

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
21 November 2011

Delphfishing, Inc.
Attn: [REDACTED]
183 Venetian Way
Sugarloaf Key, FL 33042

Re: Claim Number: N10036-1474

Dear [REDACTED]

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 N10036-1474 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 N10036-1474.

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 Form

CLAIM SUMMARY/DETERMINATION FORM

| | |
|------------------|--|
| Claim Number | N10036-1445 |
| Claimant | Delphfishing, Inc. |
| Type of Claimant | Corporate (US) |
| Type of Claim | Loss of Profits and Impairment of Earning Capacity |
| Amount Requested | \$361,138.00 |

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 6 October 2011, Mr. William Delph, on behalf of Delphfishing, Inc. (collectively the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$361,138.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

The Claimant offers charter fishing services near Key West, Florida. The Claimant alleged that concerns regarding the Deepwater Horizon oil spill caused charter fishing trips to be cancelled and bookings to be low in the summer of 2010 and continuing through 2011. Specifically, the Claimant stated, “Delphfishing, Inc.’s bookings decreased as negative publicity from the oil spill increased. When there is an interruption of business, our clients’ vacation destinations and habits change. Rebuilding our client base with new clients has proved to be far more difficult in the current state of this economy than hoped for.”²

The Claimant alleged to have sustained losses due to low bookings and cancellations in the amount of \$361,138.00 from 20 April 2010 to 27 September 2010.³

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. 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.

¹ Optional OSLTF Claim Form, dated 27 September 2011.

² Delphfishing, Inc. Hardship Letter, undated.

³ In a letter titled, “Delphfishing, Inc. Hardship Letter,” the Claimant states “the calculated loss of profits from April 20, 2010 to current date is \$361,138.00.” The Claimant signed the OSLTF claim form included in this submission on 27 September 2011.

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.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support this claim, the Claimant submitted the following documentation:

- Optional OSLTF Claim Form, dated 27 September 2011;
- Delphfishing, Inc. Hardship Letter, undated;
- Email from Darryl Pyles to the Claimant, 19 May 2010;
- Email from Hal Arve to the Claimant, 18 October 2010;
- Email from Brian Buetel to the Claimant, 19 October 2010;
- Email from Kevin Smith to the Claimant, 20 October 2010;
- Email from Joe Beale to the Claimant, 20 October 2010;
- Email from John L. Alger to the Claimant, 15 October 2010;
- Email from prinzrengll@yahoo.com to the Claimant, 15 October 2010;
- Email from Blas Maidagan to the Claimant, 15 October 2010;
- Email from Steve Bolles to the Claimant, 15 October 2010;
- Email from Steve Kaiser to the Claimant, 15 October 2010;
- Email from Earl Gordon to the Claimant, 15 October 2010;
- Email from Gary Chotiner to the Claimant, 16 October 2010;

- Email from mfitzcat@comcast.net to the Claimant, 16 October 2010;
- Invoice, Key West Harbour Monthly Rental Payment, 1 April 2010;
- 2009/2010 Monroe County Business Tax Receipt;
- 2011/2010 Monroe County Business Tax Receipt;
- Copy of State of Florida, Recreational License, 2009 – 2010;
- Copy of State of Florida, Recreational License, 2010 – 2011;
- Federal Fisheries Permit, expires 30 June 2009;
- United States Coast Guard, U.S. Merchant Marine Officer Certification, 18 August 2006;
- Delphfishing, Inc, “2 Year Comparison Statement of Loss,” 2008, 2011;
- Delphfishing, Inc. 2009 Monthly Income with explanation;
- Delphfishing, Inc., “2 Year Comparison Statement of Loss,” 2008, 2010;
- 2010 Form 1120S, showing gross sales of \$112,543.00 and income of \$-81,236.00;
- 2010 Schedule K-1 (Form 1120S);
- 2010 Form 4562;
- 2009 Form 1120S, showing gross sales of \$130,125.00 and income of \$-17,447.00;
- 2009 Schedule K-1 (Form 1120S);
- 2009 Form 4562;
- 2009 Form 4797;
- 2008 Form 1120S, showing gross sales of \$225,851.00 and income of \$23,374.00;
- 2008 Schedule K-1 (Form 1120S);
- 2008 Form 4562;
- 2008 Form 4797;
- 2008 Form 8824;
- Email response to request for additional information, 10 November 2011.
- Email from the Claimant to the NPFC, 15 November 2011, including client booking history;
- 2008, 2009, 2010 booking calendar.

Prior to presentment to the NPFC, the Claimant presented an Emergency Advance Payment claim (EAP) to RP/GCCF, seeking \$45,800.00 in loss of profits and wages damages.⁴ The Claimant was assigned ID # 3174437 and the EAP claim was assigned Claim # 229793.⁵ This claim was paid in full on 15 November 2010.

On 1 April 2011, the Claimant submitted a Second Quarter Interim Payment Claim (ICQ22011) to the RP/GCCF, seeking loss of profits and wages damages.⁶ ICQ22011 was assigned Claim # 9346257.⁷ As of the date of this determination, the claim has been deemed deficient, and no action has been taken by the RP/GCCF.⁸

On 6 October 2011, the Claimant presented this claim to the NPFC, seeking loss of profits and impairment of earnings capacity damages in the amount of \$361,138.00.⁹ Because no determination has been issued on the ICQ22011 within 90 days of presentment, the NPFC may properly adjudicate the entirety of this claim as now before the NPFC, to the extent that this

⁴ GCCF Notice of Determination, Emergency Advance Payment, 15 November 2010.

⁵ GCCF Claimant Status, accessed on 11 October 2011.

⁶ Delphfishing, Inc. Hardship Letter, undated; *See also*, Optional OSLTF Claim Form, dated 27 September 2011.

⁷ GCCF Claimant Status, accessed on 11 October 2011.

⁸ GCCF Claimant Status, accessed on 11 October 2011.

⁹ Optional OSLTF Claim Form, dated 27 September 2011.

damage amount was first presented to the RP/GCCF.¹⁰ And damage amount now before the NPFC, which was not first presented to the RP/GCCF is denied.¹¹

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 to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support this claim.

This claim is denied because the Claimant (1) has not presented documentation sufficient to verify the claimed damage amount, (2) has not demonstrated that he sustained an actual loss of profits due to the Deepwater Horizon oil spill and because (3) payments previously made to the Claimant by the Responsible Party have fully compensated the Claimant for any losses allegedly incurred.

1. The Claimant has not presented documentation to verify his claimed damage amount.

The Claimant alleged that low and cancelled bookings for fishing charters resulted in a loss of profits in the amount of \$361,138.00, from May 2010 to 27 September 2011.¹² The Claimant also stated that he had sustained a loss of revenue in that same period in the amount of \$206,673.00.¹³ The Claimant calculated his losses by comparing his monthly profit and revenue in 2008 to monthly profit and revenue in 2010 and then in 2011. The Claimant requested that 2009 not be used as a comparison year, due to health factors which “hindered [the Claimant’s] ability to work.”¹⁴ As compared to his 2008 profits, the Claimant alleged to have lost \$244,955.00 in 2010 and \$116,143.00 in profits from January – September 2011.¹⁵

Profit and Loss statements provided by the Claimant indicate that the Claimant earned profits of \$22,744.00 in 2008, \$(-17,447.00) in 2009 and \$(-191,773.00) in 2010.¹⁶ According to the Claimant’s tax documentation, the Claimant reported revenue in 2008, 2009 and 2010 of \$225,852.00, \$130,125.00, and \$112,543.00.¹⁷ Although the Claimant’s revenue only decreased by \$17,582.00 from 2009 to 2010, the Claimant alleged that his profits decreased by \$174,326.00 during this time, indicating a substantial increase in expenses in 2010.

Based on the Claimant’s profit and loss statements, the Claimant incurred average monthly expenses of \$12,976.67 in 2009 and average monthly expenses of \$25,359.67 in 2010.¹⁸ This indicates that the Claimant’s loss of profits in 2010 was due in large part to the documented increase in expenses in 2010, rather than due to cancelled or decreased bookings. This substantial increase in 2010 expenses is in spite of the fact that the Claimant’s calendars indicate that the Claimant operated far fewer charters in 2010 as compared to 2009. The Claimant has

¹⁰ 33 C.F.R. § 136.103(c)(2).

¹¹ 33 C.F.R. § 136.103(a).

¹² The Claimant stated, “the calculated total loss in profit from April 20, 2010 to current date is \$361,138.00” Delphfishing, Inc. Hardship Letter; *See also*, OSLTF Claim Form, dated 27 September 2011.

¹³ Delphfishing, Inc. Hardship Letter.

¹⁴ 2009 Monthly Income Statement.

¹⁵ Email from the Claimant to the NPFC, dated 22 October 2011.

¹⁶ 2008, 2009 and 2010 monthly profit and loss statements.

¹⁷ 2008, 2009, 2010 Forms 1120s.

¹⁸ Including monthly expenses of \$81,857.00 in October 2010. Calculations based on the Claimant’s profit and loss statements.

not provided any indication as to how increased expenses may have been due to effects of the Deepwater Horizon oil spill.

2. The Claimant has not demonstrated that he lost profits as a result of the Deepwater Horizon oil spill.

The Claimant stated that his 2009 income should not be used as a basis for calculating his actual losses, due to personal circumstances that affected the Claimant's ability to continue normal business operations.¹⁹ Elsewhere in the Claimant's submission he states that "when there is an interruption of business, our clients' vacation destination and habits change."²⁰ The Claimant makes this statement to support his claim that due to the interruption caused by the oil spill in 2010, he had difficulty rebuilding a client base in 2011 and continued to sustain substantial losses. However, the Claimant also alleged that personal issues caused an interruption to his business in 2009. Therefore, it is unclear whether the Claimant's alleged business losses in 2010 were due to the oil spill or due to the interruption in business in 2009, particularly considering that the Claimant's bookings from January-March 2010, prior to the oil spill, appear substantially lower than bookings during those months of the prior year.²¹

Furthermore, the Claimant's 2009 booking calendar does not reflect the Claimant's assertion that he was hindered in his ability to work in that year. Rather, the Claimant's calendar indicates that he maintained steady bookings throughout 2009, including during months when the Claimant reports little or no revenue on his profit and loss statements. For example, the Claimant's profit and loss statements show zero revenue in November 2009, even though his calendar shows that he was engaged in various charter trips and other ventures for all but two days of that month.

Additionally, the Claimant's booking calendar indicates that his business was decreasing in 2010 during the period leading up to the oil spill. The calendar indicates that the Claimant's bookings were significantly lower in January-March 2010, as compared to the January and March of 2008 and 2009. This is contrary to the Claimant's profit and loss statements, which show that the Claimant reported revenue significantly higher in January – March 2010 as compared to 2009. For example, the Claimant's 2009 calendar shows that in January and February 2009, the Claimant was engaged in either fishing trips, boat maintenance, or "selling bait" for all but four days of those two months. However, in 2010, 17 days in January and February were left free. The Claimant's profit and loss statements, however, indicate that the Claimant earned revenue approximately 7 times higher in January and February 2010, compared to those months in 2009. This is in spite of the Claimant's 2010 calendar showing far fewer bookings in these months.²²

Additionally, the Claimant's calendars indicate that cancellations began on 24 April 2010, and continued through the summer of 2010.²³ The dates on which the Claimant's cancellations alleged to have begun were before the effects of the oil spill were either known or reported.²⁴ In

¹⁹ The Claimant stated that healthy problems "hindered my ability to work throughout the year of 2009" and notes that he "was finally admitted into the hospital in October 2009." 2009 Monthly Income, Explanation of Profit and Loss.

²⁰ Delphfishing, Inc. Hardship Letter.

²¹ 2008, 2009 and 2010 booking calendars provided by the Claimant.

²² . Profit and loss statements indicate that the claimant earned revenue of \$2,748.00 in January of 2009, and \$3,082.00 in revenue for February of 2009, compared to reported revenues of \$22,721.00 and \$21,804.00 in January and February of 2010, when Claimant's bookings appear to be significantly lower.

²³ The Claimant's first cancellation is noted as Joe Holsinger, who cancelled a 4 day trip beginning on 24 April.

²⁴ The Deepwater Horizon oil spill began on 20 April 2010.

fact, the first reports of the possibility that oil may reach the Florida Keys did not begin to surface until approximately mid-May 2010.²⁵

In his original submission, the Claimant provided emails from various individuals noting that they had cancelled or not booked trips due to the Deepwater Horizon oil spill. Two of the individuals stated that they had cancelled scheduled trips due to the spill. The NPFC requested that the Claimant provide evidence of these bookings and cancellations.²⁶ The Claimant stated that cancellations would be reflected in the booking calendars, provided by the Claimant via email.²⁷ However information contained in the emails regarding cancelled or unbooked charters are not supported by the calendar, which fails to show that certain named individuals actually booked trips and later cancelled as a result of the oil spill.²⁸ Rather, most of the dates marked “cancelled” are not marked with a name, and contain no indication that there had been actual bookings on those dates.

3. Payments by the Responsible Party have fully compensated the Claimant for any losses allegedly sustained as a result of the Deepwater Horizon oil spill.

The Claimant has been compensated by the Responsible Party in the amount of \$45,800.00.²⁹ According to the Claimant’s profit and loss statements, in 2008, which was the Claimant’s highest grossing year, he reported profits of \$22,744. Payment previously made to the Claimant is more than double the Claimant’s profits in his highest grossing year. Therefore, based on prior earnings, any losses the Claimant may have sustained as a result of the Deepwater Horizon oil spill have been fully compensated by the responsible party.

This claim is denied because the Claimant (1) has not presented documentation sufficient to verify the claimed damage amount, (2) has not demonstrated that alleged losses were due to the damage to real or personal property caused by the discharge or substantial threat of discharge of oil, and because (3) payments made to the Claimant by the Responsible Party have fully compensated the Claimant for losses he alleged to have incurred.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor’s Review: *11/21/11*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

²⁵ See, *Timeline, Gulf of Mexico Oil Spill*, Reuters, 3 June 2010. Available at www.reuters.com/article/2010/06/03/oil-spill-events-idUSN0322326220100603.

²⁶ NPFC request for additional information, 12 October 2011.

²⁷ NPFC request for additional information, 12 October 2011.

²⁸ An email from “Prince” states that he cancelled 10 days of fishing with the Claimant. The Claimant

²⁹ GCCF Notice of Determination, Emergency Advance Payment, 15 November 2010.