

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	N10036-1789
Claimant	Martin Marine Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$929,365.62

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.

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 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 2 May 2012, and the CSSP began processing claims on 4 June, 2012.

CLAIM AND CLAIMANT

On 24 February 2012, Martin Marine Inc. (the Claimant) presented a claim to the National Pollution Funds Center (NPFC) seeking \$435,000.00 in loss of profits and impairment of earnings capacity damages, \$475,855.32 in real or personal property damages, and \$18,510.30 in damage assessment costs.¹ The Claimant alleged to have incurred all claimed damages, totaling \$929,365.62, as a result of the Deepwater Horizon oil spill.

The Claimant owns and operates the tug Martin Spirit and the barge Martin Endeavor, which were put into service under charter contract, dated 01 June 2010, with Cal Dive Offshore Contractors, Inc. (Cal Dive).² Cal Dive was operating under a contract, dated 29 November 2005 with BP America Production Company.³ Cal Dive chartered the barge and tug to provide a temporary depository for skimming operations in response to the Deepwater Horizon oil spill.⁴ The contract was to commence on or about 05 June 2010 and last a minimum of 30 days with the option to continue or cancel after 15 days of written notice.⁵ Cal Dive was to return the vessels to the Claimant, cleaned and made gas free and suitable for loading No. 6 Fuel Oil. Acceptance of the vessels was to be at the discretion of the Claimant.⁶

BP wrote Cal Dive on 30 November 2010 stating "the Vessel was redelivered and the charter terminated" effective 2400 Hrs 29 November 2010.⁷ Cal Dive forwarded the letter to the

¹ Optional OSLTF Claim Form, received on 24 February 2012.

² Cal Dive Offshore Contractors, Inc. & Martin Marine charter contract dated 01 June 2010.

³ Contract No. BPM-05-02481 dated 29 November 2005 between Cal Dive Offshore Contractors, Inc & BP America Production Company.

⁴ Cal Dive Offshore Contractors, Inc. & Martin Marine charter contract dated 01 June 2010.

⁵ Cal Dive Offshore Contractors, Inc. & Martin Marine charter contract dated 01 June 2010.

⁶ Cal Dive Offshore Contractors, Inc. & Martin Marine charter contract dated 01 June 2010 at Special Conditions e).

⁷ BP Certified Mail to Cal Dive International, Inc. dated 30 November 2010.

Claimant on 03 December 2010 with the attached sentence "we need to be prepared to sail once the surveys are completed."⁸

The Claimant alleges that the vessel was not released to Cal Dive gas free and according to contract standards by BP/Sabine Surveyors, and thus Cal Dive did not release the vessel back to the Claimant as per the contractual stipulations.⁹

Specifically, the Claimant alleges that the vessels were returned with damage to the vessels' hull caused by running aground, corrosion of the underwater antifouling paint, and damages to the cargo pump. Furthermore, the condition of the returned vessels was such that the Claimant was required to perform surveys and cleaning to receive a gas free certificate, which caused delays and lack of shipyard availability. In sum, the Claimant is alleging to have sustained additional costs relating to the above-mentioned damages and delays, totaling \$929,365.62.¹⁰

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 § 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.

Law Relating to General Uses of the Fund

(a) Uses generally

The Fund shall be available to the President for *inter alia*

....

(4) the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages;

....

Law Relating to Presentment of Claims to the OSLTF

33 U.S.C. § 2713

(a) Presentation

Except as provided in subsection (b) of this section, all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 2714 (a) of this title.

....

⁸ Email from (b) (6) at Cal Dive to (b) (6) at Martin Marine Inc.

⁹ Enclosure 1, explanation of claimed damages.

¹⁰ Enclosure 1 at page 6.

(c) Election

If a claim is presented in accordance with subsection (a) of this section and—

- (1) each person to whom the claim is presented denies all liability for the claim, or
- (2) the claim is not settled by any person by payment within 90 days after the date upon which

(A) the claim was presented, or

(B) advertising was begun pursuant to section 2714 (b) of this title, whichever is later, the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

(d) Uncompensated damages

If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund.

33 C.F.R. § 136.103 Order of presentment;

(a) Except as provided in paragraph (b) of this section, all claims for removal costs or damages must be presented first to the responsible party or guarantor of the source designated under §136.305.

(b) Claims for removal costs or damages may be presented first to the Fund only—

- (1) By any claimant, if the Director, NPFC, has advertised, or otherwise notified claimants in writing, in accordance with §136.309(e);
- (2) By a responsible party who may assert a claim under section 1008 of the Act (33 U.S.C. 2708);
- (3) By the Governor of a State for removal costs incurred by that State; or
- (4) By a United States claimant in a case where a foreign offshore unit has discharged oil causing damage for which the Fund is liable under section 1012(a) of the Act (33 U.S.C. 2712(a)).

(c) If a claim is presented in accordance with paragraph (a) of this section and—

- (1) Each person to whom the claim is presented denies all liability for the claim; or
- (2) The claim is not settled by any person by payment within 90 days after the date upon which

(A) the claim was presented, or

(B) advertising was begun pursuant to §136.309(d), whichever is later, the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

(d) No claim of a person against the Fund will be approved or certified for payment during the pendency of an action by the person in court to recover costs which are the subject of the claim.

Law Relating Rights of Subrogation

33 U.S.C. § 2712 (f) Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

Law Relating to Loss of Profits or Impairment of Earning Capacity

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.
- (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.

Pursuant to 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.

Law Relating to Damage to Real or Personal Property

33 C.F.R. § 136.213 states:

- (a) A claim for injury to, or economic losses resulting from the destruction of real or personal property may be presented only by a claimant either owning or leasing the property.
- (b) Any claim for loss of profits or impairment of earning capacity due to injury to, destruction of, or loss of real or personal property must be included as subpart of the claim under this section and must include the proof required under §136.233.

33 C.F.R. § 136.215 establishes additional proof requirements:

- (a) In addition to the requirements of subparts A and B of this part, a claimant must establish—

- (1) An ownership or leasehold interest in the property;
- (2) That the property was injured or destroyed;
- (3) The cost of repair or replacement; and
- (4) The value of the property both before and after injury occurred.

(b) In addition, for each claim for economic loss resulting from destruction of real or personal property, the claimant must establish—

- (1) That the property was not available for use and, if it had been, the value of that use;
- (2) Whether or not substitute property was available and, if used, the costs thereof; and
- (3) That the economic loss claimed was incurred as the result of the injury to or destruction of the property.

Under 33 C.F.R. § 136.217, the amount of compensation allowable for a claim involving real or personal property damage is limited to:

(a) The amount of compensation allowable for damaged property is the lesser of—

- (1) Actual or estimated net cost of repairs necessary to restore the property to substantially the same condition which existed immediately before the damage;
- (2) The difference between value of the property before and after the damage; or
- (3) The replacement value.

(b) Compensation for economic loss resulting from the destruction of real or personal property may be allowed in an amount equal to the reasonable costs actually incurred for use of substitute commercial property or, if substitute commercial property was not reasonably available, in an amount equal to the net economic loss which resulted from not having use of the property. When substitute commercial property was reasonably available, but not used, allowable compensation for loss of use is limited to the cost of the substitute commercial property, or the property lost, whichever is less. Compensation for loss of use of noncommercial property is not allowable.

(c) Compensation for a claim for loss of profits or impairment of earning capacity under §136.213(b) is limited to that allowable under §136.235.

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.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

On 24 February 2012, the Claimant presented this claim to the Fund, asserting that failed mediation attempts between Cal Dive and BP, at which the Claimant's representatives were present, constitute presentment of the claim to the responsible party under the law and regulations.

Under 33 U.S.C. § 2713 (a) and 33 C.F.R. § 136.103(a), all claims for removal costs, or damages must be presented first to the responsible party (RP). Under 33 U.S.C. § 2713 (c) and 33 C.F.R. § 136.103 (c)(2), if the claim is not settled within 90 days of presentment to the RP then the claimant may file a claim in court and/or submit their claim to the OSLTF.

The Claimant has not provided the NPFC with a copy of the contract between Cal Dive and BP, but asserts that the contract required mediation of all disputes. Cal Dive and BP went to mediation on 13 January 2012, with the Claimant present as a subcontractor to Cal Dive. However, Cal Dive refused to accept the settlement offer resulting from the negotiation, due to its alleged failure to provide adequate compensation to the Claimant.¹¹ In response to an NPFC request that the Claimant provide proof of presentment to the RP, the Claimant stated that they “had no contract for services with BP” and “due to many previous discussions and the unsuccessful mediation process with BP, [the Claimant] feels that it has exhausted its options with BP and that submission to the GCCF would be fruitless.”¹²

Evidence presented in this claim submission indicates that the Claimant may be a member of the economic damages class of the Deepwater Horizon oil spill economic and property damages class action settlement (E&PD Settlement). The NPFC sent the Claimant a letter, dated 11 July 2012, regarding the Claimant’s possible status as a member of the settlement class. In response to the letter, the Claimant stated “we feel that our claim may not be covered ... as such we are researching this further and preparing to opt out of the program given our current understanding as well as contractual issues.”¹³

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 or destruction or loss of real or personal property or 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 the claim. The NPFC considered all the documentation submitted by the Claimant.

a. Presentment to the Responsible Party

The Claimant attended mediation between the RP and Cal Dive, on 13 January 2012, regarding damages that are the subject of this claim.¹⁴ However, the Claimant did not present this claim to the RP/GCCF prior to its presentment to the NPFC, as is required by 33 U.S.C. § 2713 and 33 C.F.R. § 136.103.

The Claimant states that “the claim was not presented to BP as a responsible party or the GCCF because [the Claimant’s] contract was with Cal Dive, however, Cal Dive in turn presented the claim to BP.”¹⁵ However, mediation or any other negotiated settlement process pursuant to the contract between Cal Dive and BP is not the valid presentment of the Claimant’s claim under OPA and associated federal regulations. Further, the Claimant has not provided evidence that might support its contention that submitting a claim to the GCCF would be “fruitless.” Even had the Claimant presented such evidence, the Claimant’s assumption that the RP would deny payment on the claim, does not obviate claim presentment requirements under OPA.

OPA requires that a claim be first presented to the RP or the RP’s agent, here the GCCF. Because the Claimant has failed to meet claim presentment requirements, this claim has been

¹¹ Strasburger Attorneys at Law letter to (b) (6) dated 21 February 2012.

¹² Strasburger Attorneys at Law letter for NPFC regarding presentment dated 11 May 2012.

¹³ Email from (b) (6) to the NPFC dated 20 July 2012.

¹⁴ Strasburger Attorneys at Law letter to (b) (6) dated 21 February 2012.

¹⁵ Strasburger Attorneys at Law letter for NPFC regarding presentment dated 11 May 2012.

improperly presented to the NPFC under 33 U.S.C. § 2713 and 33 C.F.R. § 136.103, and is therefore denied.

b. E&PD Settlement

It appears that the Claimant may be a member of the Deepwater Horizon oil spill economic and property damages class action settlement (E&PD Settlement). On 11 July 2012, NPFC staff sent the Claimant a letter detailing the E&PD Settlement and requesting that the Claimant provide evidence indicating that they were either not included in, or that they have opted out of the settlement.¹⁶ The Claimant responded via email dated 20 July 2012 stating that “we feel that our claim may not be covered ... as such we are researching this further and preparing to opt out of the program.”¹⁷

According to 33 U.S.C. § 2712 (f),

[p]ayment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

The Claimant has not provided documentation to indicate that they are either excluded from or have opted out of the E&PD settlement. The Claimant has merely asserted that they will opt out, and that they believe that are likely excluded from the settlement. Although the Claimant has stated in an email to the NPFC that they “are researching this further,”¹⁸ as of the date of this determination, the Claimant has not provided the NPFC with additional evidence regarding their status in the settlement class.

