

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  
Number: 7011 1570 0001 4802 7125

5890/DWHZ  
08 November 2011

Greg Guccione  
[REDACTED]

Re: Claim Number: N10036-1484

Dear Mr. Guccione:

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 N10036-1484 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 N10036-1484.

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	N10036-1484
Claimant	Greg Guccione
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$12,000.00

### ***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 certain individual and business claims on behalf of BP.

### ***CLAIM AND CLAIMANT***

On 12 October 2011, Greg Guccione (Claimant) presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$12,000.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

The Claimant works in retail sales for the Saks Fifth Avenue store in New Orleans, Louisiana.<sup>1</sup> The Claimant asserted that, due to the Deepwater Horizon oil spill, he experienced a reduction in commissions of at a minimum \$1,000.00 per month.<sup>2</sup> The Claimant indicated that his main client base comes from the petroleum, tourism, and seafood industries; the three industries hit hardest by the Deepwater Horizon oil spill.<sup>3</sup>

### ***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).

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:

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<sup>1</sup> Letter of claim explanation from the Claimant, dated 01 September 2011.

<sup>2</sup> Letter of claim explanation from the Claimant, dated 01 September 2011.

<sup>3</sup> Letter of claim explanation from the Claimant, dated 01 September 2011.

- (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***

#### **Claimant's Submission to the OSLTF**

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

- Fax from the Claimant to NPFC verifying sum certain, dated 7 October 2011;
- Optional OSLTF Claim Form, dated 13 September 2011;
- Letter of claim explanation from the Claimant, dated 01 September 2011; and
- Paystubs from Saks Incorporated for the following periods: 25 April 2010 - 22 May 2010, 25 July 2010 - 21 August 2010, 24 April 2011 - 21 May 2011, 24 July 2011 - 20 August 2011.

Prior to presenting this Claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) claim with the GCCF on 03 October 2010 in the amount of \$6,000.00.<sup>4</sup> The Claimant was assigned Claimant ID # 3088467 and Claim # 142893. The Claimant received payment in the amount of \$16,500.00 on 06 October 2010.<sup>5</sup> Additionally, the Claimant filed a Quick Pay (QP) claim with the GCCF on 28 January 2011.<sup>6</sup> The Claimant was assigned Claim # 9260752. The Claimant received payment in the amount of \$5,000.00 on his Quick Pay claim.<sup>7</sup>

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<sup>4</sup> Report from the GCCF, dated 02 November 2011.

<sup>5</sup> Notice of Determination Emergency Advance Payment.

<sup>6</sup> Report from the GCCF, dated 02 November 2011.

<sup>7</sup> Report from the GCCF, dated 02 November 2011.

## **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 Claimant.

This claim is denied because, (1) the claim does not have proper presentment before the NPFC, (2) the Claimant has accepted a Quick Pay final payment, waiving any rights he may have to recover damages from the OSLTF regarding this incident, and (3) the Claimant has not established that any alleged losses he experienced were due to the Deepwater Horizon oil spill.

### **1. Improper Presentment**

Under 33 C.F.R. § 136.103(c), the Claimant may present a claim to the NPFC if the claim has first been denied by the responsible party or the claim has not been settled within 90 days of its presentment to the responsible party. The Claimant presented two claims to the GCCF, (1) an EAP claim of \$6,000.00 for which the Claimant was compensated \$16,500.00, and (2) an individual Quick Pay claim which the GCCF accepted and compensated the Claimant in the amount of \$5,000.00. Therefore, the Claimant does not have any claims that have been denied by the responsible party or that are unsettled. As a result, the NPFC does not have proper presentment of any claim brought by the Claimant regarding the Deepwater Horizon oil spill.

### **2. Release of Rights to the GCCF**

Information available to the NPFC indicates that the Claimant both requested and received Quick Pay payment in the amount of \$5,000.00.<sup>8</sup> The RP/GCCF requires that a Claimant execute a Release and Covenant Not to Sue in return for a Quick Pay final payment. Because the Claimant has accepted a Quick Pay final payment, and signed a Release and Covenant Not to Sue, the Claimant has released any rights to additional recovery regarding this injury to the RP/GCCF.<sup>9</sup>

Any payment from the Oil Spill Liability Trust Fund (the Fund) requires the acquisition of rights from the RP. Because these rights have been released by the Claimant to the RP/GCCF, the Claimant cannot also recover from the Fund.

If the Claimant believes that payments received from the RP/GCCF are for damages other than those that are the subject of this claim, the Claimant must explain this in his request for reconsideration.<sup>10</sup> The Claimant must also include copies of any and all waivers and covenants signed by the Claimant regarding injuries related to the Deepwater

### **3. No Evidence of Deepwater Horizon Oil Spill Causation**

The Claimant asserted that he experienced a loss of commissions at Saks because his main customer base was financially damaged by the Deepwater Horizon oil spill.<sup>11</sup> The NPFC contacted Saks Fifth Avenue to obtain verification of the Claimant's assertions and requested information regarding any effect the Deepwater Horizon oil spill had on sales at the New Orleans Saks Fifth Avenue store. Saks Fifth Avenue informed the NPFC that "our New Orleans store did not experience a noticeable drop in business during the Spring season of 2010. In fact, our total store business in April 2010 and May 2010 posted double

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<sup>8</sup> Report from the GCCF, dated 02 November 2011; the Claimant's GCCF status page.

<sup>9</sup> Standard GCCF Notice of Quick Payment Final Claim Determination.

<sup>10</sup> 33 C.F.R. § 136.115.

<sup>11</sup> Letter of claim explanation from the Claimant, dated 01 September 2011.

digit increases in business from the previous year.”<sup>12</sup> Consequently, the NPFC is unable to confirm that the Deepwater Horizon oil spill had any effect on the commissions earned by the Claimant.

This claim is denied because (1) the NPFC does not have proper presentment of costs to adjudicate the claim, (2) the Claimant accepted a Quick Pay final payment, releasing his rights regarding losses related to the Deepwater Horizon oil spill to the RP/GCCF, and (3) the Claimant failed to meet his burden to demonstrate 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: *11/8/11*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

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<sup>12</sup> Letter from Saks Fifth Avenue to the NPFC, dated 01 November 2011.