

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 2446 3350

5890/DWHZ
22 May 2012

Hackett Research Associates c/o Steven Hackett
2225 Chesterbrook Court, Suite 103
Naples, FL 34109

RE: Claim Number: N10036-1635

Dear Mr. Hackett:

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 N10036-1635 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. 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 N10036-1635.

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

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 2446 3367
Randy's Fishmarket Restaurant Inc.



Enclosure: (1) Claim Summary/Determination Form
(2) Evidence Presented in Support of Claim # N10036-1635

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	N10036-1635
Claimant	Randy's Fishmarket Restaurant, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$840,412.00

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 11 January 2012, Randy's Fishmarket Restaurant, Inc. (Claimant) presented an optional Oil Spill Liability Trust Fund (OSLTF) claim form seeking \$840,412.00 in loss of profits and impairment of earnings capacity damages to the National Pollution Funds Center (NPFC) allegedly resulting from the Deepwater Horizon oil spill.

The Claimant opened Randy's Fishmarket Restaurant in September of 2003.¹ Randy's Fishmarket is located in Naples Florida and operates as a restaurant and retail Fishmarket.² The Claimant bought Paradise Shrimp Co. located in Bonita Springs, Florida prior to the oil spill and changed the name to Randy's Paradise Shrimp Co.³

The Claimant alleges that after the oil spill, tourism dropped and the cost of seafood rose thus causing a strain on their existing cash flow.⁴ The Claimant had to make a decision to expand his business to try to mitigate the increased cost of seafood by operating a fish cleaning facility in Bonita Springs.⁵ After the oil spill, the company purchased a new facility in Bonita Springs to expand production for key lime desserts, seafood spreads and dips, and seafood processing.⁶ The Claimant closed Randy's Paradise Shrimp to move to the new location 01 April 2011, the new location opened 01 June 2011.⁷ The new location in Bonita Springs had to close three months later 01 September 2011, laying off 48 restaurant employees but retaining the location's production facilities.⁸

The Bonita Springs location has a modern refrigerated cutting room that is ready to use, but the Claimant is unable to staff the facility due to reduced cash flow.⁹ The Claimant acknowledges

¹ Hackett Research Associates response to NPFC's request for additional information letter dated 15 February 2012.

² Hackett Research Associates response to NPFC's request for additional information letter dated 15 February 2012.

³ Hackett Research Associates response to NPFC's request for additional information letter dated 15 February 2012.

⁴ Hackett Research Associates response to NPFC's request for additional information letter dated 15 February 2012.

⁵ Hackett Research Associates original submission to the NPFC, letter of explanation dated 04 January 2010.

⁶ Hackett Research Associates response to NPFC's request for additional information letter dated 15 February 2012.

⁷ Hackett Research Associates response to NPFC's request for additional information letter dated 15 February 2012.

⁸ Hackett Research Associates response to NPFC's request for additional information letter dated 15 February 2012.

⁹ Hackett Research Associates response to NPFC's request for additional information letter dated 15 February 2012.

that sales increased from 2009 through 2010;¹⁰ he alleges, however, that the increased expenses of seafood, interest, and advertising have resulted in a net loss of \$840,412.00.¹¹

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.

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.

¹⁰ Hackett Research Associates original submission to the NPFC, letter of explanation dated 04 January 2010.

¹¹ Hackett Research Associates original submission to the NPFC, letter of explanation dated 04 January 2010.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support this claim, the Claimant submitted the evidence listed in enclosure (2).

The Claimant seeks lost profits and impairment of earnings capacity in the amount of \$840,412.00.

Prior to presenting his claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) with the GCCF on 08 October 2010 in the amount of \$120,552.45.¹² He was assigned Claimant ID #3126572 and claim #181625.¹³ This claim was denied on 09 December 2010.¹⁴ Additionally, the Claimant filed an Interim 3(ICQ32011) claim with the GCCF on 01 September 2011 in the amount of \$840,412.00.¹⁵ He was assigned claim #9449214.¹⁶ ICQ32011 was paid \$98,068.88 by the GCCF and a Final Payment offer was sent to the Claimant.¹⁷

Based upon the evidence provided by the Claimant, it appears that the subject matter for each of the GCCF claims is the same as the subject matter of his claim before the NPFC, i.e., that he lost income in the form of increased expenses as a result of the Deepwater Horizon oil spill. The NPFC deems each of Claimant's two GCCF claims to be properly presented to the responsible party and properly presented to the NPFC. Accordingly, this Claim Summary determination for NPFC Claim N10036-1635 considers and addresses the earnings claimed in both claims presented to the responsible party, specifically; GCCF Claim #'s 181625 (EAP) and 9449214 (ICQ32011).

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 or destruction or loss of real or personal property or 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. The NPFC considered all the documentation submitted by the Claimant.

In order to prove a claim for loss of profits and impairment of earning capacity damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an actual financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

Regarding the Claimant's alleged financial loss; he seeks damages in the amount of \$840,412.00 resulting from increased operating expenses related to seafood purchases, interest payments, and advertising.¹⁸

The Claimant states that seafood prices increased by 24% in 2010 and another 16% in 2011.¹⁹ However, the Claimant states that he increased dinner entrees by one to three dollars and

¹² Report from the GCCF dated 17 April 2012.

¹³ Report from the GCCF dated 17 April 2012.

¹⁴ GCCF Denial Letter dated 09 December 2012.

¹⁵ Report from the GCCF dated 17 April 2012.

¹⁶ Report from the GCCF dated 17 April 2012.

¹⁷ Report from the GCCF dated 17 April 2012.

¹⁸ Hackett Research Associates response to NPFC's request for additional information letter dated 15 February 2012.

beverages by 25%.²⁰ The Claimant further acknowledges that “sales figures show a slight increase for 2010 (4.1%), however, this is only because the restaurant was forced to increase prices to compensate for higher seafood costs and other sharp increases in expenses due to the BP oil spill.”²¹ According to the Claimant’s tax returns in 2010, revenues were \$5,188,412.00 as compared to 2009 revenues of \$4,982,556.00.²² The Claimant had increased revenues for 2010 in the amount of \$205,856.00.²³

The Claimant states that “the company was forced to borrow money to meet expenses and to expand in order to survive.”²⁴ According to the Claimant’s tax returns, annual interest expense went from \$88,231.00 in 2008, to \$130,690 in 2009, to \$213,561.00 in 2010 an increase of 242%.²⁵ It is unclear to the NPFC what the increased interest is for. The Claimant cites needing an increased line of credit due to the pre oil spill high season of Jan through March 2010 not being as good as it normally is and thus needing money to get through August and September, their historically low months.²⁶

The Claimant also bought Paradise Shrimp in Bonita Springs *prior* to the oil spill for an undisclosed amount and purchased a facility in Bonita Springs *after* the oil spill and opened it 01 June 2011 for three months before it closed.²⁷ The Claimant cites that it needed to increase production operations and cut costs of seafood by filleting the fish in house thus they expanded operations but have not been able to bring their intentions to fruition due to limited “cash flow.”²⁸ The NPFC views the Claimant’s decision to incur further indebtedness in an effort to reduce his seafood costs as an independent business decision and not actually the result of the Deepwater Horizon oil spill.

The Claimant’s increased operating expenses for seafood were mitigated by charging higher prices to, reportedly, fewer customers. The Claimant’s increased interest expenses were required due to the underperformance of the high season from January through March prior to the oil spill in 2010 and/or due to the expansion of the business through purchasing Paradise Shrimp and/or the new location in Bonita Springs, Florida and not directly linked to the oil spill.

The Claimant increased advertising expenses to combat the negative media coverage and the perception of tainted oily seafood.²⁹ According to the Claimant’s tax returns, advertising expenses were \$100,822.00 in 2008, \$117,156.00 in 2009 and increased to \$157,460.00 in 2010. The increased advertising of \$40,304.00³⁰ was not shown to be directly linked to the oil spill as

¹⁹ Hackett Research Associates response to NPFC’s request for additional information letter dated 15 February 2012.

²⁰ Hackett Research Associates response to NPFC’s request for additional information letter dated 15 February 2012 at 9.

²¹ Hackett Research Associates original submission to the NPFC, letter of explanation dated 04 January 2010.

²² 2009 and 2010 Forms 1120S US Income Tax Returns for an S Corporation.

²³ 2010 revenue of \$5,188,412 minus 2009 revenue of \$4,982,556.00 equals \$205,856.00.

²⁴ Hackett Research Associates response to NPFC’s request for additional information letter dated 15 February 2012 at page 1.

²⁵ 2008, 2009, and 2010 Forms 1120S US Income Tax Returns for an S Corporation.

²⁶ Hackett Research Associates original submission to the NPFC, letter of explanation dated 04 January 2010 at page 3.

²⁷ Hackett Research Associates response to NPFC’s request for additional information letter dated 15 February 2012 at page 1.

²⁸ Hackett Research Associates response to NPFC’s request for additional information letter dated 15 February 2012 at page 2, answer to question 3.

²⁹ Hackett Research Associates original submission to the NPFC, letter of explanation dated 04 January 2010 at page 4.

³⁰ 2010 advertising of \$157,460.00 minus 2009 advertising of \$117,156.00 equals \$40,304.00.

they previously increased advertising from 2008 to 2009 by \$16,334.00.³¹ Thus the increased costs of advertising do not appear unusual year over year between 2008 and 2010. In light of the foregoing, the Claimant has not established a loss in the amount alleged by a preponderance of the evidence. Furthermore the Claimant was paid \$98,068.88 for their Interim 3 claim with the GCCF.³²

Regarding the cause of the Claimant's alleged loss, the Claimant alleges a drop in tourism to Naples, Florida due to the oil spill of 2010 reduced his customer base thus reducing potential revenues.³³ The Claimant provided two letters from The Inn at Pelican Bay and Bayfront Inn 5th Ave stating they lost 20% and 45% of guests over the summer of 2010.³⁴ However according to Collier County (Naples, Marco Island, Everglades Convention & Visitors Bureau) Tourist Tax Collections History, tourism increased for 2010 over 2009 and continued to increase for 2011.³⁵ The Tourist Development Tax increased from the 2009 amount of \$11,624,633.00 to the 2010 amount of \$12,925,684.00, and continued to increase through 2011 totaling \$13,802,806.00.³⁶ As such, the Claimant has not established by a preponderance of the evidence that his alleged loss of earnings was due to a drop in tourism related to the oil spill.

Accordingly, in light of the foregoing, this claim is denied because the Claimant has failed to meet his burden to demonstrate (1) that he has an alleged loss in the amount claimed, and (2) that his 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: *5/22/12*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

³¹ 2009 advertising of \$117,156.00 minus 2008 advertising of \$100,822.00. Further, a review of Claimant's information dated 09 January 2011, page 3, indicates that advertising costs increased from 200,019 in 2008 to 270,411 in 2009 but only 291,024 in 2010.

³² Report from the GCCF dated 17 April 2012.

³³ Hackett Research Associates independent study 01 August 2010.

³⁴ Letter from Inn at Pelican Bay dated 29 July 2010 and Letter from Bayfront Inn 5th Ave dated 31 July 2010.

³⁵ Collier County visitor's bureau tourist tax collections history calculated by month paid by guests.

³⁶ Collier County visitor's bureau tourist tax collections history calculated by month paid by guests.

Enclosure 1:

Documentation Originally Submitted 11 January 2012

- Cover Letter from Hackett Research Associates to the NPFC dated 04 January 2012;
- Summary spreadsheet detailing month by month revenue and profit for the Claimant for 2007-2011;
- Authorization letter from the Claimant to the NPFC dated 04 January 2012;
- Photocopy of the Claimant's Florida Driver License
- Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form signed 04 January 2012 and received 11 January 2012;
- GCCF Interim Payment Claim Form signed 09 August 2011;
- Addendum to Interim claim Form, Section IV.C.2;
- Letter from the Claimant to Hackett Research Associates dated 30 June 2010;
- Letter from Hackett Research Associates dated 10 July 2010;
- Letter from Hackett Research Associates dated 11 May 2011;
- Market Analysis of Effects of the BP Gulf Oil Spill dated 01 August 2010;
- 2008 Form 1120S U.S. Income Tax Return for an S Corporation;
- 2009 Form 1120S U.S. Income Tax Return for an S Corporation;
- 2010 Form 1120S U.S. Income Tax Return for an S Corporation;
- Profit and Loss Statement for the Claimant for January 2008-December 2008;
- Profit and Loss Statement for the Claimant for January 2009-December 2009;
- Profit and Loss Statement for the Claimant for January 2010-December 2010;
- Profit and Loss Statement for the Claimant for January 2011-June 2011;
- Collier County Business Tax expiring 30 September 2011;
- Florida Fish and Wildlife Conservation Commission license expiring 30 June 2011 (1);
- Florida Fish and Wildlife Conservation Commission license expiring 30 June 2011 (2);
- Florida Department of Agriculture and Consumer Services, Division of Food Safety license, expiring 31 December 2011 (1);
- Florida Department of Agriculture and Consumer Services, division of Aquaculture license dated 30 June 2012;
- Florida Department of Agriculture and Consumer Services, Division of Food Safety license, expiring 31 December 2011 (2);
- Lee County Local Business Tax Receipt with account expiring 30 September 2011;
- Florida Fish and Wildlife Conservation Commission license expiring 30 June 2012 (1);
- Florida Fish and Wildlife Conservation Commission license expiring 30 June 2012 (2);
- Department of Business and Professional Regulation Division of Alcoholic Beverages license and Tobacco expiring 31 March 2012 (1);
- Department of Business and Professional Regulation Division of Hotels and Restaurants license expiring 01 December 2011;
- Department of Business and Professional Regulation Division of Alcoholic Beverages license and Tobacco expiring 31 March 2012 (2);
- Certificate of Registration, Sales and Use Tax Certificate of Registration, effective date 31 December 2011 (1);
- Certificate of Registration, Sales and Use Tax Certificate of Registration, expiration date 31 December 2011 (2);
- State of Florida, Department of Business and Professional Regulation License expiration date 31 March 2012;
- Florida Department of State Division of Corporation, active registration with report filed 05 January 2012;
- Letter from Barber Seafood to the Claimant dated 30 June 2010;

- Letter from Performance Foodservice to the Claimant dated 10 July 2010;
- Summary of Randy's Fishmarket Restaurant Seafood Purchases by Supplier;
- Monthly Sales Report for the Claimant from 2009-2011;
- North Star Seafood Posted Order Sales Report for the Claimant ship date 01 January 2010-30 April 2010;
- North Star Seafood Posted Order Sales Report for the Claimant ship date 01 May 2010 to 31 December 2010;
- North Star Seafood Posted Order Sales Report for the Claimant ship date 01 January 2011 to 31 March 2011;
- Incredible Fresh Seafood for the Claimant from January 2009-April 2011;
- Performance Foodservice sales report from January 2009-April 2011;
- Blue Star Seafood Sales by Customer Summary from January 2009-April 2009;
- Blue Star Seafood Sales by Customer Summary from May 2009-December 2009;
- Blue Star Seafood Sales by Customer Summary from January 2010-April 2010;
- Blue Star Seafood Sales by Customer Summary from May 2010-December 2010;
- Blue Star Seafood Sales by Customer Summary from January 2011-March 2011;
- Blue Star Seafood Sales by Customer Summary for April 2011;
- Barbers Seafood Transaction report from 01 January 2009-27 April 2009;
- Barbers Seafood Transaction report from 04 May 2009-29 December 2009;
- Barbers Seafood Transaction report from 04 January 2010-18 March 2010;
- Barbers Seafood Transaction report from 03 January 2011-02 May 2011;
- Barbers Seafood Transaction report from 22 March 2010-30 December 2010;
- Letter from Inn At Pelican Bay to the Claimant dated 29 July 2010;
- Letter from Bayfront Inn to the Claimant dated 31 July 2010;
- Letter from the Claimant to Anthony Valego dated 27 April 2010;
- Letter from the Claimant to Natelee Valego dated 01 May 2010;
- Letter from the Claimant Colleen Foster dated 09 May 2010;
- Letter from the Claimant to Richard Miller dated 27 September 2010;

Documentation in response to NPFC's request for additional information submitted 21 February 2012

- Letter responding to NPFC's request for additional information answering the 12 questions;
- Randy's Fishmarket Restaurant Transaction List by Vendor for January 2008 through December 2010;
- Randy's Fishmarket Restaurant Transaction List by Vendor for January 2008 through December 2011;
- Promissory Note between Claimant and Synovus Bank of Florida dated 28 September 2010 for \$100,000.00 line of revolving credit;
- Promissory Note between Claimant and Synovus Bank of Florida dated 28 September 2010 for \$747,500.00;
- Mortgage Subordination Agreement dated 28 September 2010;
- Randy's Fishmarket Restaurant Inc. Statement of Income and Expenses January through December 2009;
- Randy's Fishmarket Restaurant Inc. Statement of Income and Expenses January through December 2010;
- Consolidation of 12 notes into one note for \$980,000.00 between Claimant and Lloyd L Bowein;
- Promissory Note between Claimant and Synovus Bank of Florida dated 28 September 2010 for \$200,000.00;