This claim is therefore considered to have been settled, and the Claimant is ineligible to recover funds from the OSLTF. According to OPA, the payment of any claim by the NPFC is subject to the NPFC’s ability to obtain, by subrogation, the rights to recover all costs and damages from the responsible party. If a claim has been settled, the Claimant no longer has rights to the claim and therefore cannot subrogate the NPFC to those rights.

While this claim may not have been quantified or paid, it is considered to have been settled by virtue of the Court’s preliminary approval of the settlement agreement. If the Claimant disagrees that they are a member of the economic damages class of the E&PD Settlement, they should submit evidence to indicate that they have either opted out or are excluded from the E&PD Settlement in their request for reconsideration of this claim.

c. Loss of Profits and Impairment of Earning Capacity Damages \$435,000.00

In order to prove a claim for loss of profits and impairment of earning capacity 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.

The Claimant has failed to present sufficient evidence to prove that they sustained an actual financial loss under OPA. Contrary to Claimant’s assertions that they lost profits or earnings as a result of the Deepwater Horizon oil spill, the Claimant actually ~~lost~~ earned income as a result of the spill by employing their vessels in oil spill response operations.

¹⁶ NPFC letter to Claimant regarding status of E&PD Settlement dated 11 July 2012.

¹⁷ Email dated 20 July 2012 at 0948 hours from [REDACTED]

¹⁸ Ibid.

According to OPA, any loss the Claimant may have sustained, “must clearly reflect adjustments for . . . all income resulting from the incident.”¹⁹ Therefore, the Claimant would only have sustained a financial loss if the amount of the Claimant’s loss actually exceeded the amount of income generated by the Claimant as a result of the incident. The Claimant has failed to provide evidence sufficient to meet this proof requirement.

Furthermore, the Claimant has failed to prove that any loss they may have sustained, was incurred as a result of the Deepwater Horizon oil spill. Rather, evidence provided by the Claimant indicates that the Claimant’s loss was a result of Cal Dive’s alleged failure to adhere to the terms of their contract, which required that Cal Dive return a clean and gas free barge ready to load No. 6 oil.

The Claimant’s vessels were released to Cal Dive from BP after Sabine Surveyors LTD issued a report indicating that the vessels were ready to carry future oil cargoes without the risk of contamination.²⁰ The Claimant’s contract with Cal Dive required that the vessels be returned with a gas free certificate;²¹ however the terms of the contract between BP and Cal Dive were not provided to the NPFCC.

The Claimant is a professional marine corporation which contracted with Cal Dive to enable Cal Dive to fulfill their contract with BP. The contracts between the parties govern the remediation of the Claimant’s alleged damages. The OSLTF, is therefore not the appropriate venue for seeking reimbursement of the Claimant’s alleged losses, which devolve from Cal Dive’s alleged failure to fulfill their contractual obligations.

The Claimant states that they “contemplated litigation against Cal Dive, but given the fact that Cal Dive is expected to attempt to pass the claim off to BP, and the expense, delay, and uncertainty of litigation, [the Claimant] has opted to pursue this claim.”²² The Claimant seeks a remedy from the Fund in hopes that it will be more expedient than forcing Cal Dive to comply with the terms of their contract. The Fund exists to pay certain uncompensated removal costs and damages resulting from the discharge or the substantial threat of a discharge of oil, as specified in the statute and regulations. However, the fact that the Claimant incurred certain damages that are related to an oil response operation, does not necessarily prove that those losses are OPA compensable. Here, the Claimant has provided evidence indicating that their alleged financial loss was the result of Cal Dive’s failure to adhere to their contractual obligations, and not a result of Deepwater Horizon oil spill. In fact, the Deepwater Horizon oil spill allowed the Claimant an opportunity to earn income it otherwise would not have earned. Any subsequent loss resulting from Cal Dive’s failure to deliver the vessels as previously stipulated by the parties, is not a loss that is compensable under OPA.

Based the foregoing, the Claimant has not established by a preponderance of the evidence that (1) they sustained an actual uncompensated financial loss, or (2) that their alleged loss was incurred as a result of the Deepwater Horizon oil spill.

d. Destruction of Real or Personal Property Damages \$475,855.32

The OSLTF is available to pay uncompensated removal costs or damages, including certain real or personal property damages, incurred as a result of the oil spill. In this instance, however, the

¹⁹ 33 C.F.R. § 136.235(a).

²⁰ Sabine Surveyors, LTD. vessel tank condition survey dated 26 November 2010.

²¹ Martin Marine charter contract with Cal Dive dated 01 June 2010 at Special Conditions (e).

²² Strasburger Attorneys at Law letter dated 11 May 2012 at paragraph 4.

alleged property damages to the Claimant's vessel are not "uncompensated," as they were incurred as a result of the Claimant voluntarily conducting for profit oil spill response operations at an agreed upon contractual rate. Accordingly, while the Claimant may be dissatisfied at the amount of compensation they received for the work performed, the damages are not considered uncompensated and are not OPA compensable.

Claimant voluntarily engaged in oil spill response operations, thereby subjecting his vessels to the harm for which they now seeks compensation. To evidence that his vessel's under coatings were damaged by Deepwater Horizon oil, the Claimant has submitted information relating to the dry-docking and repair of the undercoatings of Coast Guard vessels engaged in oil spill operations. The Claimant's evidence is misplaced, however, because of the difference in the nature of the response operations in which the two types of vessels were engaged. Coast Guard cutters respond to oil spills as part of a Congressionally mandated pollution response mission. While certain costs are associated with the "burn rate" charged for that Coast Guard asset, RP's remain liable for real or personal property damages resulting from the oil spill as opposed to other factors incorporated in the "burn rate" such as a mechanical malfunction unrelated to physical oiling.

To the contrary, the Claimant's vessels were voluntarily operating in oiled waters pursuant to a profit making venture under the defined terms of a contract. Oil Spill Response Organizations and other commercial tradesmen who engage in oil spill response operations are expected to negotiate favorable contractual terms to cover the costs associated with responding in the environment in which they operate.

Further, pursuant to the contractual agreement between Cal Dive and the Claimant dated 01 June 2010, it appears that the Claimant (owner) indemnified all parties from "any property damage suffered."²³ Here, the Claimant knew that they would be operating in oiled waters from the Deepwater Horizon incident and willingly assumed the risk to take the vessel from its off-hire status in Groves, Texas to operate for Cal Dive in Mobile, Alabama on 08 June 2010.²⁴ For the foregoing reasons, this claim for real or personal damages in the amount of \$475,855.32 is likewise denied.

e. Claim Assessment Costs \$18,510.00

Under 33 U.S.C. § 2701(5) "damages" means damages specified in section 2702 (b) of this title, and includes damage assessment costs. Section 2702(b) lists damage categories provided for by OPA, including, loss of profits or impairment of earning capacity, and real or personal property. If a claimant is unable to prove that they have indeed sustained OPA-compensable damages within one of the categories listed in the statute, then any assessment costs associated with these unproven damages, would likewise be denied compensation under OPA.

In this instance, because the Claimant's alleged damages are not OPA-compensable it follows that the assessment of non-compensable damages are likewise not compensable.

This claim is therefore denied because the Claimant has failed to meet their burden (1) to properly present this claim first to the RP prior to its submission to the OSLFT (2) to prove that they have either opted out of the E&PD Settlement or are an excluded class (3) to prove that they have sustained an uncompensated loss of profits or impairment of earnings in the amount of \$435,000.00, an uncompensated loss for property damages in the amount of \$475,855.32 and

²³ Charter Contract dated 01 June 2010 at section 11.

²⁴ Enclosure 1 at page 1 paragraphs 1 through 4.

assessment costs in the amount of \$18,510.30 for a total of \$929,365.62 and (4) to prove 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:


National Pollution Funds Division

(b) (6)

Date of Supervisor's Review:

8/23/12

Supervisor's Actions:

Review APPROVED

Supervisor's Comments: