

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 2446 4364

5890/DWHZ
25 April 2012

[REDACTED]
Shipwreck Grill LLC
206 E. Villa Maria
Bryan, Texas 77801

Re: Claim Number: N10036-1661

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 N10036-1661 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 N10036-1661.

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	N10036-1661
Claimant	Shipwreck Grill LLC
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$14,325.00

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 27 January 2012 Wade Beckman on behalf of Shipwreck Grill LLC, (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$14,325.00 in loss of profits damages resulting from the Deepwater Horizon oil spill.¹

The Claimant is the owner of the Shipwreck Grill located in Bryan, Texas, which opened for business in late 2009.² The Claimant alleged that the oil spill caused a lack of available Texas Gulf Coast oysters as well as a general increase in seafood prices.³ He further states that the oil spill caused a “severe decrease in the general public’s perception of seafood safety.”⁴

The Claimant asserted that he sustained losses due to increased product costs following the spill, as well as lack of seafood sales due to public perception that seafood was unsafe for consumption. Specifically, the Claimant alleged to have sustained the following losses: (1) \$1,508.00 due to increased oyster costs, (2) \$9,893.00 lost oyster revenue, and (3) \$2,924.00 due to increased cost of shrimp, for a total loss of \$14,325.00.⁵

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:

¹ Optional OSLTF Claim Form, signed 4 January 2012.

² Optional OSLTF Claim Form, signed 4 January 2012.

³ Letter from Claimant, 4 January 2012.

⁴ Letter from Claimant, 4 January 2012.

⁵ Letter from Claimant, 2 February 2012.

- (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:
See Enclosure (2).

On 13 September 2010, the Claimant submitted an Emergency Advanced Payment (EAP) claim to the RP/GCCF, seeking loss of profits damages in the amount of \$14,580.00.⁶ The Claimant was assigned ID # 1166431 and the EAP claim was assigned # 3005973.⁷ The RP/GCCF denied payment on the claim.

On 4 February 2011, the Claimant submitted a Full Review Final (FRF) claim to the RP/GCCF, seeking loss of profits damages in the amount of \$14,325.00.⁸ The Claimant retained ID # 1166431 and the FRF was assigned ID # 9262048.⁹ The RP/GCCF denied payment on the claim.

⁶ GCCF United States Coast Guard Report, 17 April 2012.

⁷ GCCF United States Coast Guard Report, 17 April 2012.

⁸ GCCF United States Coast Guard Report, 17 April 2012.

⁹ GCCF United States Coast Guard Report, 17 April 2012.

On 27 January 2012, the Claimant submitted this claim to the NPFC, seeking \$14,325.00 in loss of profits and impairment of earning capacity damages.¹⁰ The NPFC may adjudicate this claim to the extent that these damages have first been presented to the RP/GCCF.¹¹ Because the Claimant has presented these damages first to the RP/GCCF in an amount equal to the amount now presented to the NPFC, this determination may properly address the entirety of the claim now before the NPFC, in the amount of \$14,325.00.

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 order to prove a claim for loss of profits 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.

1. Failure to demonstrate an actual financial loss.

The Claimant alleged that he sustained a \$14,325.00 loss of profits in 2010 following the Deepwater Horizon oil spill due to increased product costs and loss of seafood sales.¹²

Under OPA's loss of profits damage category, the Claimant must provide evidence sufficient to prove that the Claimant sustained an actual loss of profits based on earnings in a comparable period in which the Claimant was not affected by the oil spill.¹³ A comparison of net income figures from May to December (the period after the Deepwater Horizon spill) reveals that the Claimant earned profits of \$50,076.00 in 2010¹⁴ as compared to \$45,658.00 in 2011.¹⁵ According to these figures, the Claimant actually profited \$7,148 more from April to December of 2010 as compared to this period in 2011.

Financial documentation provided by the Claimant therefore fails to prove that the Claimant sustained an "actual net reduction or loss of earnings or profits"¹⁶ in the period following the Deepwater Horizon oil spill.

2. Failure to prove loss due to Deepwater Horizon oil Spill.

The Claimant asserted that "the very basics of the claim... are that the BP Oil Spill caused a complete lack of availability of Texas Gulf Coast Oysters."¹⁷ However, the Claimant has failed to provide any evidence that might indicate that the oil spill caused the unavailability of Texas Gulf oysters in the period following the spill.

¹⁰ Optional OSLTF Claim Form, signed on 4 January 2012.

¹¹ 33 C.F.R. § 136.103(a).

¹² Letter from the Claimant, 2 February 2012.

¹³ 33 C.F.R. § 136.233(c).

¹⁴ Profit & Loss Statements from May 4, 2010 to January 10, 2011.

¹⁵ Profit & Loss Statements from May 3, 2011 to January 9, 2012.

¹⁶ 33 C.F.R. § 136.235.

¹⁷ Letter from the Claimant, 2 February 2012.

Research independently conducted by the NPFC revealed a number of factors affecting the Texas oyster industry in 2010. For example, the 2010 Texas oyster season was closed on April 23 due to an algae bloom.¹⁸ Upon reopening in November 2010, the oyster industry continued to be affected by above average heat stifling oyster growth, a depressed market, lower demand, and thus lower prices.¹⁹

Based on the foregoing, the Claimant has failed to demonstrate that the oil spill caused a lack of availability Texas oysters, which thereby required the Claimant to purchase a more expensive replacement product. Furthermore, the Claimant's decision not to pass any increased cost of replacement oysters on to the consumer is an independent business decision, meaning that any losses sustained based on such decision would not be a loss attributable to the oil spill.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$14,325.00, and (2) 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: *4/25/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁸ <http://galvestondailynews.com/story.lasso?ewcd=d8f209abd0278505> (last accessed 24 April 2012).

¹⁹ <http://blog.chron.com/txpotomac/2010/12/texas-oyster-producers-hurting-in-wake-of-oil-spill/> (last accessed 24 April 2012).

Enclosure (2)
Evidence Presented in Support of
NPFC Claim # N10036-1661

- Optional OSLTF Claim Form, signed on 4 January 2012;
- Letter from the Claimant to the NPFC, 4 January 2012;
- Summary of BP/GCCF claims process, 2 February 2011;
- Breakdown of claimed losses, totaling \$14,325.00;
- Loss Initial Oyster Price Increase;
- Lost Revenue and Profits from Lost Oysters
- Loss Due to Increased Shrimp Prices
- Letter from the Claimant to the GCCF, 14 September 2010;
- USPS delivery confirmation information;
- Shipwreck Grill concept description;
- Shipwreck Grill menu;
- Pictures of the Shipwreck Grill, interior and exterior;
- Email from the Claimant to the GCCF regarding lost claims info, 7 October 2010;
- Profit and Loss Statement, May – December 2010;
- Cover Letter, “Invoices and Velocity Reports Showing Price Increases”;
- Invoice # 509860, 3/24/10;
- Invoice # 513439, 4/07/10;
- Invoice # 514387, 4/12/10;
- Invoice # 517167, 4/21/10;
- Invoice # 516234, 4/19/10;
- Payment Record, Invoices 516234, 517168, 517167;
- Invoice # 519993, 5/03/10;
- Invoice # 520913, 5/05/10;
- Invoice # 522840, 5/12/10;
- Invoice # 523767, 5/17/10;
- Invoice # 524643, 5/19/10;
- Payment Record, Invoices 525610, 526520, 527477;
- Invoice # 525610, 5/24/10;
- Invoice # 527477, 6/01/10;
- Invoice # 528114, 6/02/10;
- Invoice # 529070, 6/07/10;
- Invoice # 529851, 6/09/10;
- Invoice # 530768, 6/14/10;
- Invoice # 531577, 6/17/10;
- Payment Record, Invoices 531577, 532512;
- Invoice # 532512, 6/21/10;
- Invoice # 832487A, 6/30/10;
- Invoice # 832731B, 7/02/10;
- Invoice # 833275A, 7/09/10;
- Invoice #834468A, 7/22/10;
- Invoice # 833993A, 7/19/10;
- Record of purchases, Glazier Foods Company, January 2010 – January 2011;
- Scarmardo Foodservice, Invoice Inquiry Sorted by Product, 5/01/10 – 12/31/10;
- Cover Letter, “Product mix Reports Showing Decrease in Sales”;
- PMIX Report, 02/01/2010 – 12/31/2010; 9/01/2009 – 12/31/09;

- Keen, Judy, *Along the Gulf: Seafood prices soar due to oil spill*, usatoday.com, 20 July 2010;
- Kelly, Pat, *Spill's ecological danger over, but public still wary*, newshearld.com, 21 April 2011;
- KBTX, *Gulf Oil Spill Could Soon Threaten Texas Beaches*, 2 June 2010;
- Anderson, Brett, *New Orleans family oyster company sees only dark days ahead*, Times-Picayune, 15 May 2011;
- Chiotakis, Steve, *BP oil leak could hurt seafood demand*, www.marketplace.org, 10 May 2010;
- Cover Letter, "Vendor Statements";
- Letter from Glazier Food Company to the Claimant, 4 May 2011;
- Letter from Seafood Wholesalers, Ltd. to the Claimant, 1 May 2011;
- GCCF Follow-Up to Previous Denial Letter, 28 October 2011;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 26 October 2011;
- Letter from the GCCF to the Claimant, 7 December 2010;
- GCCF letter requesting that the Claimant provide additional documentation, 30 September 2010;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 22 April 2011;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 13 August 2011;
- Letter from the GCCF to the Claimant, noting inclusion of claim submission copies, 18 October 2011;
- Letter from the GCCF to the Claimant, 7 February 2011;
- Office of the Secretary of State, Certificate of Filing of Shipwreck Grill, LLC, 29 May 2009, Texas;
- Email from the Claimant to the GCCF regarding proof of causation, 19 May 2011;
- Email from the Claimant to the GCCF requesting copies of documents submitted, 7 September 2011;
- Email from the Claimant to the GCCF requesting contact to discuss claim status, 2 August 2011;
- Email from the Claimant to the GCCF, subject: Follow-up on Claim 1166431, 27 June 2011;
- Emails between the Claimant and the GCCF, subject: Claim 1166431- incorrect email;
- Copy of GCCF Claim Submission;
- GCCF Claim Form Generated Online;
- Email Answering Questions Posed in Additional Information Request, 17 April 2012;
- Expanded Capital Account Summary;
- Complete 2010 Tax Return With Schedules and Attachments;
- Complete 2011 Tax Return With Schedules and Attachments;
- Profit & Loss Statements for August 25, 2009 through January 11, 2010;
- Profit & Loss Statements for January 11, 2011 through January 9, 2012;
- Complete 2009 Individual Tax Return With Schedules and Attachments;
- Profit & Loss Statements for January 12, 2010 through January 10, 2012.