

U.S. Department of
Homeland Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
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CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 7613

5890/DWHZ
5 December 2011

Gerald Fischer
[REDACTED]

Re: Claim Number: N10036-1403

Dear Mr. Fischer:

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 your claim number N10036-1403 involving the Deepwater Horizon oil spill. Please see the enclosed 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. If, however 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 N10036-1403.

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

Enclosures: (1) Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1403
Claimant	Gerald Fischer
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$19,506.00

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 20 April 2011, Gerald Fischer, (the Claimant), presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$17,500.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill. The Claimant's Optional OSLTF Claim Form lacked a definitive sum certain and the submission was not yet entered as a claim. Following the Claimant's initial submission to the NPFC, the Claimant filed an definitive sum certain for \$19,506.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill and the NPFC processed the Claimant's submission as a claim.

At the time of the Deepwater Horizon oil spill, the Claimant rented out his property as a camp in Bayou Dularge, Louisiana.¹ The Claimant asserts that due to the Deepwater Horizon oil spill, he was unable to rent out the camp due to fishery closures in the Gulf of Mexico.² As a result of the inability of the Claimant to rent out his property for camping purposes, the Claimant asserts he suffered reduced income in 2010.³

The Claimant provided the following explanation regarding the calculation of his sum certain of \$19,506.00: the Claimant took his gross revenues from 2009 combined with his losses from 2010 for a total sum of \$19,506.00.⁴ The Claimant then adopted this number as his sum certain.⁵

APPLICABLE LAW

The Oil Pollution Act of 1990 (OPA) provides that each responsible party for a vessel or facility from which oil is discharged into or upon the navigable waters or adjoining shorelines or exclusive economic zone is liable for removal costs and damages. 33 U.S.C. § 2702(a). Damages include the loss of profits or impairment of earning capacity due to the injury, destruction or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant. 33 U.S.C. § 2702(b)(2)(E).

¹ Optional OSLTF Claim Form received 13 September 2011.

² Optional OSLTF Claim Form received 13 September 2011.

³ Optional OSLTF Claim Form received 13 September 2011.

⁴ Letter from the Claimant dated 13 September 2011.

⁵ Optional OSLTF Claim Form received 13 September 2011.

The OSLTF, which is administered by the NPFC, 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. With certain exceptions a claim must first be presented to the responsible party. 33 U.S.C. § 2713(a). If the claim is either denied or not settled by any person by payment within 90 days after the date on which it was presented, the claimant may elect to commence an action in court or present the claim to the OSLTF. 33 U.S.C. § 2713(c).

Pursuant to the claims regulations, 33 C.F.R. § 136.233, a claimant must establish the following to prove loss of profits or impairment of earning capacity:

- (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 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 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

The Claimant's Submission to the OSLTF

In support of his claim, the Claimant presented the following documentation to the NPFC:

- Letter from the Claimant dated 13 September 2011 amending his sum certain;
- Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form, received 20 April 2011;
- GCCF Denial Letter dated 23 August 2010;
- Letter from the Claimant dated 13 September 2011 attaching evidence for the Claimant's claim;
- The Claimant's Comparative profit and loss statements for period January 2008-July 2011;
- Letter from the Claimant describing his claim;
- Partial 2009 Form 1040 Federal Tax Return;
- Partial 2008 Form 1040 Federal Tax Return;
- Partial 2007 Form 1040 Federal Tax Return;

- Copies of photographs [poor quality] of the Claimant's property;
- Incomplete lease signed 14 December 2007 by William K. Wurzlow.

