

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center
United States Coast Guard

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 5473

5890
18 November 2011

William R. McMickle



Re: Claim Number: N10036-1518

Dear Mr. McMickle:

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 claim number N10036-1518 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 N10036-1518.

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
(2) List of Documentation Provided by the Claimant

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1518
Claimant	: William R. McMickle
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$81,000.00

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 25 October 2011, William R. McMickle (Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$81,000.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.¹ The Claimant bought shrimp from a local shrimper and then sold those shrimp to the public on street corners and parking lots.²

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.

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 U.S.C. § 2702(b)(2)(E) and the promulgating regulations under 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. Another type of damages available pursuant to 33 U.S.C. § 2702(b)(2)(B) and the promulgating regulations under 33 C.F.R. § 136.213 is a claim for real or personal property damages for injury to, or economic losses resulting from destruction of, real or personal property.

Under 33 C.F.R. § 136.103, all claims for removal costs or damages must be presented first to the responsible party or guarantor, with limited exceptions.

Under 33 C.F.R. § 136.233, a claimant must establish the following for a loss of profits or impairment of earning capacity claim:

- (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.

¹ Optional OSLTF Claim Form signed 23 October 2011 and received 25 October 2011.

² Claimant's undated letter received 2 November 2011. (There was a clerical error in the NPFC date stamp's not being reset from October.)

- (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.

With limited exceptions, 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.

Regarding real or personal property claims, 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 for a real or personal property claim:

- (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:

- (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 general requirements applicable to all claims, specifically 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

Prior to presentment to the NPFC, Claimant represents having filed a claim with BP/GCCF on 19 October 2010 and that the claim was denied.³ Based on independent research by the NPFC, the Claimant presented an Emergency Advance Payment Claim to the GCCF on 19 October 2010 for Lost Wages/Earnings in the amount of \$43,200.00, an Interim Payment Claim to the GCCF on 3 June 2011 in the amount of \$94,400.00 and a Final Payment Claim to the GCCF on 8 August 2011 in the amount of \$81,000.00.⁴ All of these claims were assigned Claimant ID Number 3228506 and have been denied.⁵

On 25 October 2011, the Claimant presented this claim to the OSLTF in the amount of \$81,000.00 for loss of profits and impairment of earnings capacity.⁶ In support of this claim, the Claimant presented an extensive amount of documentation, which is listed in Enclosure (2).

The Claimant stated that he bought shrimp from a local shrimper and then sold those shrimp to the public on street corners and parking lots.⁷ The Claimant provided documentation of weekly shrimp purchases of 250 pounds each from 22 June 2009 until 28 December 2009, always at \$2.50 per pound.⁸

³ Optional OSLTF Claim Form signed 23 October 2011 and received 25 October 2011.

⁴ GCCF – U.S. Coast Guard Report as of 11/2/2011. Among information on claims for lost wages/earnings, this report indicates that the claimant also presented claims for subsistence and [personal] injury, which are unrelated to the claim presented to the NPFC.

⁵ GCCF – U.S. Coast Guard Report as of 11/2/2011.

⁶ Optional OSLTF Claim Form signed 23 October 2011 and received 25 October 2011.

⁷ Claimant's undated letter received 2 November 2011.

⁸ Twenty-six signed receipts for shrimp sales from Bobby Fields, dba Miss Kam, each indicating date, 250 pounds bought, a price per pound of \$2.50 and total price of \$625.00.

The Claimant stated that he was not required to have a fishing license – he did not do any fishing; he only bought and sold shrimp.⁹

The Claimant indicated that his losses spanned 2010 and 2011. He provided shrimp purchase receipts for the 2009 season. The Claimant stated that he always sold the entire amount he purchased (250 pounds), which would bring in \$1,500.00 per week from June to December.¹⁰

The Claimant stated that after the shrimp season opened in June 2010, he could not afford the shrimp nor could he sell shrimp to the public because, “when I went to look at them they still had oil in them from the spill”.¹¹ The Claimant also stated shrimp prices were high and he did not want to be left with shrimp if they did not sell.¹²

NPFC Determination

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. Pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, the OSLTF, which is administered by the NPFC, is available to pay claims for uncompensated damages.

The NPFC considered all documentation presented by the Claimant.

After an initial review, the NPFC sent the Claimant a letter requesting additional information to further evaluate the claim. The letter requested, among other things, financial documentation to support the damages. The Claimant was given 14 days to respond to the letter, dated 1 November 2011.

On 2 November 2011, the Claimant responded in part to the information request, by providing a letter with explanations, his 2009 Federal Income Tax Return, his 2009 Mississippi Individual Income Tax Return with W-2 Data Sheet, 2009 tax file documents from H&R Block, a City of Gulfport business license and correspondence from the GCCF.

The NPFC’s specific information request included: a copy of any fishing license; a copy of 2010 state and federal tax returns; the dates in 2010 that shrimping in Mississippi was closed; if there were shrimping closures, the impact on sales; the location where the Claimant purchased shrimp; to describe his records of sale; to describe any saved expenses and to describe his 2011 shrimp sales.

As indicated above, the Claimant did provide a number of requested items by letter on 2 November 2011. In that letter, the Claimant indicated that he could not locate his 2010 state and federal taxes, but he did indicate that he saved about \$100 to \$150 per week in fuel expenses. The Claimant also indicated that he did not have a copy of any shrimp purchases in 2010 or 2011, saying that after the spill he found “oil in them” and did not buy any. He also said that he only purchased shrimp twice in 2011 because of the price and included [those] receipts with his 2 November 2011 letter, but no receipts for 2011 were provided. The Claimant also indicated that he did not keep a record of shrimp sales because he always sold the 250 pounds he had purchased that week, and the sale value for the week would always be \$1,500.00.

⁹ Claimant’s undated letter received 2 November 2011.

¹⁰ Claimant’s undated letter received 2 November 2011.

¹¹ Claimant’s undated letter received 2 November 2011.

¹² Claimant’s undated letter received 2 November 2011

The Claimant's 2 November letter also stated that he was not required to have a fishing license; he only bought and sold shrimp. The NPFC independently confirmed that a seafood dealer license (not a fishing license) is required to sell seafood in Mississippi.¹³ The Claimant did not provide any documentation of having a dealer license to sell seafood. The City of Gulfport business license for 2009-2010 that was provided by the Claimant was issued to Xtreme Wireless & Printing, which is for prepaid wireless and for printing business cards, not for selling shrimp.

Documentation provided by the Claimant does not support his having sold shrimp in any amount. Additionally, no income for sales from a shrimp business was reported on federal or state taxes provided by the Claimant and the NPFC could not confirm that the Claimant had filed his business with the State of Mississippi.¹⁴ Selling shrimp without a seafood dealer license and without the business being registered with the State would have been in violation of Mississippi law.

The Claimant has not documented that he has a viable, ongoing business with records that establish any business income and resulting profits from the business, including the \$81,000.00 claimed.

This claim is DENIED because (1) Claimant has failed to meet the evidentiary burden to provide all evidence, information and documentation deemed necessary by the Director, NPFC, to support the claim; (2) Claimant has failed to demonstrate the alleged loss in the amount of \$81,000.00 through financial documentation, or (3) that any alleged loss was due to the injury to, 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: *11/18/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹³ Mississippi Code SEC. 49-15-28 requires any person buying or handling seafood secured from commercial fishermen, or from other wholesale dealers, for the purpose of resale, ... to be considered a wholesale dealer and shall obtain a license and pay an annual license fee of One Hundred Dollars (\$100.00), as well as a confirming phone conversation 17 November 2011 between Mississippi Dept. of Natural Resources and NPFC Staff.

¹⁴ Mississippi Secretary of State internet record search, 18 November 2011 for business by Officer Name "McMickle", <https://business.sos.state.ms/corp/soskb/SearchOfficers.asp>.

In support of this claim, the Claimant presented the following documentation:

- Optional OSLTF Claim Form signed 23 October 2011 and received 25 October 2011.
- GCCF letter dated 12 October 2011, Follow up on Previous Denial Letter.
- Bobby Fields letter dated 11 October 2011.
- Claimant undated letter To Whom It May Concern.
- Claimant letter dated 8/10/2011 To Whom It May Concern.
- Signed, but undated GCCF Appeal Form, 2 pages.
- Miss Kam sales receipt dated 12/28/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 12/21/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 12/14/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 12/7/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 11/30/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 11/23/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 11/16/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 11/9/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 11/2/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 10/26/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 10/19/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 10/12/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 9/28/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 9/21/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 9/14/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 9/7/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 8/31/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 8/24/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 8/17/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 8/10/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 8/3/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 7/27/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 7/20/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 7/13/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 7/6/2009, signed by Bobby Fields.
- Miss Kam sales receipt dated 6/22/2009, signed by Bobby Fields.
- [Full style contact page for Miss Kam.](#)
- Claimant's undated letter received 2 November 2011.
- Consent to Disclose Tax Return Information signed 16 January 2010.
- Unsigned Supplement to Application for Refund Anticipation Loan, State Refund Anticipation Check, and Refund Deposit Account.
- Unsigned Covered Borrower Identification Statement.
- Information about HSBC Refund Anticipation Loans (RALs) and Refund Anticipation Checks (RACs), signed 16 January 2010.
- Consent to Disclose Tax Return Information to H&R Block Bank, signed 16 January 2010.
- H&R Block Emerald Prepaid MasterCard Cardholder Agreement, HRB MC (2009).

- HRB Tax Group Inc. Billing Calculation dated 16 January 2010.
- City of Gulfport Privilege Tax License number 11265 for 10/1/09—9/30/10, issued to Xtreme Wireless & Printing and issued on 2 February 2010.
- 2009 Tax Form 1040A with Schedules EIC and M, and Form 8812.
- 2009 Mississippi Individual Tax Return.
- 2009 Mississippi W-2 Data Sheet from Phones Unlimited, Etc.
- GCCF Denial Letter dated 21 September 2011.
- GCCF Denial Letter dated 8 June 2011.
- GCCF Letter dated 14 December 2010.
- GCCF denial letter dated 7 December 2010.
- GCCF denial letter dated 6 December 2010.