U.S. Department of Homeland Security

United States Coast Guard

Director
National Pollution Funds Center

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5890
October 16, 2014

[redacted]

RE: NPFC CLAIM # E12205-0001

[redacted]

Dear Mr. Gonzalez:

The National Pollution Funds Center (NPFC) in accordance with the Oil Pollution Act (OPA) (33 U.S.C. 2701 et seq.), has determined that it will offer $8,786.93 for OPA claim number E12205-0001. This reconsideration determination is based on an analysis of information submitted. All costs that are not determined as compensable are considered denied. Disposition of this reconsideration constitutes final agency action.

If you accept this offer please sign the enclosed Acceptance / Release Agreement where indicated and return to:

Director
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100

If we do not receive the signed original Acceptance / Release Agreement within 60 days of the date of this letter, the determination is void. If the determination is accepted, an original signature and a valid tax identification number (EIN or SSN) are required for payment. If you are a Claimant that has submitted other claims to the National Pollution Funds Center, you are required to have a valid Contractor Registration record prior to payment. If you do not, you may register free of charge at www.SAM.gov. If the determination is accepted, your payment will be mailed within 30 days of receipt of the Release Agreement.

If you have any questions or would like to discuss the matter, you may contact me at the above address or by phone at 1-800-280-7118.

Sincerely,

[redacted]

Mark Erbe
Claims Manager
U.S. Coast Guard
By direction

Enclosures: Claim Summary / Determination
NPFC Cost Spreadsheet

CLAIM SUMMARY / RECONSIDERATION

Claim Number:	E12205-0001
Claimant:	El Fogon de Abuela
Type of Claimant:	Corporation
Type of Claim:	Loss of Profits and Earnings
Claim Manager:	Mark Erbe
Amount Requested:	$41,447.00

I. Incident

On July 26, 2012, diesel oil sheen was reported on the surface waters of Lagos Dos Bocas (Lake Two Faces) in Utuado, Puerto Rico. The lake[1] empties into the Rio Arecibo, a tributary of the Atlantic Ocean and a navigable waterway of the United States.

The US Environmental Protection Agency (US EPA), Region II was the acting Federal On-Scene Coordinator (FOSC) who requested federal funding through the Oil Spill Liability Trust Fund (OSLTF) to pay for the cleanup. The incident was assigned Federal Project Number E12205. The FOSC deemed the removal actions complete by August 18, 2012.

II. History of the Claim

Luis Gonzalez (Claimant) is the owner of the El Fogon de Abuela restaurant at Lagos Dos Bocas. The restaurant has been in operation since 2009. On December 2, 2013 the NPFC received Mr. Gonzalez's claim seeking compensation from the Fund for lost profits in the amount of $41,447.00. In the original claim Claimant asserted that he suffered a loss of profits from July 26, 2012 through August 18, 2012. He based the loss of profits on a 65% profit margin, arguing that the 2012 revenues would have been twice what they were in 2011 (the year prior to the incident) if the incident had not occurred. Based on communications with the NPFC Claimant subsequently reduced the sum certain to $23,875.00.

In a determination dated May 28, 2014, the NPFC offered Mr. Gonzalez $721.00 in loss of profits.[2] The only documentation Claimant provided in its initial submissions to prove its claimed loss of profits were monthly and annual financial records. Because it is Claimant's burden to provide all evidence deemed necessary to support the claim, the NPFC was limited to calculating the loss of profits on those documents, i.e., on a daily loss basis. In that determination, the NPFC offered compensation for 23 days, from July 26 until August 18, 2012, at which time the FOSC considered the lake to be clean and accessible.[3]

Claimant did not accept the NPFC's offer.

III. Request for Reconsideration

[1] The man-made lake is operated by Puerto Rico Electric Power Authority (PREPA) to generate hydro-electric power and by the Puerto Rico Aqueduct and Sewer Authority (PRASA) as a reservoir for drinking water.

[2] See, the NPFC's initial claim determination incorporated by reference.

