

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
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Arlington, VA 20598-7100
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
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5890/DWHZ
Claim # N10036-1211
1 September 2011

Rusk Enterprises, Inc.
C/O Catherine R. Gauthier, Esq.
Smitko & Ory, APLC
622 Belanger Street
Houma, LA 70360

Dear Ms. Gauthier:


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 N10036-1211 involving Deepwater Horizon. 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 N10036-1211.

Mail reconsideration requests to:

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


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

Copy: Rusk Enterprises, Inc.
Timothy W. Rusk
7570 Main Street
Houma, LA 70360 USPS Certified Receipt 7011 1150 0000 4666 9434
Enclosure: Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1211
Claimant	Rusk Enterprise, Inc. Timothy W. Rusk, President
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$178,000.00

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 07 June 2011, Rusk Enterprise, Inc., Timothy W. Rusk, President (Collectively Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$178,000.00 for loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.

Claimant owns and operates two retail furniture stores under the name Kayu Furniture Imports.¹ The Claimant's stores are located in Houma and Gonzales, Louisiana. The store in Gonzales was opened in July 2008. The Claimant stated that "When the oil spill occurred, many customers were fearful of spending their earnings—they were unsure of what the future held. Most customers...work directly with the fishing and oil industries."² According to the Claimant, sales were also affected by the decline in home sales due to the economy in the area in addition to the oil spill.³ The Claimant asserted that it attempted to mitigate its loss of business after the oil spill by discounting prices and promoting special sales events.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.

¹ PHONECON between, Claimant, Claimant's attorney, and NPFC Staff 22 August 2011

² OSLTF Claim Form signed by Claimant and Catherine Gauthier, Attorney, dated 23 May 2011

³ PHONECON between, Claimant, Claimant's attorney, and NPFC Staff 22 August 2011

⁴ PHONECON between, Claimant, Claimant's attorney, and NPFC Staff 22 August 2011

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.
- (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 undertake, 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, Claimant submitted the following documentation:

- OSLTF Claim Form signed by Claimant and Catherine Gauthier, Attorney, dated 23 May 2011
- Form 1120 US Corporation Income Tax Return for 2007, 2008, 2009 and 2010
- Monthly Profit and Loss Statements for Kayu Furniture Imports May 2008 to December 2010 for Houma and Gonzales locations

- City of Gonzales, Louisiana, Business License expiration date 31 December 2010
- Terrebonne Parish Occupational License expiration date 31 December 2010
- Worksheets for monthly sales for Gonzales and Houma stores
- GCCF Denial Letter on Interim/Final Payment Claim dated 11 June 2011

On 05 August 2011 NPFC sent the Claimant a letter requesting additional information in order to further evaluate the claim. On 22 August 2011, the Claimant responded to the request.

Claimant seeks lost earnings and wages in the amount of \$178,000.00.

Before presenting the claim to the NPFC, the Claimant filed an Interim/Final Payment Claim with the GCCF. The claim was assigned Claimant ID #3486144. The Interim/Final Payment Claim was denied on 11 June 2011.⁵

Based upon the evidence provided by the Claimant, it appears that the subject matter of the GCCF claim is the same as the subject matter of the claim before the NPFC, i.e., the Claimant lost earnings as a result of the Deepwater Horizon oil spill. The NPFC deems the GCCF claim to be properly presented to the Responsible Party and to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1121 considers and addresses the loss of earnings in all claims presented to the Responsible Party.

Claimant's Optional OSLTF Claim form indicated that the Claimant filed a claim in the multidistrict litigation now pending in the United States District Court for the Eastern District of Louisiana (MDL-2179 In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf Of Mexico, on April 20, 2010) against BP (the "MDL").⁶ Although the NPFC may not approve and certify the payment of a claim during the pendency of an action by the person in court to recover costs which are the subject of the claim, the NPFC may adjudicate such a claim to determine whether it may be compensable.⁷ Where appropriate, such a claim may be denied.

NPFC Determination

Under 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136, a claimant must prove that their 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.

As to the Claimant's calculation of its alleged losses, the Claimant's original alleged loss included an estimated future loss of earnings.⁸ During a conference call with the Claimant and Claimant's counsel, the NPFC notified the Claimant that estimated future

⁵ GCCF Denial Letter dated 11 July 2011

⁶ OSLTF Claim Form signed by Claimant and Catherine Gauthier, Attorney, dated 23 May 2011

⁷ See 33 C.F.R. § 136.103 (d)

⁸ PHONECON between Claimant, Claimant's attorney, and NPFC Staff 22 August 2011

losses are not compensable under OPA. In response, the Claimant's counsel stated that, in light of this information provided by the NPFC, the estimated loss for the one year following the spill should be \$53,400.00.⁹

Furthermore, under 33 C.F.R. § 136.235, any expenses and overhead that has been saved by the Claimant due to the incident must be accounted for. The Claimant does not appear to have deducted or otherwise adjusted its alleged losses for any saved expenses and overhead.¹⁰ As such, the Claimant has not met its burden of proof in establishing the amount of compensation it may be entitled to with requisite certainty.

As part of his claim, the Claimant submitted his Federal Corporate Income Tax Returns for Kayu Furniture Imports. The Gonzales, Louisiana, store opened in July 2008. The 2009 and 2010 Tax Returns included the results of operation for both stores for each respective year. The Corporate Income Tax Returns show that sales for 2010 had declined from 2009. The Claimant alleged the decline was due to the Deepwater Horizon oil spill. However, the Claimant has not provided documentation that demonstrates the decline in sales was due to the Deepwater Horizon oil spill. Claimant alleged that his customers consisted of fisherman and oil industry workers.¹¹ The Claimant also alleged that these customers were unsure of the future and afraid to spend their money on furniture.¹² However, the Claimant has not provided any documentation that would serve to support his allegations.

This claim is denied because the Claimant failed to meet the burden to demonstrate (1) that there was an alleged loss in the amount claimed, 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:  *tion Division*

Date of Supervisor's Review: *1 September 2011*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

⁹ PHONECON between Claimant, Claimant's attorney, and NPFC Staff 22 August 2011. The estimated loss computation: \$178,000 loss claimed/2 years x 60% estimated net profit = \$53,400.

¹⁰ PHONECON between Claimant, Claimant's attorney, and NPFC Staff 22 August 2011

¹¹ PHONECON between Claimant, Claimant's attorney, and NPFC Staff 22 August 2011

¹² PHONECON between Claimant, Claimant's attorney, and NPFC Staff 22 August 2011