statements indicate that the Claimant's income did not decrease at any point from May to December of 2010 as compared to 2009 or 2011. Rather, it appears as though the Claimant's total revenue and gross profits were higher from May to December of 2010 than for the same period in either 2009 or 2011.<sup>8</sup> If the Claimant sustained losses in spite of revenue increases, these losses would have been a result of increased business costs and expenses, which the Claimant has not linked to the oil spill.

Even if the Claimant had proven that business from a particular sector of its client base in fact decrease following the oil spill, there does not appear to have been an impact on the Claimant's net earnings, meaning that the Claimant did not sustain a potentially compensable loss of profits or earnings for the purposes of OPA.

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<sup>4</sup> Optional OSLTF Claim Form, received on 4 May 2013.

<sup>5</sup> 33 C.F.R. § 136.103(c)(2).

<sup>6</sup> 33 C.F.R. § 136.233(c).

<sup>7</sup> 33 C.F.R. § 136.

<sup>8</sup> The Claimant brought in \$303,692,007.17 from May to December of 2010, compared to \$277,480,313.96 for the same period of 2009 and \$262,506,435.89 in 2011.

2. Failure to prove a loss of profits as a result of the Deepwater Horizon oil spill.

In addition to proving an actual financial loss, a claimant must also prove that the loss was due to damage to property or natural resources caused by the discharge or substantial threat of discharge of oil.

In linking their losses to the oil spill, the Claimant assumes that customers located within 50 miles of the Florida Gulf Coast who burned less gas, did so as a result of the spill. However, the Claimant does not provide any evidence to support this conclusion. The location of the Claimant's customers does not, in and of itself, prove that the Claimant's business sustained losses caused by damage to property or natural resources resulting from oil discharged into the Gulf of Mexico during the Deepwater Horizon oil spill.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that they sustained a financial loss in the amount \$240,367.80, or (2) that the alleged loss is due to the injury, destruction, or loss of property or natural resources as a result of a discharge or substantial threat of discharge of oil.

Claim Supervisor: *NPFC Claims Adjudication Division* 

Date of Supervisor's Review: *5/31/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments: