

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)
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CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 9310

5890/DWHZ
18 April 2012

Dennis' Seafood, Inc.
Attn: [REDACTED]
4428 Lorino Street
Metairie, LA 70006

Re: Claim Number: N10036-1645

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 N10036-1645 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 N10036-1645.

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	N10036-1645
Claimant	Dennis' Seafood, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$174,120.00

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 18 January 2012, Myra Lacoste, on behalf of Dennis' Seafood, Inc. (collectively the Claimant) presented an Optional Oil Spill Liability Trust Fund (OSLTF) claim form to the National Pollution Fund Center (NPFC), seeking \$174,120.00 in loss of profits and impairment earning capacity.

The Claimant is a take-out seafood market located in Metairie, Louisiana.¹ The Claimant asserted that, due to the Deepwater Horizon oil spill, lots of seafood was unavailable.² As well, the Claimant asserted that customers were scared to buy seafood because of fear of oil contamination.³ The Claimant determined the company's loss of \$174,120.00 by calculating the difference between the market's gross sales in 2009, compared to gross sales in 2010.⁴

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).

¹ GCCF Interim Payment Claim Form, dated 13 January 2011.

² GCCF Interim Payment Claim Form, dated 13 January 2011.

³ GCCF Interim Payment Claim Form, dated 13 January 2011.

⁴ Letter from the Claimant to the NPFC, dated 08 January 2012.

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 the claim, the Claimant presented the following documentation to the NPFC:

- Letter from the Claimant to the NPFC, dated 08 January 2012;
- Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form, dated 08 January 2012;
- Schedules 1, 2, and 6 from GCCF Forensic Accounting Analysis, dated 09 August 2010;
- Determination Letter on Interim Payment/Final Payment Claim, dated 12 May 2011;
- Notice of Determination Emergency Advance Payment, dated 08 December 2010;
- 2010 Form 1120S, U.S. Income Tax Return for an S Corporation;
- 2009 Form 1120S, U.S. Income Tax Return for an S Corporation;
- 2008 Form 1120S, U.S. Income Tax Return for an S Corporation; and
- GCCF Interim Payment Claim Form, dated 13 January 2011.

Prior to presenting this claim to the NPFC and before the formation of the GCCF, the Claimant received compensation in the amount of \$32,286.00 from BP.⁵ In addition; the Claimant filed a One Month Emergency Advance Payment (EAP) claim with the GCCF for loss of earnings on 26 August 2010 in the amount of \$15,000.00.⁶ The Claimant was assigned Claimant ID # 1154103 and Claim # 30427. The Claimant received payment in the amount of \$106,100.00 on 08 December 2010.⁷ Lastly, the Claimant filed an Interim I (ICQ12011) claim with the GCCF for loss of earnings on 15 January 2011 in the amount of \$50,000.00.⁸ The Claimant was assigned Claim # 9219579. The GCCF denied this claim on 12 May 2011.⁹

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant's uncompensated GCCF claim¹⁰ is the same as the subject matter of the claim before the NPFC, i.e., that the Claimant lost seafood sales due to the Deepwater Horizon oil spill. The NPFC deems that the Claimant's uncompensated GCCF claim was both properly presented to the RP and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC claim N10036-1645 considers and addresses the damages claimed to the responsible party; specifically, GCCF Claim # 9219579 (ICQ12011).

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 (1) the Claimant failed to present some of the damages claimed to the responsible party (GCCF), and (2) the Claimant failed to prove it experienced an uncompensated loss due to the Deepwater Horizon oil spill.

1. Failure to Present Damages

Under 33 C.F.R. § 136.103(a), all claims for removal costs or damages must be presented first to the responsible party (RP). The Claimant presented an EAP claim to the GCCF for \$15,000.00 for which the Claimant was fully compensated in the amount \$106,100.00. The Claimant also presented an Interim I claim for \$50,000.00, which was denied. Thereafter, the Claimant presented a claim to the NPFC for \$174,120.00. Any claimed amount of damages exceeding \$50,000.00 was not properly presented to the RP/GCCF pursuant to 33 C.F.R. § 136.103(a) and is therefore denied.

2. Failure to Prove Loss

The Claimant based its loss of \$174,120.00 on the difference in gross sales of the seafood market from 2009 and 2010.¹¹ However, under 33 C.F.R. § 136.235, the amount of compensation allowable

⁵ Report from the GCCF, dated 09 April 2012.

⁶ Report from the GCCF, dated 09 April 2012.

⁷ Notice of Determination Emergency Advance Payment, dated 08 December 2010.

⁸ Report from the GCCF, dated 09 April 2012.

⁹ Determination Letter on Interim Payment/Final Payment Claim, dated 12 May 2011.

¹⁰ The NPFC does not have presentment of the Claimant's EAP claim because the Claimant has been fully satisfied for this claim. The Claimant had EAP claimed damages of \$15,000.00 and received payment from the GCCF in the amount of \$106,100.00.

¹¹ Letter from the Claimant to the NPFC, dated 08 January 2012.

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. The Claimant had already received total payments from BP in the amount of \$138,386.00,¹² which the Claimant did not allow for in the calculation of the claimed damages. Thus, even when comparing the difference in gross sales, the Claimant's actual potential loss is significantly less than the claimed damages.

Furthermore, the comparison of year to year gross sales is an inaccurate method to calculate damages. Under 33 C.F.R. § 136.235 (d), the Claimant must allow for all saved expenses in the calculation of loss. Therefore, based on the Claimant's provided financial documentation, the Claimant actually experienced an increase in earnings in 2010 compared to 2009. The Claimant had business income of \$90,942.00¹³ in 2010, compared to business income of \$55,274.00¹⁴ in 2009. One significant saved expense was that the Claimant indicated the lay-off of several employees,¹⁵ which allowed for drastically reduced salary costs for the Claimant in 2010. Based on the above, the Claimant failed to prove that it experienced an uncompensated loss due to the Deepwater Horizon oil spill.

This claim is denied because the Claimant failed to (1) make proper presentment of all claimed damages to the responsible party, and (2) demonstrate that it experienced an uncompensated loss 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: *4/18/12*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

¹² Determination Letter on Interim Payment/Final Payment Claim, dated 12 May 2011.

¹³ 2010 Form 1120S, U.S. Income Tax Return for an S Corporation.

¹⁴ 2009 Form 1120S, U.S. Income Tax Return for an S Corporation.

¹⁵ GCCF Interim Payment Claim Form, dated 13 January 2011.