

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
4200 Wilson Blvd., Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 1-800-280-7118
E-mail: arl-pf-npfcclaimsinfo@uscg.mil
Fax: 202-493-6937

CERTIFIED MAIL-RETURN RECEIPT REQUESTED
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5890/DWHZ
19 April 2012

Blackburn Brother, Inc.
Attn: [REDACTED]
19929 NC HWY 210
Rocky Point, NC 28457

Re: Claim Number: N10036-1598

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 your claim number N10036-1598 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 N10036-1598.

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	N10036-1598
Claimant	Blackburn Brothers, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$76,700.34

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 08 December 2011, Richard Blackburn, on behalf of Blackburn Brothers, Inc. (collectively the Claimant) presented an Optional Oil Spill Liability Trust Fund (OSLTF) claim form to the National Pollution Fund Center (NPFC), seeking \$76,700.34 in loss of profits and impairment earning capacity.

The Claimant is a seafood wholesale distributor that operates out of Rocky Point, North Carolina.¹ The Claimant asserted that, due to the Deepwater Horizon oil spill, Gulf Coast oysters were contaminated and the company was unable to get the supply of oysters needed to meet the demands of its clients.² The Claimant determined his loss by calculating the difference between the company's 2008 gross sales of Gulf Coast oysters and the 2010 gross sales of Gulf Coast oysters.³

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

¹ GCCF Claim Form, undated.

² Answer 6, Claimants written response to requested information from the NPFC, dated 01 March 2012.

³ Document titled 'Blackburn Brothers Gulf Oyster Sales,' with handwritten calculation of loss.

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:

- Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form dated 30 November 2011;
- Balance Sheet for period ending 31 December 2007;
- Balance Sheet for period ending 31 December 2008;
- Balance Sheet for period ending 31 December 2009;
- Balance Sheet for period ending 31 December 2010;

- Profit and Loss YTD Comparison for period January 2008-December 2008;
- Profit and Loss YTD Comparison for period January 2009-December 2009;
- Profit and Loss YTD Comparison for period January 2010-December 2010;
- Profit and Loss YTD Comparison for period January 2007-December 2007;
- 2010 Form 1120S Federal Income Tax Return;
- 2009 Form 1120S Federal Income Tax Return;
- 2008 Form 1120S Federal Income Tax Return;
- 2007 Form 1120S Federal Income Tax Return;
- Document titled 'Blackburn Brothers Gulf Oyster Sales';
- Profit and Loss YTD Comparison for period May 2010-December 2010;
- GCCF Claim Form, undated;
- Letter from the GCCF, dated 04 November 2010;
- Letter from the GCCF, dated 26 January 2011;
- Letter from the GCCF, dated 31 January 2011;
- Claimants written response to requested information from the NPFC, dated 01 March 2012;
- Document titled 'Blackburn Brothers Gulf Oyster Sales,' with handwritten calculation of loss;
- List of the Claimant's customers;
- Profit and Loss YTD Comparison for period January 2010-December 2010 (Corrected Version);
- Spreadsheet titled "Invoices for Oyster Purchases 2008;"
- Spreadsheet titled "Invoices for Oyster Purchases 2009;"
- Spreadsheet titled "Invoices for Oyster Purchases 2010;"
- Monthly profit and loss statements for
- Monthly Profit and Loss YTD Comparison for period January 2008-December 2008;
- Monthly Profit and Loss YTD Comparison for period January 2009-December 2009; and
- Monthly Profit and Loss YTD Comparison for period January 2010-December 2010.

Prior to presenting this claim to the NPFC, the Claimant filed a Full Review Final (FRF) claim with the GCCF on 07 December 2010 for loss of earnings in the amount of \$76,700.34.⁴ He was assigned Claimant ID # 3289361 and Claim # 9056120. This claim was denied by the GCCF on 22 April 2011.⁵

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant's GCCF claim is the same as the subject matter of his claim before the NPFC, i.e., that the Claimant lost Gulf Coast oyster sales due to the Deepwater Horizon oil spill. The NPFC deems that the Claimant's GCCF claim was both properly presented to the RP and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC claim N10036-1598 considers and addresses the damages claimed to the responsible party; specifically, GCCF Claim # 9056120 (FRF).

⁴ Report from the GCCF, dated 09 April 2012.

⁵ Denial Letter on Interim/Final Payment Claim, dated 22 April 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 the Claimant.

This claim is denied because the Claimant failed to prove that it experienced a financial loss as a result of the Deepwater Horizon oil spill. The Claimant stated that the losses for their seafood distribution business were limited to a decrease in Gulf Coast oyster sales.⁶ Information provided by the Claimant indicates that sales for Gulf Coast oysters did drop to \$160,663.90 in 2010.⁷ However, the Claimant did not provide any justification for why they based their loss on 2008 sales of \$236,364.24, instead of their decreased sales of \$210,264.61 in 2009.⁸ Furthermore, under 33 C.F.R. § 136.235 (d), the Claimant must allow for all saved expenses in the calculation of loss. Here, the Claimant based their loss on gross sales of Gulf Coast oysters, which does not allow for the consideration of any saved expenses, such as cost of goods sold.⁹ Further, to the extent that the Claimant is seeking lost Gulf Coast Oyster sales between 2008 and 2009 in the amount of \$27,099.63, these lost sales can't possibly be related to the Deepwater Horizon oil spill since they predate the event.¹⁰

As well, under 33 C.F.R. § 136.235 (b), the NPFC must consider all income from alternative employment or business undertaken in the calculation of the Claimant's loss. The Claimant indicated to the NPFC that they sold non-Gulf Coast oysters in addition to Gulf Coast oysters.¹¹ Based on the financial documentation provided, the Claimant actually experienced a significant increase in oyster sales as a whole in 2010. The Claimant went from gross oyster sales of \$351,757.10¹² in 2009 to gross oyster sales of \$540,755.47¹³ in 2010. After considering the cost of goods sold and any potential oyster price increases, the Claimant still went from a gross oyster profit of -3,133.40¹⁴ in 2009 to a gross oyster profit of \$108,110.25¹⁵ in 2010. Comparing 2010 to 2008, since the Claimant based its loss on 2008 numbers, the Claimant's gross oyster profits were again drastically higher at \$108,110.25 in 2010, compared to \$46,280.05¹⁶ in 2008.

Looking more broadly at the Claimant's financial documentation, the Claimant's gross sales for all products was higher in 2010 (\$6,898,548.00)¹⁷ compared to both 2008 (\$6,706,822.00)¹⁸ and 2009 (\$6,752,126.00)¹⁹. The NPFC notes that the Claimant's net profit did decrease in 2010 to

⁶ Answers 2 and 5, Claimants written response to requested information from the NPFC, dated 01 March 2012.

⁷ Document titled 'Blackburn Brothers Gulf Oyster Sales,' with handwritten calculation of loss.

⁸ Document titled 'Blackburn Brothers Gulf Oyster Sales,' with handwritten calculation of loss.

⁹ Document titled 'Blackburn Brothers Gulf Oyster Sales,' with handwritten calculation of loss.

¹⁰ AI response #1, Spreadsheet for Difference in Sales.

¹¹ Answer 2, Claimants written response to requested information from the NPFC, dated 01 March 2012.

¹² Profit and Loss YTD Comparison for period January 2009-December 2009.

¹³ Profit and Loss YTD Comparison for period January 2010-December 2010 (Corrected Version).

¹⁴ Profit and Loss YTD Comparison for period January 2009-December 2009.

¹⁵ Profit and Loss YTD Comparison for period January 2010-December 2010 (Corrected Version).

¹⁶ Profit and Loss YTD Comparison for period January 2008-December 2008.

¹⁷ 2010 Form 1120S Federal Income Tax Return.

¹⁸ 2008 Form 1120S Federal Income Tax Return.

¹⁹ 2009 Form 1120S Federal Income Tax Return.

\$43,933.00²⁰, compared \$51,525.00²¹ in 2008 and \$71,736.00²² in 2009. However, as described above, the Claimant experienced a substantial profit from oysters in 2010, even after considering the cost of goods. Thus, the Claimant has failed to provide a connection between any increased cost of goods in 2010 and the Deepwater Horizon oil spill. Consequently, the Claimant failed to prove that it experienced a loss due to the Deepwater Horizon oil spill.

This claim is denied because the Claimant failed to meet its burden to (1) prove he experienced a loss in the amount claimed, and (2) 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: *4/19/12*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

²⁰ 2010 Form 1120S Federal Income Tax Return.

²¹ 2008 Form 1120S Federal Income Tax Return.

²² 2009 Form 1120S Federal Income Tax Return.