

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
19 April 2012

Mr. Damien Lindsey



Re: Claim Number: N10036-1665

Dear Mr. Lindsey:

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 N10036-1665 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 N10036-1665.

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	N10036-1665
Claimant	Damien Lindsey
Type of Claimant	Private (US)
Type of Claim	Subsistence Use/Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$25,000.00

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 February 2012, Mr. Damien Lindsey (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$25,000.00 in loss subsistence use damages resulting from the Deepwater Horizon oil spill.¹ However, this claim also appears to address the Claimant's loss of income due to his alleged inability to fish.

The Claimant alleged that because of the closure of certain Gulf Coast fishing grounds, he was unable to continue to subsist on his catch, and incurred additional costs that he would not have incurred had he been able to continue to harvest seafood from May 2010 until May 2011.

The Claimant specifically stated that he "was unable to fish due to the beaches being closed because of the oil that was in the water. It was declared unsafe for consumption."²

The Claimant's submission also indicates that he "lost income and future income as a result of this oil spill,"³ indicating that this claim contains a loss of profits component as well as a subsistence component. Therefore, this determination shall address this claim under both a loss of profits damage analysis as well as a loss of subsistence use loss analysis.

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.

Loss of Profits and Impairment of Earning Capacity Claims Requirements

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

¹ Optional OSLTF Claim Form, signed on 12 January 2012.

² Letter from the Claimant, responding to evidentiary requirements for OPA subsistence claims, undated.

³ Optional OSLTF Claim Form, signed on 12 January 2012.

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.

Subsistence Use Claims Requirements

Under 33 C.F.R. §§ 136.219-223, each claim for subsistence use must:

- (a) be for lost subsistence use by an eligible client;
- (b) identify and describe the actual subsistence use of each natural resource for which compensation is being claimed;
- (c) describe how and to what effect the claimant's subsistence use was affected by injury to or loss of each specific natural resource;
- (d) describe efforts to mitigate the subsistence loss;
- (e) be based on the reasonable cost to replace the lost subsistence use of natural resources; and
- (f) be reduced by the amount of all compensation made available to the claimant to compensate for the loss, all income which was derived utilizing the time which otherwise would have been used to obtain the subsistence resources, and any avoided costs associated with the subsistence activity, such as gas for vehicles or boats, bait, and other overhead costs not incurred due to the spill.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support this claim, the Claimant submitted the following documentation:

- Optional OSLTF Claim Form, signed on 2 February 2012;
- Article, *BP Cited for 5 More Alleged Violations*, AP, 7 December 2011;
- Article, *BP sues owner of Deepwater Horizon rig for \$40bn damages*, AP, undated.
- Handwritten statement titled, "Sum Certain";
- Handwritten statement regarding the nature of the Claimant's loss;
- Handwritten statement, responding to proof requirements for a claim for subsistence use
- Handwritten witness statement, signed by Edward Lee Harris, 17 December 2011;
- Handwritten witness statement, provided by Michael Arseneau;
- Handwritten statement provided by the Claimant, regarding inability to furnish certain documentation;
- Handwritten statement regarding the Claimant's injuries/sickness;
- Response to NPFC Request for additional information (4pgs).

On 14 October 2010, the Claimant submitted two Emergency Advance Payment (EAP) claims and a Final Payment claim to the RP/GCCF, seeking personal injury and loss of subsistence use damages in the amount of \$9,808.00.⁴ The Claimant was assigned Claimant ID 1009114 and the EAP and Final Payment claims were assigned claim #'s 9012268, 3026135 and 3026139.⁵ All claims were denied by the RP/GCCF.

On 23 November 2010, the Claimant submitted an EAP claim to the RP/GCCF seeking loss of profits and wages damages in the amount of \$700.00.⁶ This claim was also denied.

On 2 February 2012, the Claimant submitted this claim to the NPFC, seeking \$25,000.00 in loss of subsistence use damages.⁷ OPA requires that any claim presented to the NPFC be first presented to and either denied by, or undetermined within 90 days of presentment to the RP.⁸ Because the Claimant has only presented subsistence use claims to the RP/GCCF totaling \$9,808.00, the NPFC initially denies payment on this claim in the amount of \$15,192.00, as this amount was not first presented to the RP/GCCF.

NPFC Determination

According to 33 C.F.R. § 136.103(a), all claims for removal costs or damages must be presented first to the responsible party. Therefore, this claim is initially denied in the amount of \$15,192.00, because, as discussed above, these damages were not first presented to the RP/GCCF. The remainder of this determination shall therefore address this claim for loss of subsistence use damages in the amount of \$9,808.00.

The remainder of this claim is denied because (1) the Claimant has not provided documentation to indicate how or to what extent the Claimant's alleged subsistence use was affected by the

⁴ GCCF United States Coast Guard Report, 3 April 2012.

⁵ GCCF United States Coast Guard Report, 3 April 2012.

⁶ GCCF United States Coast Guard Report, 3 April 2012.

⁷ Optional OSLTF Claim Form, received on 2 February 2012.

⁸ 33 C.F.R. § 136.103(a).

Deepwater Horizon oil spill, and (2) the Claimant has not provided documentation to prove that he sustained a loss of profits or earning capacity as a result of the Deepwater Horizon oil spill

1. Loss of Subsistence Use

In order to prove a claim for loss of subsistence use damages, a claimant must provide evidence to meet certain evidentiary requirements regarding how and to what extent the claimant's subsistence use was affected by the injury to or loss of each specific natural resource.⁹

Therefore, the amount of compensation allowable is,

the reasonable replacement cost of the subsistence loss suffered by the claimant if, during the period of time for which the loss of subsistence is claimed, there was no alternative means of subsistence available.¹⁰

Furthermore, the amount of compensation potentially available to a claimant must be reduced to account for (1) expenses saved due to the claimant's inability to fish, (2) all income the claimant earned during the time which otherwise would have been used to catch fish.¹¹

In a letter dated 12 March 2012, the NPFC requested that the Claimant provide certain additional documentation to meet the requirements of law listed above, including (1) financial records such as receipts or bank account statements documenting the replacement cost of the subsistence loss sustained, (2) records of all income earned in 2008, 2009 and 2010, and (3) trip tickets and landing data to confirm the extent and nature of the Claimant's subsistence use.¹²

On 29 March 2012, the Claimant responded to the NPFC request for additional information. The Claimant indicated that because he is currently incarcerated, he cannot furnish (1) proof of income earned prior to and during the period in which he was affected by the oil spill, (2) trip tickets and landing data to show the areas in which the Claimant fished prior to and during the oil spill, or (3) proof of replacement cost of subsistence loss suffered.

Additionally, the Claimant stated that he was paid in cash and would be unable to provide evidence such as receipts or bank account statements to indicate the amount of fish he was able to catch and sell, or to prove that he actually earned income by selling his catch.

This claim for loss of subsistence use damages is denied because the Claimant has failed to meet his burden to prove (1) that he incurred certain replacement costs due to a loss of subsistence use, or that (2) he was unable to fish for a particular period of time due to effects of the Deepwater Horizon oil spill.

2. Loss of Profits and Impairment of Earning Capacity Damages

Statements in this claim submission indicate that the Claimant relied on fishing as a means of earning income as well as for subsistence purposes. For example, in response to an NPFC request for additional information, the Claimant stated he calculated his losses "based on the income of a harvestman."¹³ The Claimant indicated on his OLSTF Claim Form that the Claimant "lost income and future income as a result of this oil spill."¹⁴

⁹ 33 C.F.R. § 136.221(c).

¹⁰ 33 C.F.R. § 136.223(a).

¹¹ 33 C.F.R. § 136.223(b)(1-3).

¹² NPFC request for additional information, 12 March 2012.

¹³ Response to NPFC request for additional information, received on 29 March 2012.

¹⁴ Optional OSLTF Claim Form, received on 2 February 2012.

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

The Claimant has presented no financial documentation that would indicate that the Claimant's earnings were in any way affected by the oil spill. The NPFC requested such documentation in a letter dated 12 March 2012. As noted above, the Claimant stated that due to his incarceration, he cannot to provide any financial documentation to support this claim.

Furthermore, the Claimant has not provided any evidence to prove that any loss the Claimant may have sustained was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

This claim is therefore denied because the Claimant has failed to meet his burden to prove (1) that the Claimant sustained a loss or reduction in profits, or (2) that the loss was caused by the discharge or substantial threat of discharge of oil resulting from the Deepwater Horizon oil spill.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *4/19/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments: