

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
2 April 2012

Derek Austin
[REDACTED]

RE: Claim Number: N10036-1673

Dear Mr. Austin:

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 N10036-1673 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 N10036-1673.

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	N10036-1673
Claimant	Derek Austin
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Earning Capacity and Subsistence Use
Amount Requested	\$2,500.00 for Subsistence and \$2,500.00 for Profits and Earnings

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 claims for certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT

On 02 February 2012, Derek Austin (Claimant) presented an optional Oil Spill Liability Trust Fund (OSLTF) claim form seeking \$2,500.00 in lost profits and earning capacity and \$2,500.00 for a loss of subsistence use to the National Pollution Funds Center (NPFC) alleging damages resulting from the Deepwater Horizon oil spill. His total loss for both claims is \$5,000.00.

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.

Loss of Earning Capacity

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.

Loss of Subsistence Use

The claims regulations (33 C.F.R. §§136.219-223) provide additional requirements for claims for loss of natural resources relied upon for food (i.e., subsistence use claims). Specifically, each claim for loss of subsistence use of natural resources must:

- 1) be for lost subsistence use and submitted by an eligible claimant;
- 2) identify and describe the actual subsistence use of each specific natural resource for which compensation is being claimed;
- 3) describe how and to what extent the claimant's subsistence use was affected by injury to or loss of each specific natural resource;
- 4) describe efforts to mitigate the subsistence use loss;
- 5) be based on the reasonable cost to replace the lost subsistence use of natural resources; and
- 6) be reduced by the amount of all compensation made available to the claimant to compensate for the loss, all income which was derived by 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.

The NPFC has provided more detail about these claim requirements at:

http://www.uscg.mil/npfc/Claims/DWH_faqs.asp.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support his claim, the Claimant submitted:

- 1) Optional OSLTF claim form dated 25 July 2012.

- 2) Affidavit from buyer of seafood from the Claimant.
- 3) Claimant's letter explaining recategorization of claim into subsistence and lost profits dated 11 February 2012.
- 4) Receipt for fresh catch seafood in Houston Texas dated 11 February 2012 for four dinners.
- 5) GCCF full review final payment claim form.
- 6) Texas Parks and Wildlife search of records for licenses for claimant for 01 January 2008 through 16 June 2011. Results one residential saltwater fishing license for 23 October 2008 through 31 August 2009.

On 27 June 2011, the Claimant submitted a claim to the GCCF for lost subsistence use of natural resources following the Deepwater Horizon spill, in the amount of \$5,000. That claim was denied by the GCCF on 13 July 2011. On 2 February 2012, Mr. Austin presented a claim for loss of subsistence use of natural resources to the NPFC in the amount of \$5,000.00. On 14 February 2012, Mr. Austin modified this claim to a combined claim for lost profits and subsistence use with the total amount remaining as \$5,000.00 and the subsistence claim portion modified to \$2,500.00 and \$2,500.00 for profits and earnings capacity. The lost subsistence use portion of the claim (\$2,500.00) is for costs to replace fish, crabs, and shrimp that he claims he was unable to catch for food due to the oil spill. The impairment of profits and earnings capacity portion of the claim (\$2,500.00) is for alleged lost sales of seafood which he could not catch due to the oil spill.

The NPFC verified that prior to presenting his claim to the NPFC; the Claimant filed a Full Review Final claim (FRF) with the GCCF for lost subsistence.¹ He was assigned GCCF Claimant ID #3525864 and GCCF Claim #9405952. This claim was denied by the GCCF.²

NPFC Determination

This claim is denied. Under 33 CFR 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.

Lost Profits or Earnings

This portion of the claim is denied because the Claimant failed to present his claim for lost profits or earnings capacity to the GCCF before presenting his claim to the NPFC. Under 33 C.F.R. § 136.103(a), all claims for removal costs or damages must be presented first to the responsible party (RP). Based upon the evidence provided by the Claimant, it appears that the subject matter for the GCCF claim is only for subsistence. As a result, the subject matter of his claim before the NPFC, i.e., that he lost subsistence *and* profits and earnings as a result of the Deepwater Horizon oil spill was not properly presented to the responsible party as to that portion relating to lost profits and earnings. Accordingly, the claimed amount relating to lost profits and earnings in the amount of \$2,500.00 is denied for the failure to first properly present that claim the responsible party prior to presenting the claim the Fund.

¹ GCCF Claimant Status page.

² GCCF Denial Letter dated 13 July 2011.

Loss of Subsistence Use

The NPFC finds that Mr. Austin has not met his burden of proving a subsistence use loss as defined by OPA (33 U.S.C. 2701 et seq.) and OPA claims regulations (33 C.F.R. Part 136). His claim is deficient because he has not provided:

- (1) sufficient evidence of a loss suffered due to the spill. He has not documented a pattern of subsistence use prior to the spill for which he seeks compensation; that is, where, how often, and how much seafood he and his family regularly caught and consumed for subsistence purposes. He has also failed to prove that he was in possession of a valid fishing license from the state of Texas which would help support a legal subsistence use of the resources;
- (2) any basis to support his claim that he suffered a \$2,500 loss of subsistence use. For example, the NPFC cannot determine the period of claimed loss or the actual increased costs incurred to replace the fish that he would have purchased if the spill had not occurred (i.e., insufficient receipts or statements were provided to support damages incurred in the amount claimed); or
- (3) a description of how and to what extent the claimant's subsistence use was affected by injury to or loss of each specific natural resource.

Accordingly, this claim is denied.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *4/2/12*

Supervisor's Actions: *Denial approved*

Supervisor's Comments: