

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
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5890/DWHZ
08 April 2013

Canton's Pearls LLC
ATTN: [REDACTED]
3301 Boston Street
Baltimore, MD 21224

Re: Claim Number: N10036-1676

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 N10036-1676 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 N10036-1676.

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 (1): Claim Summary/Determination
Enclosure (2): Documentation Submitted in Support of Claim N10036-1676

cc: [REDACTED]

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1676
Claimant	Canton Dockside
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$838,734.00

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 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.

On 08 March 2012, the United States District Court, Eastern District of Louisiana issued a "Transition Order" (TO) limiting the GCCF's ability to accept, process, or pay claims except as provided in that order. The TO created a Transition Process (TP) to facilitate the transition of the claims process from the GCCF to a proposed Court Supervised Settlement Program (CSSP). The Court granted Preliminary Approval of the proposed settlement agreement on 02 May 2012, and the CSSP began processing claims on 04 June 2012.

CLAIM AND CLAIMANT

On 8 February 2012, Charles Abbott, esq., on behalf of Canton Dockside, LLC. (collectively, "the Claimant") submitted a claim to the NPFC, seeking to recover \$838,743.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant is a restaurant and crab house located in Baltimore, Maryland. According to the restaurant's website, the Claimant "deals directly with Baltimore's fishermen in order to serve . . . the biggest, freshest crabs."² However, a copy of the Claimant's menu at the time of the oil spill indicates that "watermen in the gulf region work year round to provide our restaurant with the largest crabs available . . ."³ The Claimant also provided evidence indicating that signs posted at the entrance of the restaurant advertise Louisiana shrimp and crab. Records of crab sales submitted in support of this claim indicate that from at least 2007 through 2010, the Claimant purchased the vast majority of its crab from suppliers selling Gulf of Mexico blue crab.

The Claimant alleged that the oil spill caused the restaurant to sustain \$838,743.00 in losses from May through December 2010. Prior to the oil spill, the Claimant had anticipated May to December 2010 sales to increase by 100% over sales for the same period of 2009. Restaurant management anticipated this high level of growth due to the addition of 170 deck seats as well as the planned expansion of the interior dining area to include 150 additional seats. However, the Claimant alleged that "due to the oil spill and the supply of crabs, they chose to defer the

¹ Optional OSLTF Claim Form dated 5 January 2012.

² <http://www.cantondockside.com/crabs.html>, Accessed on 28 March 2013.

³ Canton Dockside Menu.

expansion until the uncertainty of the tainted crabs had been rectified.”⁴ Furthermore, the Claimant “has had to keep its large expanded dock closed for quite some time because of the lack of product and customers.”⁵ As a result of the deferral of the interior expansion and the closure of the deck, the restaurant did not experience growth from May to December 2010 as anticipated. As such, the Claimant seeks to recover the difference in actual and anticipated sales for 2010.

In addition to lost sales, the Claimant alleged that they sustained a loss of profits due to the increase in costs of crab and other Gulf of Mexico seafood. Specifically, increased costs of goods account for \$55,614.00 of the Claimant’s \$838,743.00 in alleged losses.

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 water, adjoining shorelines, or the exclusive economic zone of the United States, as described in § 2702(b) of OPA.

The OSLTF 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. 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; and
- (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;

⁴ Claim cover letter, Part VI.

⁵ Claim Cover Letter, Part VII, 1.

- (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.

Under 33 U.S.C. § 2712(f), payment of any claim or obligation by the Fund under OPA shall be subject to the United States Government acquiring, by subrogation, all rights of the claimant or State to recover from the responsible party.

DETERMINATION OF LOSS

Claimant's Submission to the NPFC

The Claimant submitted the following documentation in support of this claim:
See, Enclosure (2).

On 9 February 2012, the Claimant submitted this claim to the NPFC seeking \$838,743.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.⁶ Prior to submitting this claim to the NPFC, the Claimant submitted an Emergency Advance Payment (EAP) Claim to the RP/GCCF. According to the Claimant, the RP/GCCF denied payment on the claim.⁷

Because this claim was first presented to and denied by the Responsible Party through the GCCF, the NPFC deems OPA presentment requirements to have been met. The NPFC may therefore properly adjudicate this claim to the extent that all damages now presented were included in this claim as first presented to the GCCF.⁸

Furthermore, evidence in this claim submission indicates that the location of the Claimant's business excludes them from the Economic and Property Damage and Class Action Settlement (the E&PD Settlement).

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 all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

In order to prove a claim for loss of profits or impairment of earning capacity damages, a claimant must first prove "that the claimant's income was reduced . . ."⁹ A reduction in income under OPA is evidenced by "[t]he amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered."¹⁰ Furthermore, the amount of compensation potentially available to a claimant must be limited by certain factors, including successful attempts by the claimant to mitigate its losses.¹¹

⁶ Claim Cover Letter, 26 January 2012..

⁷ Claim Cover Letter, 26 January 2012.

⁸ 33 C.F.R. § 136.103(a).

⁹ 33 C.F.R. § 136.233(b).

¹⁰ 33 C.F.R. § 136.

¹¹ 33 C.F.R. § 136.235.

Here, the Claimant alleged to have sustained lost profits from May to December of 2010 totaling \$838,743.00. This includes losses in the amount of \$55,614.00 for increased costs of goods as well as \$1,508,706.00 in actual lost sales before saved expenses.

In establishing a baseline by which to measure their losses, the Claimant placed significant weight on a plan to increase the restaurant's seating capacity in 2010. As of May 2010, the Claimant expanded their deck to include 170 additional seats and had also begun planning to expand their interior dining space to seat an additional 150 patrons. The Claimant estimated that because of the planned expansions, the restaurant would have experienced revenue growth of 100% from May to December of 2010 as compared to the same period of 2009. However, following the oil spill, the Claimant did not expand the restaurant's interior and chose to keep the newly expanded deck closed. The Claimant cited the possibility of "tainted crab" as well as "lack of product and customers" as the reasons for their decision not to proceed with expansions and to keep the deck closed.¹²

Because the Claimant did not utilize additional deck seating and did not expand the interior of their restaurant in 2010, it did not experience anticipated growth. The Claimant further alleged that not only did the business fail to grow as expected, but that it "saw a drastic decrease in its restaurant and carryout business" due to a lack of seafood availability as well as a decrease in customer counts.¹³ However, financial documentation submitted in support of this claim fails to indicate either (1) that customer counts or sales decreased, or (2) that crabs were unavailable from May to December of 2010. Rather, the Claimant's profit and loss statements indicate that for every month from May to December of 2010, restaurant sales increased over corresponding monthly sales in 2009. This is true for restaurant sales generally and crab sales specifically. Overall, 2010 sales revenue increased by 11% over 2009 and 2008 levels, even without utilization of the new deck seating or the expanded interior seating capacity. Based on the foregoing, the Claimant has not demonstrated that restaurant sales decreased during the claimed loss period.

Furthermore, the Claimant has not provided evidence sufficient to prove that increased crab costs in 2010 caused the restaurant to sustain a loss of profits. Profit and loss statements indicate that income from crab sales in 2010 remained consistent with 2009 levels. Furthermore, the Claimant's Federal Tax Returns indicate that the Claimant's cost of goods sold as a percentage of gross sales remained steady in 2009 and 2010 after improving slightly from 2008. In 2008, 2009 and 2010, the Claimant's cost of goods sold accounted for 53.71%, 48.04% and 48.89% of gross sales. The Claimant's total income for each of those years was reported at \$1,121,620.00, \$1,259,824.00 and \$1,383,484.00.¹⁴ This sales data fails to support the Claimant's assertion that the restaurant sustained uncompensated losses due to increased cost of crabs or other seafood products after the oil spill.

