

U.S. Department of
Homeland Security

United States
Coast Guard



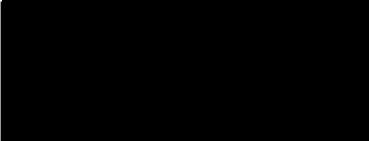
Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 9791

5890/DWHZ
5 July 2012

Fiberglass Finesse, Inc.



Re: Claim Number: N10036-1794

Dear Mr. Jeffries:

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 N10036-1794 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination Form for further explanation.

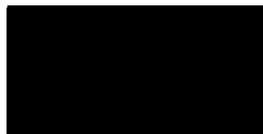
You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you 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 N10036-1794.

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	N10036-1794
Claimant	Fiberglass Finesse, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$150,171.00

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 certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT

On 4 May 2012, Mr. George Jeffries, on behalf of Fiberglass Finesse, Inc. (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$150,171.00 in loss of profits and impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant owns and operates a company specializing in fiberglass building, repair and design. The Claimant alleged that when he opened his business in 1992, he “served mainly as a small ‘Job Shop’ for a variety of industries, but primarily all tourism related businesses and restaurants.”² The Claimant alleged that beginning in 2010; he started a major marketing campaign, which failed to generate expected results due to the economic effects of the oil spill on the Claimant’s customer base.³

Using anticipated earnings which would have been generated from specific projects which the Claimant alleged were cancelled as a result of the Deepwater Horizon oil spill, the Claimant calculated to have lost a total of \$150,171.00 in earnings in 2010.⁴

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.

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.

¹ Optional OSLTF Claim Form, signed on 26 April 2012.

² Letter from the Claimant describing losses, undated.

³ Letter from the Claimant describing losses, undated.

⁴ Response to NPFC request for additional information , 26 May 2012.

- (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.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

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

- Optional OSLTF Claim Form, signed on 20 April 2012;
- Letter from the Claimant, describing losses, undated;
- Line graph depicting monthly sales fluctuations;
- Bar graph showing advertising costs for 2010 as compared to average of 2005 – 2009;
- List of companies with whom the Claimant alleged to have lost business;
- Letter from Bruce Barry, Wacky World, to the Claimant, 7 March 2011;
- Letter from Jim Leet, Marine Concepts International, Inc., to the Claimant, 8 March 2011;
- Letter from JR Fischer, DBS to the Claimant, 2 June 2010;
- Fiberglass Finesse estimate, 20 April 2010;
- Letter from JR Fischer to the Claimant re Hot Dog Willy, undated;
- Letter from Derek Lombardi to the Claimant, 4 March 2011;
- Fiberglass Finesse estimate, 1 May 2010;
- Response to NPFC request for additional information, 26 May 2012, including following supporting documents:
 - 2009 Form 1120S, showing gross sales of \$124,187.00 and business income of \$47,304.00;
 - 2009 Schedule K-1 (Form 1120S);
 - 2010 Form 1120S, showing gross sales of \$162,765.00 and business income of \$13,404.00;
 - 2010 Schedule K-1 (Form 1120S);
 - 2010 Federal Supporting Statements;
 - 2011 Form 8879-S;
 - 2011 Form 1120S, showing gross sales of \$118,302.00 and business income of \$54,711.00;
 - 2011 Form 1125-A;

- 2011 Schedule K-1 (Form 1120S);
- Monthly Profit and Loss Statements, January 2009 – December 2011.

In his submission to the NPFC, the Claimant indicates that in March of 2011, he previously submitted this claim to the RP/GCCF.⁵ The GCCF assigned Claimant ID 3504606 and denied payment on the claim.⁶

On 4 May 2012, the Claimant submitted this claim to the NPFC, seeking \$150,171.00 in loss of profits and impairment of earning capacity damages, allegedly incurred as a result of the Deepwater Horizon oil spill.⁷ OPA requires that all claims for costs or damages be presented first to the RP/GCCF, prior to their presentment to the NPFC.⁸ Should the GCCF deny payment on the claim, or fail to issue a determination following 90 days of presentment, the claimant may present the claim to the NPFC.⁹ Therefore, if any of the damages now presented in this claim to the NPFC, have not first been presented to the GCCF, these damages are denied for improper presentment.

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 to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support this claim.

In order to prove a claim for loss of profits damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an actual financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

1. Failure to demonstrate an actual financial loss.

In order to prove that a claimant sustained an actual financial loss within the meaning of OPA, a claimant must prove that his “income was reduced”¹⁰ following the oil spill. “The claimant’s profits or earnings in comparable periods”¹¹ must establish a baseline by which to measure whether or not the claimant’s income decreased during the period in which the claimant alleges a loss. A Claimant may also present evidence of actually cancelled contracts. However, in order to prove that any cancelled work resulted in an actual loss; a Claimant must prove that any cancelled projects were not replaced with other work.

Here, the Claimant alleged to have sustained a financial loss of \$151,171.00 in 2010 as a result of the Deepwater Horizon oil spill.¹² However, documentation provided by the Claimant shows that in 2010, the Claimant reported higher gross sales than in either 2009 or 2011. Specifically, for the period of May to December of 2010, the Claimant reported gross sales of \$121,002.92, as compared to \$84,057.57 and \$76,733.65 for the same periods of 2009 and 2011 respectively.¹³

This substantial growth in sales in the period following the oil spill resulted in the Claimant’s profits rising from -\$2,623.58 in 2009 to -\$846.03 in 2010.¹⁴ The Claimant’s profits then rose to \$31,623.99 from May to December 2011 in spite of a significant drop in revenue in 2011 as compared to 2010. This indicates that the Claimant’s expenses were substantially higher in 2010 than in either 2009 or 2011.

⁵ Optional OSLTF Claim Form, signed on 26 April 2012.

⁶ Optional OSLTF Claim Form, signed on 26 April 2012.

⁷ Optional OSLTF Claim Form, signed on 26 April 2012.

⁸ 33 C.F.R. § 136.103(a).

⁹ 33 C.F.R. § 136.233(b).

¹⁰ 33 C.F.R. § 136.233(b).

¹¹ 33 C.F.R. § 136.233(c).

¹² Response to NPFC request for additional information, 26 May 2012.

¹³ 2009, 2010 and 2011 Forms 1120S.

¹⁴ Monthly profit and loss statements provided by the Claimant (May to December of each year).

The Claimant's profits increased from 2009 to 2010 during the period in which the Claimant would have been affected by the oil spill. Notably, the Claimant's revenue also grew substantially during this year, as compared to either 2009 or 2011. Although the Claimant alleged that a newly instituted marketing plan should have resulted in even higher sales in 2010, the Claimant's lower than expected sales growth in 2010 is not a financial loss within the meaning of OPA.

Based on the foregoing, the Claimant has failed to provide documentation to prove that he sustained an actual financial loss in the period following the Deepwater Horizon oil spill.

2. Failure to prove loss due to Deepwater Horizon oil Spill.

The Claimant alleged that he lost certain business opportunities due to the economic effects of the oil spill on his tourism-reliant customer base in Pinellas County, Florida. In support of this assertion, the Claimant provided letters from customers regarding their decisions not to pursue certain projects with the Claimant due to the effects of the Deepwater Horizon oil spill.

Any business lost by the Claimant must have been guaranteed by a contract or other agreement to indicate that the Claimant would have actually earned the income he alleged to have lost as a result of the oil spill. Notably, the Claimant has not included copies of contracts, or other evidence of work in progress that was cancelled as a result of the spill. Rather, all documentation indicates that certain customers, with whom the Claimant had no pre-existing agreement, chose not to use the Claimant's services in the months following the oil spill. The Claimant has not provided evidence to prove that any projects that were allegedly lost or cancelled, were not replaced by other projects

The NPFC contacted each customer with whom the Claimant alleged to have lost business as a result of the oil spill. One customer stated that although the Claimant had bid on a particular project, no contracts had yet been awarded, and the Claimant's bid had not been accepted.¹⁵ Other customers stated that they were unable to give the Claimant certain work, but also stated that no work was actually in progress at the time of the oil spill.

It does not appear, then, that the Claimant lost any guaranteed work as a result of the oil spill. Rather, losses presented by the Claimant are speculative. Speculative losses of income are not compensable under OPA, which provides compensation for "*actual* net reductions or loss of earnings or profits suffered" (emphasis added).¹⁶

Furthermore, as noted above, the Claimant's gross sales increased substantially from May to December of 2010, as compared to that period of either 2009 or 2011. Therefore, any loss of profits sustained by the Claimant would have been due to increased expenses. Tax documentation provided by the Claimant indicates that in 2009, the Claimant compensated officers a total of \$9,000.00.¹⁷ In 2010, officer compensation increased to \$30,000.00, and in 2011, the company did not compensate officers.¹⁸ Therefore, it seems that the majority of the Claimant's reduction in business earnings in 2010 would have been due to a substantial increase in officer compensation and other expenses in 2010, and not due to the Deepwater Horizon oil spill. The Claimant has not provided evidence that might prove that increased expenses was somehow a result of the Deepwater Horizon oil spill.

Furthermore, the Claimant alleged that business losses were linked to decreased tourism in 2010. However, 2010 Pinellas County tourism statistics indicate that tourism in the summer and fall of 2010 did not decrease as compared to the previous year. It is unclear then, how or to what extent the oil spill may have affected the Claimant's customer base. The 2010 Annual Visitors Profile for Pinellas County indicates that the number of visitors to the county in May, June, July and August 2010, actually increased

¹⁵ PHONECON: NPFC Staff and potential customer of the Claimant, 15 May 2012.

¹⁶ 33 C.F.R. § 136.235

¹⁷ 2009 Form 1120S.

¹⁸ 2010 and 2011 Forms 1120S.

as compared to those months of 2009.¹⁹ Likewise, the Visitors Profile indicates that expenditures in the spring and summer months of 2010, did not drop, but remained at 2009 levels.²⁰ These statistics are further supported by Pinellas County Bed Tax collections, which indicate year over year increases starting in July of 2010 and continuing through 2011.²¹

The Claimant alleged that these statistics are not relevant because decrease in tourism numbers were not the direct cause of the Claimant's losses. Rather, the Claimant alleged that losses were due to "the negative mindset of most area entrepreneurs who . . . had to decide whether to use limited funds to invest in the future or save as much as possible in order to survive [effects of the oil spill]."²² However, a decision by a customer to forgo repair and construction work with the Claimant is not a loss caused by the discharge of oil resulting from the Deepwater Horizon oil spill, particularly considering that the Claimant has not provided evidence sufficient to prove that his customer base actually sustained losses as a result of the oil spill.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$150,171.00, and (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 a discharge of oil.

Claim Supervisor:  *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *7/5/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁹ St. Petersburg/Clearwater Area Convention and Visitors Bureau Annual 2010 Visitor Profile, <http://www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf>, at 6. Accessed on 3 January 2012.

²⁰ St. Petersburg/Clearwater Area Convention and Visitors Bureau Annual 2010 Visitor Profile, Available at, www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf, at 7. Accessed on 3 January 2012.

²¹ Pinellas County, CVB statistics, Bed Tax Information. Available at, www.pinellascvb.com/cms/index.php?id=6. Accessed on 3 January 2012.

²² Response to NPFC Request For Additional Information, 26 May 2012.