Prior to presenting this Claim to the NPFC, the Claimant filed a claim with BP.⁶ BP issued payment on this claim in the amount of \$12,000.00.⁷ Additionally, the Claimant filed an Emergency Advance Payment (EAP) Six Month Claim with the GCCF for loss of profits and impairment of earnings capacity on 28 August 2010 in the amount of \$23,000.00.⁸ The Claimant was assigned Claimant ID # 1020190 and Claim ID # 35763. The EAP Claim was denied on 14 December 2010.⁹ Additionally, the Claimant filed a Full Review Final (FRF) Claim with the GCCF for loss of profits and impairment of earnings capacity on 04 January 2011 in the amount of \$42,000.00. The Claimant was assigned Claim ID # 9131039. The FRF Claim was denied as deficient on 15 June 2011.¹⁰

Based upon the evidence provided by the Claimant, it appears that the subject matter for Claimant's GCCF claims is the same as the subject matter of his claim before the NPFC, i.e., that due to the Deepwater Horizon oil spill, the Claimant was unable to rent out his camp grounds and as a result suffered reduced income. The NPFC deems that Claimant's GCCF claims as properly presented to the RP and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC claim N10036-1403 considers and addresses the claim presented to the responsible party up to \$19,506.00, specifically; GCCF Claim #'s 35763 (EAP) and 9131039 (FRF).

NPFC Determination

The claim is denied. 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 documentation presented by the Claimant.

The claim is denied because the Claimant failed to prove that the alleged loss in the amount of \$19,506.00 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.

The Claimant failed to provide a connection between his purported loss and the oil spill. Although the Claimant asserts that due to the oil spill he was unable to rent out his camp grounds, he fails to provide evidence to prove a connection between the oil spill and the lack of rentals at his camp. Included in the Claimant's submission to the NPFC are profit and loss statements¹¹, partial Federal Tax Returns, photographs of the Claimant's property, and an incomplete property lease. These submitted materials failed to prove a connection between the oil spill and a reduction in rents at the Claimant's campground.

Nevertheless, in an effort to determine the effect of the Deepwater Horizon oil spill on the Claimant's camp ground, the NPFC made a request¹² for additional information to the Claimant on 04 October 2011.¹³ The NPFC requested that the Claimant provide: full and complete profit and loss statements from 2008-2011, full and complete federal tax returns from the business for 2008-2010, bank statements

⁶ Report from the GCCF dated 21 November 2011.

⁷ Report from the GCCF dated 21 November 2011.

⁸ Report from the GCCF dated 21 November 2011.

⁹ GCCF Denial Letter dated 14 December 2010.

¹⁰ GCCF Deficiency Denial Letter dated 15 June 2011.

¹¹ The NPFC notes that the monthly revenues listed from January 2008-December 2008 match exactly to the corresponding months from January 2009-December 2009. There was no explanation provided regarding the duplication of revenues. As discussed below, the NPFC made a request for additional information to clarify this coincidence, but no response was provided.

¹² The NPFC notes that although the hard copy of the NPFC's Request for Additional Information was returned as unclaimed on 17 November 2011, the NPFC provided the Claimant, at his request, with an electronic copy of the Request for Additional Information on 11 October 2011.

¹³ NPFC Request for Additional Information dated 04 October 2011.

from the business from 2008-2010, commercial fishing licenses from 2008-2011, commercial boating licenses from 2008-2011, proof of ownership of all vehicles utilized for the fishing camp business, a log of all rentals from 2008-2011 indicating the dates of the rentals, the rents charged and the renter, documentation of any reservation cancellations that occurred due to the oil spill including contact information for the cancellations and a complete lease for the property of the business.¹⁴

Although the Claimant was granted an extension¹⁵ to respond to the NPFC's Request for Additional Information, to date no response has been provided to the NPFC. Accordingly, the Claimant fails to prove his alleged loss in the amount claimed or that it was a result of the injury, destruction or loss of property or natural resources as a result of a discharge or substantial threat of a discharge of oil.

This claim is denied because the Claimant failed to meet his 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: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *12/5/11*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

¹⁴ NPFC Request for Additional Information dated 04 October 2011.

¹⁵ Email from the NPFC to the Claimant dated 09 November 2011.