

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
16 April 2012

Penny's Place Café
ATTN: [REDACTED]
2800 Hwy 90, Unit A
Avondale, LA 70094

Re: Claim Number: N10036-1671

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 N10036-1671 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 N10036-1671.

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	N10036-1671
Claimant	Penny's Place Cafe
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$42,730.00

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 6 February 2012, Ms. Penny Poole, on behalf of Penny's Place Cafe, (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$42,730.00 in loss of profits damages resulting from the Deepwater Horizon oil spill.¹

The Claimant owns and operates a small restaurant in Avondale, Louisiana, which caters mostly to workers in the fishing and shipping industries.² The Claimant alleged that following the Deepwater Horizon oil spill, the business (1) lost customers, and (2) sustained increased product costs, causing the Claimant to sustain a loss of profits totaling \$42,730.00.³ The Claimant asserts that both the loss of customers and loss due to increased cost of inventory resulted from effects of the Deepwater Horizon oil spill.⁴

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

¹ Optional OSLTF Claim Form, signed on 18 January 2012.

² Response to NPFC Request for Additional Information, 29 March 2012.

³ Optional OSLTF Claim Form, signed on 18 January 2012.

⁴ Optional OSLTF Claim Form, signed on 18 January 2012.

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:

- Optional OSLTF Claim Form, signed on 18 January 2012;
- 2011 Occupational License Tax 550751;
- 2010 Occupational License Tax 530737;
- 2009 Occupational License Tax 511693;
- 2008 Occupational License Tax 491912;
- B&B Accounting Invoice, 24 January 2012;
- GCCF Claim Form, Emergency Advance Payment claim, seeking \$42,730.00 in lost earnings or profits;
- Tax Return Transcript, 2008, showing business income of -\$14,435.00;
- 2008 Form 1040, showing adjusted gross income of \$62,447.00;
- 2008 Schedule C (Form 1040), showing profit of \$14,435.00;
- 2008 Form 8863;
- Monthly Profit and Loss Statements, 2008;
- 2009 Tax Return Transcript, showing business income of -\$28,873.00;
- 2009 Form 1040, showing business profit of -\$8,873.00;
- 2009 Schedule C (Form 1040), showing profit of -\$8,873.00
- 2009 Form 2106-EZ;
- 2009 Schedule M (Form 1040A or 1040);
- Monthly Profit and Loss Statements, 2009;
- 2010 Tax Return Transcript, showing business income of -\$40,163.00;
- 2010 Form 1040, showing adjusted gross income of \$41,695.00;
- 2010 Schedule C (Form 1040), showing profit of -\$40,163.00;
- 2010 Schedule M (Form 1040A or 1040);
- 2010 Form 1099-MISC;
- 2010 Form W-2 Wage and Tax Statements;

- Monthly Profit and Loss Statements, 2010;
- Monthly Profit and Loss Statements, 2011;
- Copy of Menu, showing seafood options available only on Friday;
- Response to Request for additional information, 29 March 2012;
- Copy of Take-Out menu;
- Copy of menu with price adjustments;
- List of individuals whom the Claimant let go following the oil spill;
- Product invoices, 2008, 2009, 2010, 2011;

On 1 November 2010, the Claimant filed an Emergency Advance Payment (EAP) claim with the RP/GCCF, seeking lost profits damages totaling \$42,730.00.⁵ The Claimant was assigned Claimant ID # 3333002 and the EAP claim was assigned claim # 391002. The RP/GCCF denied payment on this claim.⁶

On 23 December 2010, the Claimant filed a First Quarter Interim Claim (ICQ12011) with the RP/GCCF, again seeking lost profits damages totaling \$42,730.00.⁷ The ICQ12011 was assigned claim # 9143212, and as of the date of this determination, is under “re-review” with the RP/GCCF.⁸

On 6 February 2012, the Claimant submitted this claim to the NPFC, seeking \$42,730.00 in loss of profits and impairment of earning capacity damages.⁹ OPA requires that a Claimant first present a claim for costs or damages to the RP, prior to presentment to the NPFC.¹⁰ Should the RP fail to issue on a determination on the claim within ninety days, or should the RP issue a full or partial denial on a claim, the Claimant may present the same claim to the NPFC.¹¹

Because the claim now before the NPFC has first been presented to the RP/GCCF and remains unsettled following a period longer than ninety days, the NPFC may fully adjudicate this claim for lost profits and impairment of earning capacity damages in the amount of \$42,730.00. Further, this Claim Summary Determination considers and addresses both of the Claimant’s GCCF Claims: Claim #’s 391002 and 9143212.