In sum, the Claimant has not proven that they have sustained an uncompensated loss of profits as a result of the Deepwater Horizon oil spill. Although the Claimant failed to meet anticipated growth levels in 2010, it does not appear that they were unable to do so as a result of either (1) product unavailability (2) decreased sales or (3) increased cost of seafood caused by the Deepwater Horizon oil spill.

¹² Claim Cover Letter, Part VI.

¹³ Claim Cover Letter, Part VII, 1.

¹⁴ 2008, 2009, 2010 Federal Tax Returns.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove that they sustained a financial loss in the amount of \$838,743.00 as a result of 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: *4/08/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

Enclosure (2)
Evidence Presented in Support of
NPFC Claim # N10036-1678

- 1) Optional OSLTF claim for dated 05 January 2012
- 2) Cotton Schmidt & Abbott LLP Cover Letter
- 3) Cotton Schmidt & Abbott LLP Introduction Letter (claim explanation)
- 4) Emails between Claimant and GCCF personnel from 18 February 2011 through 29 December 2011.
- 5) BP Oil Spill Interim Claim Form
- 6) Lost Profits Assessment of Canton's Pearls LLC dba Canton Dockside Resulting from the Deepwater Horizon Oil Spill prepared by Bourgeois Bennett, LLC CPAs dated 19 November 2010 and updated 28 January 2011
- 7) Advertising expenses for 2010
- 8) LA Blue Crab Co Inc Sales by Customer Detail for 01 January 2010 through 08 November 2010
- 9) Architectural services for Canton Dockside Restaurant bill for \$7,077.00
- 10) Articles of Organization of Canton's Pearls, LLC
- 11) 1st Mariner Bank Payoff Statement
- 12) 2007 Form 1065 US Return of Partnership Income
- 13) 2008 Form 1065 US Return of Partnership Income
- 14) 2009 Form 1065 US Return of Partnership Income
- 15) Third Amendment to Canton Pearls, LLC signed 07 June 2010
- 16) Second Amendment to Canton Pearls, LLC signed 01 April 2009
- 17) State of MD Department of Assessments and Taxes
- 18) Employee payment history from 14 March 2010 through 24 October 2010
- 19) Pictures of electric signs, store, and deck
- 20) Copy of Menu
- 21) Canton Pearls LLC Profit and Loss January through December 2007 and by month
- 22) Canton Pearls LLC Profit and Loss January through December 2008 and by month
- 23) Canton Pearls LLC Profit and Loss January through December 2009 and by month
- 24) Canton Pearls LLC Profit and Loss January through December 2010 and by month
- 25) Canton Pearls LLC All Transactions for Crabs Companies (K&L Crabs, Cajun Crab Connection, White Marsh Transport, Tino Mones SFD, Southwest Airline Cargo, Shell Beach Co, Premium Packing LLC, Pomes Seafood, John Sturgill, J&T Seafood, Crabs LLC, Carolina Crab Co) January through December 2010
- 26) Expenses by Vendor detailed reports
- 27) Invoices for purchases for 2008 through 2010
- 28) Six pictures of crabs
- 29) Article from Bloomberg Businessweek titled "Oil Spill Imperils Gulf Coast Fishing Industry (Update 1) dated 29 April 2010 –
- 30) Article from Gulflive.com Harlan Kirgan MS press titled "Researchers find evidence of oil spill in Gulf's food chain" dated 30 June 2010
- 31) Article from Los Angeles Times titled "Gulf oil spill: Undersea oil masses confirmed in tests" dated 21 June 2010
- 32) Article from LA Seafood Newsroom titled "Fishermen fear the Economic Worst" dated 17 June 2010
- 33) Article from Gulflive.com Harlan Kirgan MS press titled "Shrimpers opting for cleaning Gulf of Mexico oil over shrimping" dated 16 June 2010
- 34) Article from Daily Finance.com titled "For Food Business, BP Oil Spill is a Recipe for Disaster" dated 09 June 2010

- 35) Article from e360yale.edu titled "The BP Spill's Growing Toll on the Sea Life of the Gulf" dated 09 June 2010
- 36) Article from suite.com titled "BP Gulf oil spill – Impact on Americas Environment and Economy" dated 07 June 2010
- 37) Article from the dailygreen.com titled "Gauging the Long-Term Impacts of the BP Oil Spill" dated 06 June 2010
- 38) Article from NOLA.com titled "Crab-Crazy MD finds itself a victim of BP's Gulf oil spill" dated 26 September 2010
- 39) Article from bpoilslick.blogspot.com titled "Oil spill waters contain carcinogens" dated 30 September 2010
- 40) Article from leanweb.org titled "BP oil spill Seafood Sampling Project Results Overview" dated 03 January 2011
- 41) Article from ABC News titled "BP Oil Spill: Oil Hits Louisiana Wetlands, Causes Spike in Seafood Prices" dated 19 May 2010
- 42) Article from The Times Picayune titled "A mixed message in spill's aftermath" dated 07 January 2011
- 43) Article from The Times Picayune titled "With so little being done to clean this up, were never going to win this battle" dated 08 January 2011
- 44) Article from AP titled "Spill report kindles Democratic push for reform" dated 11 January 2011
- 45) Article from Nola.com titled Scientists wary of BP oil spill's long-term effects on species dated 10 November 2010
- 46) Article from Newsinferno.com titled "Scientist Studying BP Oil Spill Finds Crude on Gulf of Mexico Floor" dated 30 November 2010
- 47) Article from Ehow.com titled "Risks associated with eating blue crabs" dated 14 October 2010
- 48) Article from USA Today titled Obama goes to LA to address oil spill" dated 04 May 2010
- 49) Article from beforeitsnews.com titled "Numerous Lab BP Gulf Oil Spill Results Contradict Feds Sample-Find Widespread Contamination of Water and Seafood" dated 15 November 2010
- 50) Article from evostc.state.ak.us titled Pacific Herring undated
- 51) Article from NOLA.com titled "MD is hungry for LA crabs, but LA can't deliver" dated 26 September 2010
- 52) Article from WLF.louisiana.gov/news/32931 titled "LDWF Secretary Again Asks GBP to Fund an Extensive Seafood Testing, Certification and Marketing Plan" dated 15 September 2010
- 53) Article from NOLA.com titled Is it really safe to eat gulf seafood dated 19 December 2010
- 54) Article from The State titled "Gulf oil spill hurt SC businesses dated 11 December 2010
- 55) Article from The Christian Monitor titled "New Gulf oil spill mystery: How much dispersant did BP use?" dated 01 August 2010
- 56) Article from BBC News titled "Gulf of Mexico oil leak worst US environment disaster" dated 30 May 2010
- 57) Article from Slashfood.com titled LA Blue Crabs Show Signs of Oil Contamination dated 10 August 2010
- 58) Article from Louisianaseafoodnews.com titled "From Oil to Red Tape, The BP Mess Continues" dated 03 October 2010
- 59) Article from Southernstudies.org titled "Independent tests find oil spill contamination in LA oysters and crabs" dated 31 August 2010
- 60) Article from The Christian Monitor titled "Gulf oil spill to blame for oily blobs in vital Gulf sea life?" dated 24 August 2010

- 61) Article from al.com titled “Gulf Seafood/BP image” dated 20 August 2010
- 62) Article from hوماتoday.com titled “Major Study charts lasting oil plume in Gulf” dated 19 August 2010
- 63) Article from wwltv.com titled “State pushes for more money from BP for seafood testing” dated 19 August 2010
- 64) Article from McClatchydc.com titled “Gulf oil spill still a threat to seafood, JMA study indicates” dated 17 August 2010
- 65) Article from nola.com titled Blue Crabs provide evidence of oil tainting Gulf food web” dated 10 August 2010
- 66) Article from nowpublic.com titled “Environmental & Health Impacts of BP oil spill by Dr Tom Termotto (handwritten date 05 August 2010)
- 67) Article from Nola.com titled “LA blue crabs are tough, but Gulf oil spill might be tougher” dated 20 July 2010
- 68) Article from Scientific Research into Gulf Seafood Survival dated 13 July 2010
- 69) Article from associatedcontent.com titled “Environmental Effects of the BP Oil Spill” dated 10 July 2010
- 70) Article from usatoday.com titled Food Safety concerns mount as oil found in Gulf crabs” dated 02 July 2010 – oil droplets in crab larvae
- 71) Article from foodsafetynews.com titled “Will Oil-Eating Bacteria Plague the Gulf?” dated 01 July 2010
- 72) Article from McClatchydc.com titled “Oil found in Gulf crabs raises new food chain fears” dated -01 July 2010
- 73) Article from environmentamerica.org titled BP’s Oil Spill Disaster Hurts LA Fisherman & Seafood Businesses dated 07 May 2010
- 74) Since May 6 LA officials have lab tested more than 6930 finfish crab shrimp and oysters none have tested positive for hydrocarbons even close to levels that NOA or the FDA say reach a level of concern, MDMR tested shrimp and crab and found them to be fine (Dale Diaz), NOAA has done testing, FDA has sent a mobile lab to the region and is increasing inspections of Gulf Seafood processors
- 75) Abstract from American Society of Zoologists 1992 titled “effects of pollutants on Molting and Regeneration in Crustacea”
- 76) Deepwater Report to the President dated January 2011
- 77) Study reviewed in Fisheries Science 16(1-3):24-34, 2008 “The Chesapeake Bay Blue Crab: A Multidisciplinary Approach to Responsible Stock Replenishment
- 78) ALS Laboratory Group 06 August 2010 for Boston Chemical Data Group
- 79) Proposal for Fed Grant: Research report on the effect of dispersants on blue crab larvae dated 02 July 2010
- 80) Study titled Polychlorinated Biphenyls in Blue Crabs from South Carolina dated 1987
- 81) Oil spill sampling project results from St. Bernard parish from leanweb.org dated 26 October 2010
- 82) NOAA Technical Memorandum NMFS-AFSC-3 “Impact of Oil Pollution and Prince William Sound Studies: Bibliography of 1960-91 Publications and Reports, Auke Bay Laboratory dated August 1992
- 83) University of Colorado Study titled “Health Effects of the Gulf Oil Spill dated 08 September 2008
- 84) Topical Field Courses – Western Program – Miami University titled “Final Paper: Non-point Source Pollution and its impact on the Chesapeake Bay: ecosystem and human health dated 03 June 2002
- 85) Oxfordjournals.org/content/32/3/495.abstract dated 1992
- 86) Exxon Valdez Oil Spill Restoration Project Final Report dated December 1998

Documents submitted in response to Additional Information Request:

- Cover Letter, 12 July 2012;
- 2010 Federal Tax Returns;
- 2011 Monthly Profit and Loss Statements;
- 2011 Federal Tax Returns;
- 2012 Monthly Profit and Loss Statements (Jan – May);
- Affidavit of Eric Hamilton;
- Response by Bourgeois Bennett, 30 June 2012;
- Letter from Casey LeBlanc in support of claim, 29 June 2012;
- Letter from Chris Pomes in support of claim, 6 July 2012;
- Letter from L.A. McKnight in support of claim, undated;
- Letter from Michael Robin in support of claim, 6 July 2012;
- Letter from Sara Shrewsbury in support of claim, 6 July 2012;
- Letter from Tim Demsky in support of claim, 6 July 2012;
- Letter from Tim Foltz in support of claim, 6 July 2012;
- Copy of restaurant menu.