[3] The NPFC calculated the loss by taking Claimants 2012 annual income of $241,915 minus the Cost of Goods Sold (COGS) of $113,608, minus the Cost of Operations of $116,630, which leaves a net profit of $11,677 for 2012. The NPFC divided the $11,677 by 12 months providing a net profit of $973.08 per month. We then divided that amount by 31 days to come to the daily loss of profit of $31.39. Finally, we multiplied the $31.39 by 23 to come to the total loss of profit of $721.97.

Claimant requested reconsideration of his claim via email on July 26, 2014. Upon reconsideration, Claimant is represented by attorney Paul Vilaro who recalculates Claimant's alleged loss of profits at $32,091.13.[4] This amount includes alleged additional costs related to the incident and includes:

Loss of Profits	$30,681.13
Personnel Costs	$ 668.00
Professional Fees	$ 300.00
Mileage Costs	$ 240.00
Perishable Vegetables	$ 202.00
Total Claimed:	**$32,091.13**

In addition to these claimed costs, Claimant's counsel requested a contingent fee resulting from this claim at 33% of the amount compensated over the $721.97 that was initially offered by the NPFC.[5] Claimant now asserts that his loss of profits extended through December 2012.

In support of the request for reconsideration Claimant submits Exhibits I – VII in support of its claim: I) NPFC's initial determination; II) a graph comparing monthly revenues from 2012 to 2013 and a list of months from 2009 through 2013 with highlighted months that a hurricane and/or tropical storm landed in Puerto Rico; III) website articles (in Spanish) with photos of the spill site; IV) website video of the spill; V) 2012 Schedule K, Income tax return; VI) spreadsheet noting shutdown/startup hours for eleven people to support claimed personnel costs of $668.00; and VII) redacted NPFC claim determination E10203-0001.

IV. APPLICABLE LAW:

The Fund shall be available to the President for the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined to be consistent with the National Contingency Plan and uncompensated damages. 33 U.S.C. § 2712(a)(4).

Damage means damages specified in section 2702(b) of this title, and includes the costs of assessing these damages. 33 U.S.C. § 2701(5).

Covered damages are (A) Natural Resources; (B) Real or Personal Property; (C) Subsistence Use; (D) Revenues; (E) Profits and Earning Capacity, and (F) Public Services. 33 U.S.C. § 2702(b)(2)(A)-(F).

The President shall promulgate, and may from time to time amend, regulations for the presentation, filing, processing, settlement, and adjudication of claims under this Act against the Fund. 33 U.S.C. § 2713(e).
The claims regulations are found at 33 C.F.R. Part 136.

The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. 33 CFR 136.105(a).

A claimant seeking reimbursement for a loss of profits must provide its profits or earnings in comparable periods and during the period when the claimed loss was suffered, as established by income tax returns, financial statements and similar documents. 33 CFR 136.233(c).

The amount of compensation allowable for a loss of profits is limited to the actual net reduction or loss of earnings or profits and must clearly reflect adjustments for any saved or normal expenses not incurred as a result of the incident. 33 CFR 136.235.

[4] See, email of July 25, 2014 confirming Claimant authorized Mr. Valero to be his representative
[5] See, email from claimant's counsel to Mark Erbe dated August 4, 2014.

A claim may include the reasonable costs incurred by the claimant to assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed but, not attorney's fees or other administrative costs associated with preparation of the claim. 33 CFR 136.105(e)(8).

The Director, NPFC, upon written request of the claimant or a person duly authorized to act on the claimant's behalf, reconsiders any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, provided any additional support for the claim. 33 CFR 136.115(d).

V. Claimant's Argument on Reconsideration:

Claimant explains in its August 4, 2014 email to the NPFC how it calculates the revised alleged lost profits of $30,681.13.[6] It uses General Accepted Accounting Principles (GAAP), which is: Revenue (or Sales), minus Cost of Goods Sold (COGS), which equals Gross Margin on Sales, minus Operating Expenses. This equals Net Income (or Profit). These categories are found on Claimant's Schedule K, Income form. Claimant submitted its Schedule K tax form for 2013 that completes income data from 2009 through 2013. Claimant refers to the Schedule K, Income tax form for 2012 and relies on actual monthly taxable revenue from 2009 through 2013 that was submitted in the initial claim.[7] Claimant explains that its COGS vary depending on revenues and that its Gross Margin is 53.04% of revenue. Operating Expenses are fixed costs that are included in the Schedule K, Income form for each of the five years.

On reconsideration, Claimant asserts that there are two time periods the restaurant lost revenue. The first period begins July 27, 2012, the day after the incident, and ends August 31, 2012. The second period begins September 1, 2012 and ends December 31, 2012.

First Period of Alleged Lost Revenue

Claimant asserts that the first period began July 27 and continued through August 2012. To calculate the lost revenue for July 2012 Claimant takes its actual July 2012 revenue of $40,317 and divides by three, the number of weeks in July before the incident and finds the average weekly revenue of $13,439 ($40,317 / 3 = $13,439 per week). As evidence of the negative impact that the spill had on August 2012 revenue, Claimant points to the significantly lower revenue for August 2012 when compared to monthly revenues in 2013. To calculate August lost revenues Claimant takes July's projected average weekly revenue and multiplies by five, the number of weeks, from July 27 through August 2012 to arrive at the projected lost revenue for the first period of $67,195 ($13,439 x 5 = $67,197).

Second Period of Alleged Lost Revenue:

Claimant alleges that lost revenue extends from September through December 2012. As evidence of continuing lost revenues past August 2012, Claimant takes the average monthly revenues from September through December 2013 and compares that to the average monthly revenue for the same period in 2012. Claimant then asserts the difference between the revenues for September through December 2012 and 2013 is evidence that the spill continued to reduce revenues in 2012. Claimant takes actual monthly revenues from September to December 2013, which totals $76,588 and divides by four (months) to find the average of $19,147 ($76,588 / 4 = $19,147). Claimant's finds the average monthly revenue for 2012 taking actual revenues for the same period which total $66,088 for an average of $16,502 (NPFC finds $66,088 / 4 = $16,522). Claimant subtracts the two averages for a difference of $2,645 ($19,147 - $16,502 = $2,645). Claimant multiplies the $2,645 by four months to arrive at the projected lost revenue of $10,580 ($2,645 x 4 = $10,580).

Combined Alleged Lost Revenue:

Claimant combines the two alleged lost revenue periods (August 2012 through December 2012) for a total of $77,775 ($67,195 + $10,580 = $77,775) and subtracts *actual* August 2012 revenue of $6,751 to arrive at the alleged total lost revenue of $71,024 ($77,775 - $6,751 = $71,024). Claimant's projected revenue calculation is $71,024 and applies this in the GAAP formula to calculate alleged lost profits.

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[6] See, Claimant's email dated August 4, 2014 to the NPFC

[7] See, Claimant's Exhibit II

Gross Margin: Claimant calculates gross margin by taking total annual revenues and subtracting annual cost of goods sold (COGS) and dividing the difference into revenue. Revenue and COGS is from Claimant's Schedule K, Income Tax Return for 2012.[8] To find the gross margin one takes the difference between revenue of $241,915 and COGS of $113,608 the difference is the gross margin of $128,307 or 53% of revenue. To find the percent of gross margin to revenue, Claimant divides the $128,307 gross margin into revenue $241,915 and arrives at 53% ($128,307 / $241,915 = 53%). Claimant asserts a gross margin of 53%.

Projected Gross Margin: Claimant applies the 53% gross margin to his calculation for projected lost revenue of $71,024. Claimant takes his computed alleged lost revenues of $71,024 and multiplies by 53%, gross margin to arrive at the *projected* gross margin of $37,671.13 ($71,024 x 53.04% = $37,671.13).

Operating Expense: Claimant explains that COGS are variable expenses that increase or decrease with the amount of sales revenues and the restaurant's fixed expenses remain the same amount for each month. Claimant states that the restaurant's monthly fixed expenses are: rent $500, depreciation $739 and insurance is $157 for a total of $1,398. Claimant multiplies monthly fixed expense of $1,398 by five, the number of months, August through December 2012 that Claimant alleges lost profits. Claimant asserts operational costs total $6,990 ($1,398 x 5 = $6,990).

Claimant's alleged lost profits are calculated:

Revenue..........................$ 71,024.00
Less COGS....................($ 33,352.97)...46% of Revenue
Gross Margin..................$ 37,671.13....53% of Revenue
Operating Expense.........($ 6,990.00)
Lost Profits............. ......$ 30,681.13

Additional Expenses $ 1,410.00
Claimant's Claimed LP....**$32,091.13**

VI. NPFC Analysis on Reconsideration:

The NPFC, on reconsideration, reviews the claim *de novo* and all information submitted in support of the request for reconsideration. In this case Claimant provided more information in its request for reconsideration, i.e., more complete income tax records, and explained its GAAP methodology in calculating its loss of profits.[9] As a result the NPFC, using Claimant's GAAP methodology, calculated its loss of profits as discussed below.

NPFC Analysis of Claimant's First Period of Alleged Lost Revenue:

July 2012 lost profits

While the NPFC acknowledges that Claimant suffered a loss of profits during the last six days of July 2012 due to the removal actions, the NPFC disagrees with Claimant's loss of profits calculations for July 2012.

The GAAP formula is the standard means for calculating a net profit or loss; thus the NPFC finds it reasonable to apply Claimant's own GAAP methodology in order to determine its July loss of profits.

The NPFC applies Claimant's July 2012 revenue of $40,317 and multiplies it by 46.96% (the percent of Cost of Goods Sold). That provides monthly COGS of $18,932.86. Subtracting COGS from the monthly revenue provides a monthly gross margin of $21,384.14. We find the annual operating expenses of $116,630 from Claimant's 2012 Schedule K,

[8] See, Claimant's Exhibit V
[9] In its initial claim submissions Claimant did not provide any information on its accounting methodologies nor did it provide operating expenses or saved expenses not incurred due to the incident..

income tax statement. We divide that by 12, to find an average monthly operating expense of $9,719.17.[10] We then deduct the monthly operating expense from the gross margin to arrive at the monthly net income of $11,664.97 ($21,384.14 - $9,719.17 = $11,664.97). To find the daily net income we divide the monthly net income by 25 (the number of days prior to the spill incident), which provides a net income of $466.60 per day. The NPFC then multiplies the number of days the spill affected Claimant's business in July (six) to come to a loss of profits totaling $2,799.59 ($466.60 x 6 = $2,799.59).

August Lost Profits

As noted above in the initial NPFC determination, we offered the Claimant compensation which ended on August 18, 2012 because that is the day the FOSC deemed removal actions complete. Puerto Rico was under a Tropical Storm watch (Isaac) by August 21, 2012. Claimant provided historical data to confirm other hurricane and tropical storm activity during the month of August 2011[11], which may account, in part, for the lower revenue during that time. Since the NPFC used averages for August 2010, 2011 and 2013 (which included months with and without hurricanes/tropical storms) we find it reasonable, in this claim, to extend Claimant's loss period to the end of August.

On reconsideration, Claimant estimates its alleged August 2012 lost profits by using its July 2012 average revenue to project its August 2012 revenue loss. The NPFC disagrees with this quantification because Claimant's July revenues from 2009 through 2012 are higher than its August revenues for the same period; therefore there is no basis for using such a methodology. The NPFC finds it more reasonable to quantify Claimant's losses by averaging August revenues from 2010, 2011 and 2013 and then applying Claimant's own GAAP method to come to its loss of profits. When 2010, 2011 and 2013 revenues are averaged, it totals $18,039.33.[12] To find the monthly COGS the NPFC takes the average monthly revenue of $18,039.33 and multiplies by 46.96% to arrive at $8,471.27 ($18,039.33 x .46.96% = $8,471.27).[13] Subtracting monthly COGS from monthly revenue provides a gross margin of $9,568.06 ($18,039.33 - $8,471.27 = $9,568.06). Subtracting monthly gross margin from the operating expenses of $9,719.17 provides a net income of (-$151.11) ($9,568.06 - $9,719.17 = (-$151.11)). We then divide the average net income of (-$151.11) by 31 days to arrive at a daily average net profit of (-$4.87).