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 evidence 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.

The Claimant alleged to have sustained a financial loss totaling \$42,730.00 as a result of the Deepwater Horizon oil spill. The Claimant attributes this loss to a decrease in sales, and an increase in inventory costs.

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

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

⁷ GCCF United States Coast Guard Report, 3 April 2012.

⁸ GCCF Claimant Status, accessed on 10 April 2012.

⁹ Optional OSLTF Claim Form, signed on 18 January 2012.

¹⁰ 33 C.F.R. § 136.103(a).

¹¹ 33 C.F.R. § 136.103(a).

However, documentation provided by the Claimant indicates that factors other than the Deepwater Horizon oil spill were negatively impacting the Claimant's business in the period leading up to and following the oil spill. In a letter dated 13 March 2012, the NPFC requested that the Claimant provide an explanation as to why profit and loss statements indicated a large drop in sales from 2008 to 2009.¹² The Claimant provided the following statement:

In 2009, business started decreasing because of the change of ownership at a major shipyard in the area, "Avondale Shipyards." A major portion of the shipbuilding was being moved to Pascagoula, Mississippi and my business was affected dramatically.¹³

The Claimant stated that the effects of the impending closure of the Avondale Shipyard continued to cause the Claimant to sustain losses throughout 2010 and 2011.¹⁴ However, according to the Claimant, the effects of the oil spill compounded these losses.

In responding to an inquiry from the NPFC regarding why the Claimant's sales decreased so significantly immediately following the oil spill, the Claimant stated that,

sales dropped off immediately because the majority of my clientele went to work for the cleanup effort or were affected by their [loss of income] in the fishing industry.¹⁵

However, the Claimant has not provided any documentation or other proof to identify her clientele, or to show that her clientele was specifically affected by the Deepwater Horizon oil spill, thereby causing them to be unable to patronize the Claimant's restaurant. Even assuming that the Claimant's assertions are true, a decrease in patronization resulting from clients pursuing business opportunities outside of the locale of the Claimant's restaurant are not an OPA compensable loss. If the Claimant decides to return to the NPFC on reconsideration, the NPFC will require greater detail to indicate how the Claimant's losses are the result of the Deepwater Horizon oil spill as opposed to a myriad of other economic factors such as the closing of the Avondale Shipyard and the flight of her customers for greater economic opportunities.

Furthermore, the Claimant stated that losses incurred by the restaurant caused the Claimant to reduce the size of her staff. The Claimant provided names and contact information for these individuals in response to an NPFC request for such information. The NPFC contacted one of the former employees, identified as having been let go following the oil spill. The employee stated that they were laid off several years ago, but were unable to recall in which year they last worked for the Claimant.¹⁶ The former employee also stated that their lay-off was not the result of effects of the Deepwater Horizon oil spill.¹⁷

Lastly, the NPFC notes that the Claimant has a varied menu, which does not rely heavily on seafood items. In fact, the menu for the Claimant's restaurant indicates that seafood is only available on Fridays and during Lent.¹⁸ Although product invoices indicate that shrimp prices increased from approximately May to September of 2010, the Claimant's menu contained so few seafood items, she has not proven that the increased costs actually resulted in a loss to the Claimant's business.

¹² NPFC request for additional information, 13 March 2012.

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

¹⁴ Response to NPFC request for additional information, 29 March 2012.

¹⁵ Response to NPFC request for additional information, 29 March 2012.

¹⁶ PHONECON: NPFC staff and former employee of Claimant, 10 April 2012.

¹⁷ PHONECON: NPFC staff and former employee of Claimant, 10 April 2012.

¹⁸ Laminated copy of menu provided by the Claimant; See also, Response to NPFC request for additional information, 29 March 2012.

Based on the foregoing, the Claimant has not provided evidence to indicate the true extent of her losses, and has also failed to prove that any loss the business may have sustained was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

This claim is denied because the Claimant failed to meet her burden to demonstrate (1) that she sustained a loss in the amount of \$42,730.00, 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: *4/13/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments: