

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  
29 December 2011

Colonial Marine, LLC.  
ATTN: [REDACTED]  
25163 Newport Road  
Robertsdale, AL 36567

Re: Claim Number: N10036-1593

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 N10036-1593 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 N10036-1593.

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	N10036-1593
Claimant	Colonial Marine, LLC.
Type of Claimant	Corporate (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$27,297.00

### ***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 2 December 2011, Mr. Alan Cade, on behalf of Colonial Marine (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$27,297.00 in loss of profits damages that allegedly resulted from the Deepwater Horizon oil spill.<sup>1</sup>

The Claimant is a marine repair business, established in Robertsdale, Alabama in 1998.<sup>2</sup> The Claimant relocated from Robertsdale to Daphne, Alabama in March of 2010 in order to “increase profits by being closer to the clients it serves and to attract new clients who were unwilling to drive to [the Claimant’s] original business location[.]”<sup>3</sup> Although the Claimant’s profits showed a significant increase in 2010 as compared to 2008 and 2009, the Claimant alleged that had the Claimant not relocated, the Claimant would have sustained a loss as compared to previous years.<sup>4</sup> The Claimant specifically stated,

“[d]espite showing increased total income for 2010 over 2009 . . . this income increase was due to the move to a more profitable location. The oil spill affected [the Claimant’s] profits, just as it did EVERY OTHER marine business in the area.”<sup>5</sup>

The Claimant alleged that the loss incurred in 2010 is evidenced by the Claimant’s 2011 income, which indicates what the Claimant would have earned after the relocation of his business, had the oil spill not occurred.<sup>6</sup>

The Claimant alleged that due to the effects of the Deepwater Horizon oil spill, the Claimant sustained a loss of profits in the amount of \$27,297.00 in 2010.<sup>7</sup>

<sup>1</sup> Optional OSLTF Claim Form signed on 27 November 2011.

<sup>2</sup> Letter from the Claimant, undated.

<sup>3</sup> Letter from the Claimant to the GCCF, 13 June 2011.

<sup>4</sup> Letter from the Claimant to the GCCF, January 2011.

<sup>5</sup> Letter from the Claimant to the GCCF, January 2011.

<sup>6</sup> Letter from the Claimant to the GCCF, 13 June 2011.

<sup>7</sup> Optional OSLTF Claim Form, signed on 27 November 2011.

## ***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 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 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, signed 27 November 2011;
- Letter from the Claimant to the NPFC, 27 November 2011;
- Emails from the Claimant to the NPFC, requesting claim filing instructions;

- Monthly Profit and Loss Statement, 2010, 2011;
- Profit and Loss Statement, March 2011;
- Profit and Loss Statement, April 2011;
- Profit and Loss Statement, May 2011;
- Profit and Loss Statement, June 2011;
- Profit and Loss Statement, July 2011;
- Profit and Loss Statement, August 2011;
- Profit and Loss Statement, September 2011;
- Profit and Loss Statement, October 2011;
- Letter from the Claimant to the GCCF, explaining business move, 7 July 2011;
- Profit and Loss Statement, June 2011;
- Fax Cover Sheet from Sue Cade to Jim McNealy;
- Letter from A. Robert Outlaw, Jr., to the Claimant, 16 June 2011;
- Letter from Virginia Macpherson, to the Claimant, undated;
- Email from Henry Morgan, Jr. to the Claimant, 24 May 2011;
- Letter authorizing Sue Cade to discuss claim with the GCCF, 7 June 2011;
- Fax Cover Sheet from Sue Cad to Jim McNealy, undated;
- Letter from John O. Hearin to the Claimant, 27 November 2011;
- Response to NPFC Request for Additional Information, 18 December 2011;
- Contact information for competitors, Fairhope AL;
- 2010 Form 1120S, showing gross sales of \$105,570.00 and business income of \$22,722.00;
- 2010 Schedule K-1 (Form 1120S);
- 2010 Form 4562;
- 2010 Federal Statements;
- 2010 Federal Asset Report;
- 2009 & 2010, Two Year Comparison Worksheet, Form 1120S;
- 2009 Form 1120S, showing gross sales of \$70,289.00 and business income of \$10,051.00;
- 2009 Schedule K-1 (Form 1120S);
- 2009 Form 4562;
- 2009 Federal Statements;
- 2009 Federal Asset Report;
- 2009 Form 1120S;
- 2009 Schedule K-1 Summary Worksheet;
- 2008 & 2009 Two Year Comparison Worksheet;
- 2008 Form 1120S, showing gross sales of \$41,000 and business income of \$9,015.00;
- 2008 Form 4562;
- 2008 Federal Statements;
- Copy of check from ESIS to the Claimant, \$1,529.00;
- Monthly Profit and Loss Statements, 2009;
- Various letters from the Claimant, previously provided to the GCCF;
- Profit and Loss YTD Comparison;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 26 July 2011.

Prior to presentment of this claim to the NPFC, the Claimant presented a First Quarter Interim Claim (ICQ12011) to the RP/GCCF, seeking loss of profits and wages damages in the amount of

\$15,000.00.<sup>8</sup> The Claimant was assigned Claimant ID 1125518 and the ICQ12011 was assigned Claim # 9281413.<sup>9</sup> This claim was denied by the RP/GCCF.

The Claimant then presented a Third Quarter Interim Claim (ICQ32011) to the RP/GCCF, seeking \$23,218.00 in loss of profits and wages damages.<sup>10</sup> The ICQ32011 was assigned Claim # 9418761 and was also denied.<sup>11</sup>

On 2 December 2011, the Claimant presented this claim to the NPFC, seeking loss of profits and earning capacity damages in the amount of \$27,297.00.<sup>12</sup> Because the Claimant has presented claims regarding the same subject matter as currently before the NPFC, in total amount that exceeds the amount now before the NPFC, presentment requirements under OPA have been met, and the NPFC may adjudicate this claim in its entirety.<sup>13</sup>

### **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.

In determining whether or not the Claimant sustained a compensable loss of profits under OPA, the Claimant must provide evidence sufficient to demonstrate “the actual net reduction or loss of earnings or profits suffered.”<sup>14</sup> The Claimant must also prove that the alleged loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

The Claimant reported gross sales of \$70,289.00 in 2009 and \$105,570.00 in 2010.<sup>15</sup> In those years, the Claimant reported respective profits of \$10,051.00, and \$27,722.00.<sup>16</sup> The Claimant attributed the growth from 2009 to 2010 to the relocation of his business in March of 2010, and alleged that earnings prior to the relocation should not be used as a basis for determining whether or not the Claimant sustained a financial loss in 2010 after the relocation.<sup>17</sup>

However, the Claimant’s relocation does not appear to have significantly altered the business to the point where earnings in 2008 and 2009 would be irrelevant in determining the extent of the Claimant’s alleged losses in 2010. Rather, evidence provided by the Claimant indicates that the business was largely unchanged. The Claimant stated that following the relocation, he continued to rely on his regular customer base, and offered the same services at the same prices, as offered at the Claimant’s prior location.<sup>18</sup> Additionally the Claimant stated that the Claimant did not advertise the relocation of his business, but relied on referrals from regular customers, who

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<sup>8</sup> GCCF United States Coast Guard Report, 23 December 2011.

<sup>9</sup> GCCF United States Coast Guard Report, 23 December 2011.

<sup>10</sup> Response to request for additional information, 18 December 2011.

<sup>11</sup> GCCF United States Coast Guard Report, 23 December 2011.

<sup>12</sup> Optional OSLTF Claim Form, signed on 27 November 2011.

<sup>13</sup> 33 C.F.R. § 136.103(a).

<sup>14</sup> 33 C.F.R. § 136.235.

<sup>15</sup> 2009, 2010 Forms 1120s, provided by the Claimant.

<sup>16</sup> 2009, 2010 Forms 1120s, provided by the Claimant.

<sup>17</sup> Letter from the Claimant to the GCCF, 7 July 2011. The Claimant writes, “if we had not moved, we would have been able to show the losses that would of occurred at the old location as many of our regular clients did not use their boats.”

<sup>18</sup> Response to NPFC request for additional information, 18 December 2011.

“were the reason [the Claimant] moved to a more convenient location.”<sup>19</sup> Based on these factors, the Claimant’s income prior to relocation is relevant in determining whether or not the Claimant sustained a financial loss in 2010 during the months following the Deepwater Horizon oil spill.

The Claimant’s profits increased by 126.1% from 2009 to 2010.<sup>20</sup> However, the Claimant alleged that profits would have increased by an even greater percentage had the Deepwater Horizon oil spill not occurred.<sup>21</sup> As a basis for this assertion, the Claimant compares monthly profits in 2010 to monthly profits in 2011, alleging that the Claimant’s 2011 income is an indication of what the Claimant was unable to earn due to the oil spill in 2010.<sup>22</sup>

However, the Claimant’s earnings from 2008 to 2011 indicate that business had been steadily growing year to year, and that this growth continued from 2010 to 2011.<sup>23</sup> Higher income from one year to the next does not indicate that the Claimant lost income in the previous year. In other words, the Claimant’s higher income in 2011 does not prove that the Claimant sustained a financial loss in 2010, just as the Claimant’s higher income in 2009 does not prove that the Claimant sustained a financial loss in 2008.<sup>24</sup> The Claimant specifically stated that “we have seen a 120% increase in gross profit” in 2011 as compared to 2010, thereby demonstrating the extent of the Claimant’s 2010 loss.<sup>25</sup> However, as previously noted, the Claimant’s profits grew at a similar rate (126.1%) from 2009 to 2010. Based on significant growth in the Claimant’s business in 2010, financial documentation provided by the Claimant fails to demonstrate that the Claimant sustained an actual financial loss due to effects of the Deepwater Horizon oil spill.

Furthermore, the Claimant’s assertion that his 2011 income is indicative of what his 2010 income would have been, assumes that the Claimant would have immediately generated new business upon relocation in March of 2010. If this were the case, then the Claimant’s income in April of 2010, after relocation, but prior to the effects of the oil spill, should reflect the Claimant’s April 2011 income. Monthly profit and revenue comparisons, however, indicate that the Claimant earned income of \$7,313.52 in April 2010, and \$17,824.16 in April 2011.<sup>26</sup> The disparity indicates that any “loss” the Claimant experienced in April of 2010 as compared to 2011, was not caused by the oil spill, which did not begin until 20 April 2010.

Based on the foregoing, this claim is denied because the Claimant failed to meet his burden to demonstrate that he sustained a loss in the amount of \$27,297.00, 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: *12/29/11*

Supervisor’s Action: *Denial approved*

<sup>19</sup> Response to NPFC request for additional information, 18 December 2011.

<sup>20</sup> 2009, 2010 Forms 1120s indicate that the Claimant earned profits of \$10,051.00 in 2009 and \$22,722.00 in 2010.

<sup>21</sup> Letter from the Claimant to the GCCF, 13 June 2011.

<sup>22</sup> The Claimant stated that,

<sup>23</sup> 2008, 2009, 2010 Forms 1120s.

<sup>24</sup> The Claimant reported revenue of \$70,289.00 in 2009 and \$41,000.00 in 2008.

<sup>25</sup> Letter from the Claimant to the GCCF, 7 July 2011.

<sup>26</sup> Profit & Loss YTD Comparison, April 2010, 2011.

Supervisor's Comments: