

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: 800-280-7118
E-mail: arl-pf-npfcclaimsinfo@uscg.mil
Fax: 703-872-6113

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 7215 0018

5890/DWHZ
19 April 2013

Skipjack's Crab House, LLC



Re: Claim Number: N10036-1675

Dear Mr. Wood and Mr. Remeta,

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 N10036-1675 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 N10036-1675.

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 (1): Claim Summary/Determination

Enclosure (2): Documentation Submitted in Support of Claim N10036-1675

cc: Mr. Charles Abbott
650 Poydras Street, Ste. 2810
New Orleans, LA 70130

By Certified Mail:
No. 7011 1570 0001 4803 7506

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1675
Claimant	Skipjack's Crab House, LLC
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$490,914.00

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 8 February 2012, Charles Abbott, Esq., on behalf of Skipjack's Crabhouse, LLC. (collectively, "the Claimant") submitted a claim to the NPFC, seeking to recover \$490,914.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant is a "seafood restaurant, crab house and seafood retailer" located in Baltimore, Maryland.² The Claimant opened its business in September of 2009 after purchasing a seafood restaurant at the same location. The Claimant's menu includes steamed crabs, as well as a wide variety of seafood and non-seafood menu items. Since the restaurant opened in 2009, it has purchased the vast majority of its crabs from one particular supplier located in Akers, Louisiana.³

According to documentation presented in support of this claim, the Claimant's "sister restaurant"⁴ has the right of first refusal to purchase all crabs shipped from the Akers, Louisiana supplier. However, because the two restaurants have common ownership, the benefits of this agreement are also extended to the Claimant.⁵ The Claimant emphasizes this point to illustrate their dependence on Gulf of Mexico crab in general, and on the success of this particular supplier specifically.

¹ Optional OSLTF Claim Form dated 5 January 2012.

² Claim Cover Letter, 3 February 2011.

³ The Claimant purchased 98.85%, 85.34% and 95.83% of its crab from Seaside Seafood in 2010, 2011 and 2012 respectively. See, Skipjack's Crab House Crab Purchases, 2010, 2011, 2012.

⁴ Claim Cover Letter, 26 January 2011.

⁵ Right of First Refusal Agreement between Seaside Seafood and The Clemson Crab Company, 11 April 2003.

The Claimant alleged that prior to the oil spill, the restaurant was on track to meet first year projections. However, following the oil spill, the Claimant alleged that a lack of crab availability, consumers' lack of interest in Gulf of Mexico seafood, and increased cost of crab, caused the restaurant to fail to meet its first year profit goals. Using first year projections as a baseline, the Claimant calculated to have lost \$490,914.00 in profits from May 1, 2010 through December 31, 2010, which the Claimant now seeks to recover from the NPFC.

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.

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:

See, Enclosure (2).

On 9 February 2012, the Claimant submitted this claim to the NPFC seeking \$490,914.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.⁶ Prior to submitting this claim to the NPFC, the Claimant submitted an Emergency Advance Payment (EAP) Claim to the RP/GCCF. According to the Claimant, the RP/GCCF denied payment on the claim.⁷ The claim has also been presented to the BP Claims Program, which has also not made a payment on the claim.

Because this claim was first presented to and denied by the Responsible Party through the GCCF, the NPFC deems OPA presentment requirements to have been met. The NPFC may therefore properly adjudicate this claim to the extent that all damages now presented were included in this claim as first presented to the GCCF.⁸

Furthermore, evidence in this claim submission indicates that the location of the Claimant's business excludes them from the Economic and Property Damage and Class Action Settlement (the E&PD Settlement).

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 first prove "that the claimant's income was reduced . . .".⁹ A reduction in income under OPA is evidenced by "[t]he amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered . . .".¹⁰ Furthermore, the amount of compensation potentially available to a claimant must reflect adjustments based on certain factors, including successful attempts by the claimant to mitigate their losses.¹¹

The Claimant opened their restaurant in September of 2009, intending on sourcing blue crab from Seaside Seafood in Akers, Louisiana. According to a right of first refusal agreement, the Clemson Crab Company, having common ownership with the Claimant, had the right to

⁶ Claim Cover Letter, 26 January 2012.

⁷ Claim Cover Letter, 26 January 2012.

⁸ 33 C.F.R. § 136.103(a).

⁹ 33 C.F.R. § 136.233(b).

¹⁰ 33 C.F.R. § 136.233(c).

¹¹ 33 C.F.R. § 136.235.

purchase all crabs available through Seaside Seafood. Upon the opening of the Claimant's restaurant, the Claimant was also extended the benefit of the agreement. The Claimant alleged that Seaside Seafood was unable to supply it with the crab necessary to meet its demands, and was also forced to raise the cost of crab as a result of decreased availability following the oil spill. Furthermore, the Claimant alleged that customer demand for crab decreased as a result of fears of oil contamination. As such, the Claimant alleged that they were unable to meet first year profit projections and that in addition to their failure to grow as expected, the restaurant actually lost business.

Specifically, the Claimant stated,

not only was Skipjack's not able to capitalize on its aggressive marketing and advertising efforts, it actually saw a drastic decrease in its restaurant and carry-out business.¹²

As the restaurant only opened in September of 2009, the Claimant measured their losses based on management projections for the year of 2010, which was the restaurant's first full year in business.

For several reasons, the Claimant has failed to provide evidence necessary to prove that the business sustained a loss of profits from May to December of 2010 as a result of the Deepwater Horizon oil spill: (1) Financial documentation provided in support of this claim fails to indicate either (a) that the restaurant's first year growth was actually hindered, or (b) that the sales decreased from May to December of 2010. (2) Evidence of the Claimant's 2011 earnings fails to indicate that the Claimant could have reached 2010 projections in the absence of the oil spill. (3) The Claimant has not demonstrated that Seaside Seafood had the capability to satisfy the entirety of the Claimant's crab orders, considering that at least one other restaurant was the primary beneficiary of the right of first refusal agreement,¹³ and; (4) because the Claimant offers crab at market price, it does not appear as though the increased cost of crab in 2010 actually resulted in an identifiable profit loss for the Claimant.

According to the Claimant's first year projections, the Claimant anticipated total revenue for the period from May to December 2010 to reach \$1,758,694.00. The Claimant projected that total costs of goods for the same period would reach about \$874,095.00, for a gross profit of \$884,599.00.¹⁴ If this is the amount that the Claimant would have earned in the absence of the oil spill, then it seems as though the Claimant's profits during 2011 when the Claimant was not affected by the oil spill, would demonstrate that these sales levels were indeed attainable during the Claimant's first year in business.

However, 2011 numbers fall far short of the Claimant's 2010 projections. Rather, from May to December of 2011, the Claimant reported gross profit of \$416,632.29, which is only about 47% of first year projections. As such, the Claimant's alleged first year losses, which are not based on actual sales history and not supported by 2011 earnings, are speculative and not compensable under OPA's loss of profits or impairment of earning capacity damage category, which only allows compensation for substantiated, actual losses.¹⁵

¹² Claim Cover Letter, Part VI.

¹³ A letter from Jim Wood of Seaside Seafood states, "since 2003, the overwhelming majority of the crabs we purchased were sold to The Clemson Crab Company, LLC."

¹⁴ Exhibit III, Skipjack's Crab House, LLC, Projected Profit Analysis For Nine Months Ended April to December 2010.

¹⁵ 33 C.F.R. § 136.235.

Additionally, the Claimant's financial documentation fails to indicate that increased crab costs resulted in a loss of profits. Although crab costs increased, the Claimant's profit margin on crab sales remained steady throughout 2010 and 2011. According to data gathered from the Claimant's May through December 2010 profit and loss statements, cost of crabs purchased accounted for about 73.2% of crab sales made by the restaurant. In 2011, the Claimant reported a slightly smaller profit margin for crab sales, as costs accounted for 73.36% of sales. Therefore, the Claimant has not proven that the increased crab costs caused the Claimant to sustain a loss of profits on crab sales from May to December 2010.

Finally, the Claimant has failed to provide evidence to prove that the oil spill caused the restaurant's growth rate to slow during its first year in business. Based on 2009 through 2011 sales and profits data, it seems as though the restaurant maintained a steady rate of growth from the time it opened throughout the end of 2011, with no identifiable decrease in growth during the claimed loss period.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove that they sustained a financial loss in the amount of \$490,914.00 as a result of the discharge or substantial threat of discharge of oil resulting from the Deepwater Horizon oil spill.


Claim Supervisor: *NPTC Claims Adjudication Division*

Date of Supervisor's Review: *4/19/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

Enclosure (2)
Evidence Presented in Support of
NPFC Claim # N10036-1675

- 1) Cotton Schmidt & Abbott LLP Cover Letter
- 2) Cotton Schmidt & Abbott LLP Introduction Letter
- 3) Emails between Claimant and GCCF personnel from 18 February 2011 through 29 December 2011.
- 4) Lost Profits Assessment of Skipjack's Crab House, LLC Resulting from the Deepwater Horizon Oil Spill prepared by Bourgeois Bennett, LLC CPAs dated 19 November 2010 and updated 01 February 2011
- 5) Seaside Seafood Inc Resolution Authorizing Asset Purchase Agreement dated 10 October 2002
- 6) Skipjack's Crab House Balance Sheet as of 25 October 2010
- 7) 2009 Form 1065 US Return of Partnership Income
- 8) Skipjack's Crab House LLC Employee List January 2010 through October 2010
- 9) Skipjack's Crab House LLC Wage and Tax Register
- 10) Last page showing totals for Transaction Detail by Account for January through December 2010
- 11) Skipjack's Crab House Profit and Loss Statement for January 2010 through September 2010
- 12) Skipjack's Crab House Profit and Loss Statement for January 2010 through December 2010
- 13) Six pictures of crabs
- 14) Article from Bloomberg Businessweek titled "Oil Spill Imperils Gulf Coast Fishing Industry (Update 1) dated 29 April 2010 –
- 15) Article from Gulflive.com Harlan Kirgan MS press titled "Researchers find evidence of oil spill in Gulf's food chain" dated 30 June 2010
- 16) Article from Los Angeles Times titled "Gulf oil spill: Undersea oil masses confirmed in tests" dated 21 June 2010
- 17) Article from LA Seafood Newsroom titled "Fishermen fear the Economic Worst" dated 17 June 2010
- 18) Article from Gulflive.com Harlan Kirgan MS press titled "Shrimpers opting for cleaning Gulf of Mexico oil over shrimping" dated 16 June 2010
- 19) Article from Daily Finance.com titled "For Food Business, BP Oil Spill is a Recipe for Disaster" dated 09 June 2010
- 20) Article from e360yale.edu titled "The BP Spill's Growing Toll on the Sea Life of the Gulf" dated 09 June 2010
- 21) Article from suite.com titled "BP Gulf oil spill – Impact on Americas Environment and Economy" dated 07 June 2010
- 22) Article from the dailygreen.com titled "Gauging the Long-Term Impacts of the BP Oil Spill" dated 06 June 2010
- 23) Article from NOLA.com titled "Crab-Crazy MD finds itself a victim of BP's Gulf oil spill" dated 26 September 2010
- 24) Article from bpoilslick.blogspot.com titled "Oil spill waters contain carcinogens" dated 30 September 2010
- 25) Article from leanweb.org titled "BP oil spill Seafood Sampling Project Results Overview" dated 03 January 2011
- 26) Article from ABC News titled "BP Oil Spill: Oil Hits Louisiana Wetlands, Causes Spike in Seafood Prices" dated 19 May 2010

- 27) Article from The Times Picayune titled "A mixed message in spill's aftermath" dated 07 January 2011
- 28) Article from The Times Picayune titled "With so little being done to clean this up, were never going to win this battle" dated 08 January 2011
- 29) Article from AP titled "Spill report kindles Democratic push for reform" dated 11 January 2011
- 30) Article from Nola.com titled Scientists wary of BP oil spill's long-term effects on species dated 10 November 2010
- 31) Article from Newsinferno.com titled "Scientist Studying BP Oil Spill Finds Crude on Gulf of Mexico Floor" dated 30 November 2010
- 32) Article from Ehow.com titled "Risks associated with eating blue crabs" dated 14 October 2010
- 33) Article from USA Today titled Obama goes to LA to address oil spill" dated 04 May 2010
- 34) Article from beforeitsnews.com titled "Numerous Lab BP Gulf Oil Spill Results Contradict Feds Sample-Find Widespread Contamination of Water and Seafood" dated 15 November 2010
- 35) Article from evostc.state.ak.us titled Pacific Herring undated
- 36) Article from NOLA.com titled "MD is hungry for LA crabs, but LA can't deliver" dated 26 September 2010
- 37) Article from WLF.louisiana.gov/news/32931 titled "LDWF Secretary Again Asks GBP to Fund an Extensive Seafood Testing, Certification and Marketing Plan" dated 15 September 2010
- 38) Article from NOLA.com titled Is it really safe to eat gulf seafood dated 19 December 2010
- 39) Article from The State titled "Gulf oil spill hurt SC businesses dated 11 December 2010
- 40) Article from The Christian Monitor titled "New Gulf oil spill mystery: How much dispersant did BP use?" dated 01 August 2010
- 41) Article from BBC News titled "Gulf of Mexico oil leak worst US environment disaster" dated 30 May 2010
- 42) Article from Slashfood.com titled LA Blue Crabs Show Signs of Oil Contamination dated 10 August 2010
- 43) Article from Louisianaseafoodnews.com titled "From Oil to Red Tape, The BP Mess Continues" dated 03 October 2010
- 44) Article from Southernstudies.org titled "Independent tests find oil spill contamination in LA oysters and crabs" dated 31 August 2010
- 45) Article from The Christian Monitor titled "Gulf oil spill to blame for oily blobs in vital Gulf sea life?" dated 24 August 2010
- 46) Article from al.com titled "Gulf Seafood/BP image" dated 20 August 2010
- 47) Article from houmatoday.com titled "Major Study charts lasting oil plume in Gulf" dated 19 August 2010
- 48) Article from wwltv.com titled "State pushes for more money from BP for seafood testing" dated 19 August 2010
- 49) Article from McClatchydc.com titled "Gulf oil spill still a threat to seafood, JMA study indicates" dated 17 August 2010
- 50) Article from nola.com titled Blue Crabs provide evidence of oil tainting Gulf food web" dated 10 August 2010
- 51) Article from nowpublic.com titled "Environmental & Health Impacts of BP oil spill by Dr Tom Termotto (handwritten date 05 August 2010)
- 52) Article from Nola.com titled "LA blue crabs are tough, but Gulf oil spill might be tougher" dated 20 July 2010
- 53) Article from Scientific Research into Gulf Seafood Survival dated 13 July 2010

- 54) Article from associatedcontent.com titled “Environmental Effects of the BP Oil Spill” dated 10 July 2010
- 55) Article from usatoday.com titled Food Safety concerns mount as oil found in Gulf crabs” dated 02 July 2010 – oil droplets in crab larvae
- 56) Article from foodsafetynews.com titled “Will Oil-Eating Bacteria Plague the Gulf?” dated 01 July 2010
- 57) Article from McClatchydc.com titled “Oil found in Gulf crabs raises new food chain fears” dated -01 July 2010
- 58) Article from environmentamerica.org titled BP’s Oil Spill Disaster Hurts LA Fisherman & Seafood Businesses dated 07 May 2010
- 59) Since May 6 LA officials have lab tested more than 6930 finfish crab shrimp and oysters none have tested positive for hydrocarbons even close to levels that NOA or the FDA say reach a level of concern, MDMR tested shrimp and crab and found them to be fine (Dale Diaz), NOAA has done testing, FDA has sent a mobile lab to the region and is increasing inspections of Gulf Seafood processors
- 60) Abstract from American Society of Zoologists 1992 titled “effects of pollutants on Molting and Regeneration in Crustacea”
- 61) Deepwater Report to the President dated January 2011
- 62) Study reviewed in Fisheries Science 16(1-3):24-34, 2008 “The Chesapeake Bay Blue Crab: A Multidisciplinary Approach to Responsible Stock Replenishment
- 63) ALS Laboratory Group 06 August 2010 for Boston Chemical Data Group
- 64) Proposal for Fed Grant: Research report on the effect of dispersants on blue crab larvae dated 02 July 2010
- 65) Study titled Polychlorinated Biphenyls in Blue Crabs from South Carolina dated 1987
- 66) Oil spill sampling project results from St. Bernard parish from leanweb.org dated 26 October 2010
- 67) NOAA Technical Memorandum NMFS-AFSC-3 “Impact of Oil Pollution and Prince William Sound Studies: Bibliography of 1960-91 Publications and Reports, Auke Bay Laboratory dated August 1992
- 68) University of Colorado Study titled “Health Effects of the Gulf Oil Spill dated 08 September 2008
- 69) Topical Field Courses – Western Program – Miami University titled “Final Paper: Non-point Source Pollution and its impact on the Chesapeake Bay: ecosystem and human health dated 03 June 2002
- 70) Oxfordjournals.org/content/32/3/495.abstract dated 1992
- 71) Exxon Valdez Oil Spill Restoration Project Final Report dated December 1998

Documents submitted in response to Additional Information Request:

- Skipjack’s Crab House, LLC, Projections and Assumptions;
- 2010 Federal Tax Returns;
- January – December Profit and Loss Statements 2011;
- 2011 Monthly Profit and Loss Statements;
- 2011 Federal Tax Returns;
- 2012 Monthly Profit and Loss Statements (Jan – July);
- Affidavit of Eric Wood;
- Response by Bourgeois Bennett, 30 June 2012;
- Bourgeois Bennett Response, 10 July 2012;
- Letter from Cindy Winter, 2 July 2012;
- Letter from Desiree Brewer, 11 July 2012;
- Letter from Greg Kosmas, 11 July 2012;
- Letter from Jim Wood, 3 July 2012;

- Letter from Kathryn Napoli, 2 July 2012;
- Letter from Thomas Welch Jr., 8 July 2012;
- Copy of Restaurant Menu
- Itemized response to NPFC request for additional information, 12 July 2012;
- Sales Projection chart;
- Sales By Category/Item Report, May 2010;
- Records of crab purchases, 2010, 2011 and 2012.