

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: 7012 2210 0001 7215 0452

5890/DWHZ  
6 June 2013

Jones Swanson Huddell & Garrison  


Re: Claim Number: N10036-1937

Dear Ms. Lasky:

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 N10036-1937 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 N10036-1937.

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  
cc: Causeway BP, LLC  
10323 Causeway Blvd  
Tampa, FL 33619

By Certified Mail:  
No. 7012 2210 0001 7215 0469

## CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1937
Claimant	Causeway BP, LLC
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$962,814.70

### ***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 17 May 2013, Ms. Catherine Lasky, legal representative of Causeway BP, LLC, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$962,814.70 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.<sup>1</sup>

At the time of the oil spill, the Claimant owned and operated a service station which sold BP branded fuel. The station had been in operation since May of 2009.<sup>2</sup> The station was located along a route frequently traveled by visitors to Clearwater, Florida and other beach destinations on Florida's west coast.<sup>3</sup> The Claimant alleged that the business

served a significant number of customers who were on the way to the beach and that business declined significantly during the months following the Deepwater Horizon explosion, resulting in the ultimate closing of the station in November of 2011.<sup>4</sup>

In order to calculate their losses, the Claimant used "a pre- and post-Spill comparison of the sales and profits and then appl[ied] a Risk Transfer Premium of 2.5."<sup>5</sup> The Claimant's sum certain of \$962,814.70 also includes a \$3,000.00 accountant's fee.

<sup>1</sup> Claim cover letter, 17 May 2013.

<sup>2</sup> 2009 Profit and Loss Statement.

<sup>3</sup> Claim cover letter, 17 May 2013.

<sup>4</sup> Claim cover letter, 17 May 2013.

<sup>5</sup> Claim cover letter, 17 May 2013.

## ***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:

- Claim cover letter, 17 May 2013;
- Causeway BP, LLC, Agreed-upon Procedures Report; Compensation Claim, prepared on 18 January 2013;
- 2009 Federal Income Tax Returns;
- 2010 Federal Income Tax Returns;
- 2011 Federal Income Tax Returns;
- Maps of service area and the Claimant's business location;
- BP Claim Determination Notification, 24 April 2013;
- 2009 Profit and Loss Statement;
- 2010 Profit and Loss Statement;
- 2011 Profit and Loss Statement;
- Email submission from the Claimant to the NPFC, 17 May 2013;
- Fuel Sales Chart;
- Business Articles of Organization;

The Claimant alleged to have presented this claim to the BP Claims Program on 18 January 2013. BP denied payment on the claim in a letter dated 24 April 2013.<sup>6</sup>

On 17 May 2013, the Claimant presented this claim to the NPFC seeking to recover \$962,814.00 in loss of profits or impairment of earning capacity damages. The NPFC does not have information necessary to confirm the amounts and subject matter of this claim as previously presented to the BP Claims Program. However, the NPFC will adjudicate this claim to the extent that OPA presentment requirements have been satisfied.<sup>7</sup> Any damages now before the NPFC which were not previously presented to and denied by the Responsible Party would be denied for improper presentment.<sup>8</sup>

Furthermore, evidence in this claim submission indicates that the Claimant is excluded from the Deepwater Horizon Economic and Property Damage Class Action Settlement (E&PD Settlement).<sup>9</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.

For the reasons explained below, this claim is not compensable under OPA.

1. Future or other damages not actually incurred by the Claimant are not compensable under OPA.

<sup>6</sup> BP Claim Determination Notification, 24 April 2013.

<sup>7</sup> 33 C.F.R. § 136.103(a).

<sup>8</sup> 33 C.F.R. § 136.103(c)(2).

<sup>9</sup> Claim cover letter, pg. 3. Sellers of BP branded fuel are excluded from the settlement class. See, [http://www.laed.uscourts.gov/OilSpill/Orders%5C10012012Order\(StigmaDealerRecreation\).pdf](http://www.laed.uscourts.gov/OilSpill/Orders%5C10012012Order(StigmaDealerRecreation).pdf)

The Claimant alleged to have sustained both lost profits damages and alternatively, a loss or reduction of revenues.<sup>10</sup> The NPFC notes that in accordance with OPA, lost revenue damages may only be “recoverable by the government of the United States, a state, or a political subdivision thereof.”<sup>11</sup> Because the Claimant is a private entity, this claim is analyzed under OPA’s loss of profits and impairment of earning damage category.

In order to prove a claim for loss of profits damages, a Claimant must first prove that they sustained a “net reduction or loss of earnings or profits.”<sup>12</sup> In calculating their losses, the Claimant applied a “risk transfer premium” of 2.5 to the calculated actual losses to reach a sum certain of \$962,814.70. However, prospective or other damages not actually sustained, are not compensable under OPA’s loss of profits damage category, which limits potentially available compensation to “the actual net reduction or loss of earnings or profits *suffered*” [emphasis added].<sup>13</sup> Therefore, payment is initially denied on \$385,125.88 of this claim, which constitutes losses not allegedly incurred by the Claimant.

2. The Claimant has failed to prove that alleged losses were due to the Deepwater Horizon oil spill.

In order to prove a claim for loss of profits damages under OPA, a claimant must provide evidence sufficient to prove that their claimed loss was due to damage to real property or natural resources resulting from the discharge or substantial threat of discharge of oil.<sup>14</sup>

The Claimant alleged that they sustained losses due to decreased tourist traffic in and around Tampa, Florida as a result of the oil spill. However, financial documentation provided by the Claimant fails to indicate that fuel sales decreased in the period following the oil spill. It appears as though the business was only in operation from May 2009 through November 2011. Throughout this period, the Claimant experienced its highest fuel sales in the spring and summer months of 2010. The Claimant’s sales appear to have dropped in 2011, but the Claimant has not provided any evidence to indicate that tourism in the Tampa, Florida area was somehow affected by the Deepwater Horizon oil spill in 2011.

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 \$962.814.70, 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 discharge of oil.

Claim Supervisor:  *Adjudication Division*

Date of Supervisor’s Review: *6/6/13*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

<sup>10</sup> Claim cover letter, 17 May 2013, pg. 3.

<sup>11</sup> 33 U.S.C. § 2702(b)(2)(d).

<sup>12</sup> 33 C.F.R. § 136.235.

<sup>13</sup> 33 C.F.R. § 136.235.

<sup>14</sup> 33 C.F.R. § 136.1.