

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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5890/DWHZ
18 July 2013

Dive In Dude Inc.



Re: Claim Number: N10036-1964

Dear Ms. Jones:

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 N10036-1964 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 N10036-1964.

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

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1964
Claimant	Dive In Dude Inc
Type of Claimant	Corporate
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$127,283.00

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 28 June 2013, Nancy Jones, on behalf of Dive In Dude, Inc. ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$127,283.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant catches shrimp and sells its catch to wholesalers for resale. The Claimant, which is based in Jacksonville, Florida and operates an "ice boat" as opposed to a freezer boat, alleged that it had plans to travel to the Gulf of Mexico to catch shrimp, which it intended to sell to a specific wholesaler. Before it traveled to the Gulf, the Claimant alleged that the wholesaler informed them that he would not purchase any shrimp it may have caught, due to concerns regarding his ability to sell the shrimp to local consumers who were fearful of oil contamination. As such, the Claimant decided not to travel to the Gulf and instead shrimped in the Jacksonville area. The Claimant further alleged that "processors decreased price due to Gulf processors closing and having nowhere to send shrimp."²

The Claimant has not indicated how it calculated its losses to arrive at its sum certain of \$127,283.00.

¹ See both the cover letter signed by Mr. F. Gerald Maples, dated 6/7/2013, and the Deepwater Horizon Oil Pollution Act form, 6/3/2013, both submitted to the NPFC by the claimant with the claim on 6/27/2013.

² Optional OSLTF Claim Form, signed on 17 June 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:

- Optional OSLTF Claim Form, 17 June 2013;
- BP Claims Program Denial letter, dated 29 April 2013;
- Letter from Claimant to BP Claims, dated 15 June 2013;
- Letter from Wholesaler to BP Claims, dated 17 June 2013.

Prior to submitting this claim to the NPFC, the Claimant attempted to recover loss of profits or impairment of earning capacity damages through the BP Claims program. The BP Claims program denied payment due to lack of documentation to support that the loss of income was due to the oil spill.³

On 28 June 2013, the Claimant presented this claim to the NPFC, seeking to recover \$127,283.00 in loss of profits or impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.

Evidence in this claim submission indicates that the Claimant is likely not a member of the Deepwater Horizon Economic and Property Damage Class Action Settlement (E&PD Settlement).⁴

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 damages, a claimant must provide evidence sufficient to prove (1) that the Claimant sustained a loss or reduction in income, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill. This claim is denied because the Claimant has failed to provide evidence to meet either proof requirement.

1. Failure to prove financial loss

The Claimant alleged to have sustained oil spill related losses of \$127,283.00 due to its decision to shrimp in Jacksonville rather than in other unspecified Gulf waters in 2010. However, the Claimant has not provided any evidence to indicate that it indeed sustained losses in this amount.

³See BP Claims Denial Letter, dated 29 April 2013, and submitted to the NPFC with the claim by the claimant on 6/28/2013.

⁴ At the time of the oil spill, the Claimant was living in Jacksonville, FL, outside of the settlement's parameters.

In order to prove that a Claimant has sustained a compensable loss of profits, a Claimant must provide evidence to indicate “the amount of the claimant’s profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered.”⁵ The amount of compensation potentially available to a claimant is limited by several factors including “[a]ll income from alternative employment or business undertaken.”⁶ The Claimant has not provided any financial documentation whatsoever, thereby failing to prove that it indeed sustained a financial loss.

2. Failure to prove that alleged loss was caused by the oil spill.

The Claimant alleged that it decided not to travel to the Gulf to shrimp after a certain wholesaler indicated that he would not purchase shrimp from the Gulf of Mexico due to concerns regarding oil contamination. The Claimant has not provided any evidence to indicate that it have ever caught or sold shrimp in the waters that were affected by federal fishery closures during the Deepwater Horizon oil spill. Furthermore, the Claimant’s losses, based on a wholesaler’s speculation regarding consumer preferences following the oil spill are speculative and therefore not compensable under OPA, which only allows compensation for actual losses.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that it sustained a \$127,283.00 loss of profits, and (2) that its alleged loss was caused by damage to real or personal property or natural resources resulting from 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: *7/18/13*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

⁵ 33 C.F.R. § 136.233(c).

⁶ 33 C.F.R. § 136.235(b).