To account for the actual revenue of $6,751 that Claimant earned in August 2012, the NPFC again applied the GAAP formula in order to come to Claimants true profits. We found the COGS of $3,170.27 by multiplying revenue by 46.96% ($6,751 *.4696 = $3,170.27). Subtracting COGS from revenue we find the gross margin of $3,580.27 ($6,751 - $3,170.27 = $3,580.73). Subtracting monthly operating expense of $9,719.17 from the gross margin we arrive at a net income of (-$6,138.44). ($3,580.73 - $9,719.17 = (-$6,138.44)). We then divide the actual monthly net profit of ($6,138.44) by 31 to arrive at the actual daily net profit of (-$198.01).

Claimant's actual August daily net profit of (-198.01) is then offset by the average daily net profit of (-4.87) to come to (-193.14). This $193.14 represents Claimant's August 2012 loss per day. The NPFC multiplied the $193.14 by 31 days for a total August loss of profits of $5,987.34.

Therefore, the NPFC finds Claimant's total loss of profits from July 26 through August 31, 2012 is $8,786.93 ($2,799.59 + $5,987.34).

***NPFC Analysis of Claimant's Second Period of Alleged Lost Revenue*:**

Claimant argues that the second loss period began August 27, 2012 and continued through December 31, 2012. Claimant asserts that because the average revenue from September to December 2013 is higher than 2012 there is evidence that Claimant continued to lose profits after August 2012; however, the NPFC does not agree that only comparing 2013

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[10] Claimant did not provide actual monthly operating expenses; therefore the NPFC had to use an average obtained from Claimants annual operating expenses.

[11] See, Claimant reconsideration Exhibit II.

[12] Claimant revenues: 2010 - $16,501.00; 2011 - $8,261.00; 2013: $29,356.00

[13] See, 46.96% COGS to revenue is the percent of 2012 COGS divided into 2012 revenue

revenues to 2012 revenues is persuasive evidence because Claimant's revenues in each successive year from 2009 through 2013 is higher than the previous year.[14]

The NPFC reviewed Claimants revenues from September through December in 2010, 2011, 2012 and 2013. In September 2012, which was the month immediately after the spill month, Claimant 's revenue was $18,551. This is higher than any other September from 2010 through 2013. It represents revenue well over 1.5 times what was made in September 2010 and 2011. The NPFC finds that September 2012 rebounded exceptionally well and therefore effectively establishes the Claimant suffered no loss of profits after August 31, 2012; therefore, the NPFC denies any claimed loss of profits past August 2012 due to this spill.

Claimant's Additional Damages Claimed:

On reconsideration, Claimant asserts increased expenses associated with the incident, specifically, personnel costs, professional fees, mileage fees and perishable vegetables. In support of these costs Claimant cites NPFC claim number E10203-0001.[15]

NPFC Claim number E10203-0001 is distinguishable from this claim. In that claim the EPA FOSC requested aid and support from Claimant's personnel to conduct diving operations to determine if the vessel could be lifted. The costs associated with those personnel actions were related to the removal actions. The mileage costs were incurred and associated with travel from the Museum to the dive site. In this claim the claimed costs are not related to any removal actions or any actions requested by the EPA FOSC. Under reconsideration, Claimant also requests that counsel's contingent fee resulting from this claim, which is 33% of the amount found compensable over the $721.97 already offered by the NPFC, be considered by the NPFC. Contingent fees are legal fees. The Fund is available for uncompensated removal costs and damages. OPA damages do not include attorney fees. Also, the claims regulations provide that attorney fees are not payable from the Fund. 33 CFR 136.105(e)(8). The contingent fees are denied.

Personnel Costs

Claimant provided a piece of paper with eight persons on it noting four hours spent in "shut down" on August 4th and four hours spent in "start up" on August 17th. These eight hours are charged at a rate of $7.50 per hour for all employees except one, who had a rate of $8.50. Total claimed costs equal $668.00.

Claimant provides no information explaining how these personnel costs are additional incurred costs due to the incident. Claimant failed to provide normal employee costs for this or any period; therefore, the NPFC cannot determine if these are increased costs that represent lost profits. These costs are denied.

Professional Fees

Claimant states it paid legal counsel $300.00 for consultation services performed on March 17, 2013 regarding this claim.

As stated above, OPA damages do not include attorney fees and the claims regulations preclude payment of attorney fees. 33 CFR 136.105(e)(8). These costs are denied.

Mileage Costs

[14] The NPFC created spreadsheets using Claimant's monthly and annual tax statements that show how the NPFC calculates Claimant's lost profits.
[15] See, Claimant Reconsideration Exhibit VII.

Claimant requests compensation for six 80 mile round trips from Claimant's home to the floating pier at Dos Bocas Lake. Claimed costs are .50 a mile x 80 miles = $40.00 x 6 trips = $240.00. Claimant states these trips were necessary in order to verify the status of the spill and ascertain whether the restaurant could be re-opened; however these costs are not associated with removal actions and Claimant failed to provide the NPFC any records which document what mileage costs are during the course of normal business. Therefore the NPFC cannot determine if these are increased costs due to the oil spill. In fact, it appears Claimant saved mileage costs during the spill period, however no saved expenses were ever provided in the claim. These costs are denied.

Perishable Vegetables
Claimant estimates it lost $202.00 in perishable vegetables ($25.00 in tomatoes, $30.00 in peppers, $42.00 in lettuce and $105.00 in plantains). Claimant failed to provide any records establishing that this claimed loss was due to the incident or what spoilage is during the course of normal business. These costs are denied.

V. Summary

The NPFC determines that Claimant suffered a loss of profits in the amount of $8,786.93 from July 26 through August 31,, 2012 (July 26-31;$2,799.59 and August 1-31; $5,987.34); therefore, it will offer this amount on reconsideration.

AMOUNT on RECONSIDERATION: $8,786.93

Claim Supervisor: [redacted]

Date of Supervisor's Review: [redacted]

Supervisor Action: ***Approved***

Supervisor's Comments:

ACCEPTANCE / RELEASE AGREEMENT

Claim Number: E12205-0001	Claimant Name: El Fogon de Abuela

I, the undersigned, ACCEPT this settlement offer of $8,786.93 as full and final compensation for damages arising from the specific claim number identified above. With my signature, I also acknowledge that I accept as final agency action all costs submitted with subject claim that were denied in the determination and for which I received no compensation.

This settlement represents full and final release and satisfaction of the amounts paid from the Oil Spill Liability Trust Fund under the Oil Pollution Act of 1990 for this claim. I hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action under any other law, that I may have against any party, person, firm or corporation that may be liable for the amounts for which I have been compensated under this claim. I authorize the United States to sue, compromise or settle in my name and the United States is fully substituted for me and subrogated to all of my rights arising from and associated with those amounts paid for which I am compensated for with this settlement offer. I warrant that no legal action has been brought regarding this matter and no settlement has been or will be made by me or any person on my behalf with any other party for amounts paid which is the subject of this claim against the Oil Spill Liability Trust Fund (Fund).

This settlement is not an admission of liability by any party.

With my signature, I acknowledge that I accept as final agency action all amounts paid for this claim and amounts denied in the determination for which I received no compensation.

I, the undersigned, agree that, upon acceptance of any compensation from the Fund, I will cooperate fully with the United States in any claim and/or action by the United States against any person or party to recover the compensation. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for those amounts paid for which the Fund has provided compensation, by providing any documentation, evidence, testimony, and other support, as may be necessary for the United States to recover from any other person or party.

I, the undersigned, certify that to the best of my knowledge and belief the information contained in this claim represents all material facts and is true. I understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. §§ 287 and 1001).

____________________ Title of Person Signing	____________________ Date of Signature
____________________ Printed Name of Claimant or Authorized Representative	____________________ Signature

____________________ Title of Witness	____________________ Date of Signature
____________________ Printed Name of Witness	____________________ Signature

____________________ *DUNS/EIN/SSN ***Required for Payment**	____________________ Bank Routing Number	____________________ Bank Account Number