

U.S. Department of  
Homeland Security

**United States  
Coast Guard**

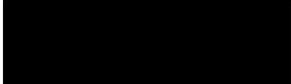


Director  
National Pollution Funds Center  
United States Coast Guard

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US COAST GUARD  
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED  
Number: 7011 1150 0000 4636 2526

5890/DWHZ  
26 October 2011

Ms. Laura W. Flaherty  


Re: Claim Number: N10036-1354

Dear Ms. Flaherty:

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 N10036-1354 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 N10036-1354.

Mail reconsideration requests to:

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

Sincerely,



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

Enclosure: Claim Summary/Determination Form

## CLAIM SUMMARY/DETERMINATION FORM

|                  |  |
|------------------|--|
| Claim Number     | N10036-1354  |
| Claimant         | Ms. Laura Flaherty   |
| Type of Claimant | Private (US)   |
| Type of Claim    | Loss of Profits and Impairment of Earning Capacity/Subsistence Use |
| Amount Requested | \$13,000.00  |

### ***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 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 claims for certain individual and business claims on behalf of BP.

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

On 25 August, 2011 Ms. Laura Flaherty (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$10,000.00 in loss of profits and impairment of earnings capacity, and \$3,000.00 in lost subsistence use, allegedly resulting from the Deepwater Horizon oil spill.<sup>1</sup>

The Claimant alleged to have worked as a deckhand on a shrimp boat in the Chef Menteur Pass, near New Orleans, Louisiana from 1970 until the time of the oil spill.<sup>2</sup> The Claimant stated that “after the spill, my work was cut and also my seafood supply was cut.” The Claimant alleged that she “depends on [fishing] for money and food.”<sup>3</sup>

The Claimant asserted that she lost \$10,000.00 in profits due to the loss of her position as a deckhand, and also alleged to have sustained \$3,000.00 in damages due to loss of subsistence use as a result of the Deepwater Horizon oil spill.

### ***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 Section 2702(b) of OPA.

#### **Loss of Profits and Impairment of Earning Capacity Claims Requirements**

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:

<sup>1</sup> Optional OSLTF Claim Form, dated 14 August 2011.

<sup>2</sup> Optional OSLTF Claim Form, dated 14 August 2011.

<sup>3</sup> Optional OSLTF Claim Form, dated 14 August 2011.

- (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.
- (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.

#### Subsistence Use Claims Requirements

Under 33 C.F.R. §§ 136.219-223, each claim for subsistence use must:

- (a) be for lost subsistence use by an eligible client;
- (b) identify and describe the actual subsistence use of each natural resource for which compensation is being claimed;
- (c) describe how and to what effect the claimant's subsistence use was affected by injury to or loss of each specific natural resource;
- (d) describe efforts to mitigate the subsistence loss;
- (e) be based on the reasonable cost to replace the lost subsistence use of natural resources; and
- (f) be reduced by the amount of all compensation made available to the claimant to compensate for the loss, all income which was derived utilizing the time which otherwise would have been used to obtain the subsistence resources, and any avoided costs associated with the subsistence activity, such as gas for vehicles or boats, bait, and other overhead costs not incurred due to the spill.

## ***DETERMINATION OF LOSS***

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

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

- Optional OSLTF Claim Form, 14 August 2011;
- Documentation submitted to the GCCF.

### Losses asserted in NPFC Claim N10036-1308.

On 18 November, 2010, the Claimant presented an Emergency Advance Payment claim seeking lost wages and earnings damages (EAP1) as well as a loss of subsistence use (EAP2) to the RP/GCCF.<sup>4</sup> The Claimant was assigned ID 1055728; EAP1 was assigned 487941; EAP2 was assigned 488028. The Claimant sought \$1,000.00 in damages each for EAP1 and EAP2. Both claims were denied by the RP/GCCF.

After receiving denials from the RP/GCCF on EAP1 and EAP2, on 15 August 2011, the Claimant presented a claim to the NPFC seeking \$5,000.00 in loss of profits and impairment of earnings capacity. The NPFC assigned this claim # N10036-1308. This claim was denied by the NPFC on 18 August 2011 due to the Claimant's failure to prove (1) that she sustained an actual financial loss, and (2) that her alleged losses were caused by the Deepwater Horizon oil spill.<sup>5</sup>

### Losses asserted in NPFC Claim N10036-1354.

On 13 January 2011, the Claimant presented a First Quarter Interim claim to the RP/GCCF, seeking lost wages and earnings damages in the amount of \$5,000.00 (ICQ12011a), as well as loss of subsistence use damages in the amount of \$5,000.00 (ICQ12011b).<sup>6</sup> ICQ12011a and ICQ12011b were collectively assigned Claim # 9209587 and were subsequently denied by the RP/GCCF.<sup>7</sup>

On 13 June 2011, the Claimant presented the same losses addressed in ICQ12011a and ICQ12011b for full and final review (FRF) by the RP/GCCF. FRF claims were collectively assigned Claim # 9202533 and were subsequently denied by the RP/GCCF.

On 25 August 2011, the Claimant presented this claim to the NPFC, seeking \$10,000.00 in loss of profits and impairment of earning capacity damages, as well as \$3,000.00 in loss of subsistence use damages.<sup>8</sup>

As more fully explained in the NPFC Determination section of this letter, because this is a new claim, and not a request for reconsideration of N10036-1308, the NPFC will not address this claim to the extent that it has already been denied by the NPFC, and will only address new damages which have not been adjudicated by the NPFC. Therefore, the NPFC initially denies this claim in the amount of \$5,000.00 for loss of profits and earning capacity damages, which appear to constitute damages regarding the same subject matter and damage amount as presented to and denied by the NPFC in claim # N10036-1308. The NPFC may properly adjudicate the remainder of the Claimant's loss of profits claim in the amount of \$5,000.00, which has been

<sup>4</sup> GCCF Coast Guard Report, 21 September 2011.

<sup>5</sup> NPFC Determination, Claim N10036-1038, dated 18 August 2011.

<sup>6</sup> GCCF Coast Guard Report, 6 October 2011.

<sup>7</sup> GCCF Coast Guard Report, 21 September 2011.

<sup>8</sup> Optional OSLTF Claim Form, dated 14 August 2011.

presented to, and denied by the RP/GCCF, and has not previously been adjudicated by the NPFC.

The Claimant's subsistence use claim in the amount of \$3,000.00 may be adjudicated by the NPFC in its entirety, as it has first been presented to the RP/GCCF, and because the NPFC has not issued a final determination regarding the Claimant's alleged loss of subsistence use damages.

In sum, the following NPFC determination shall address the Claimant's (1) loss of profits and impairment of earnings capacity damage claim in the amount of \$5,000.00, and (2) loss of subsistence use claim in the amount of \$3,000.00.

### **NPFC Determination**

According to 33 C.F.R. § 136.103, all claims for removal costs or damages must be presented first to the responsible party. Furthermore, once the NPFC has issued a determination on a claim, a claimant may request reconsideration of the claim, which must be in writing and must be received by the NPFC within 60 days of the date of the initial determination letter. If a claim has been denied by the NPFC, a claimant may not resubmit the same claim, unless the claimant adheres to the reconsideration requirements listed above and on the first page of this letter.

This claim for loss of profits and impairment of earning capacity damages is initially denied in the amount of \$5,000.00, because, as discussed above, the NPFC has issued a determination denying a claim regarding these particular losses.<sup>9</sup>

The remainder of this claim is denied because (2) the Claimant has not provided documentation to show that she sustained a loss of profits or earning capacity as a result of the Deepwater Horizon oil spill; and (2) the Claimant has not provided documentation to indicate how or to what extent the Claimant's alleged subsistence use was affected by the Deepwater Horizon oil spill.

#### **1. Loss of Profits and Impairment of Earning Capacity**

In order to prove a claim for loss of profits and impairment of earnings capacity, a claimant must sufficiently demonstrate (1) that she sustained an actual financial loss, and (2) that the loss sustained by the Claimant was caused by the Deepwater Horizon oil spill.

The Claimant has failed to demonstrate either a financial loss, or a causal link between her losses and the Deepwater Horizon oil spill. The Claimant alleged that the oil spill caused her to lose her job working as a deckhand for a fisherman in the Chef Menteur Pass.<sup>10</sup> However, the Claimant has not provided any documentation, such as tax records, pay stubs, bank account statements or other evidence of earnings to demonstrate that she ever earned income as a deckhand on a shrimp boat.

In the Claimant's submission to the NPFC, she stated that she was paid less than \$5,000.00 each year, so she was not required to pay taxes.<sup>11</sup> However, in her submission to the GCCF, the

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<sup>9</sup> NPFC Claim N10036-1308, determination issued on 18 August 2011, denying lost profits and earnings damages claim in the amount of \$5,000.00.

<sup>10</sup> Optional OSLTF Claim Form, dated 14 August 2011.

<sup>11</sup> Optional OSLTF Claim Form, dated 14 August 2011.

Claimant alleged that she had earned about \$16,000.00 each year.<sup>12</sup> The Claimant has not provided documentation that would allow the NPFC to verify either assertion. The Claimant has also failed to present any evidence to show that the Deepwater Horizon oil spill was the reason for her alleged loss of earnings. A letter allegedly written by the Claimant's former employer regarding the effects of the oil spill on the Claimant's income could not be verified.<sup>13</sup> Therefore, the Claimant's loss of profits claim is denied.

## 2. Loss of Subsistence Use

The Claimant has also submitted a claim for \$3,000.00 in loss of subsistence use. However, the Claimant has not provided any evidence to demonstrate that she actually caught and relied on fish for subsistence, nor has she demonstrated that she was unable to catch fish because of the oil spill.

Because the Claimant has presented no documentation to support her contention that she made subsistence use of a particular natural resource, the Claimant has not demonstrated that she sustained a loss of subsistence use due to the Deepwater Horizon oil spill. The Claimant also has not provided documentation to indicate the costs she incurred to replace the fish she alleged to have been unable to catch.<sup>14</sup> Furthermore, the Claimant has not provided evidence to indicate where she was fishing prior to the oil spill, or to show that the fishing waters in which the Claimant fished were closed as a result of the oil spill.

The entirety of this claim, totaling \$13,000.00 is denied because (1) \$5,000.00 of the Claimant's loss of profits claim has been previously adjudicated and denied by the NPFC in N10036-1308, (2) the Claimant has not demonstrated that she has sustained a loss of profits due to the Deepwater Horizon oil spill in the amount of \$5,000.00, and (3) the Claimant has not demonstrated that she ever relied any a particular natural resource for subsistence use, and has not demonstrated that any resource on which she relied, was affected by the Deepwater Horizon oil spill.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *10/26/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

<sup>12</sup> GCCF Claim Form at §C.1.

<sup>13</sup> Letter from Ed Ross to the GCCF, undated.

<sup>14</sup> Requirements for a loss of subsistence use claim are listed in 33 C.F.R. §§ 136.219-223, as noted on page 3 of this letter.