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
20 September 2012

Pedro Almansa
[redacted]

Re: Claim Number: N10036-1761

Dear Mr. Almansa:

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 N10036-1761 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 N10036-1761.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely,

[redacted]
Claims Adjudication Division
National Pollution Funds Center
U.S. Coast Guard

Enclosure: Claim Summary/Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	N10036-1761
Claimant	Pedro Almansa
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	$23,027.72

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.

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 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 2 May 2012, and the CSSP began processing claims on 4 June, 2012.

CLAIM AND CLAIMANT

On 12 April 2012, Pedro Almansa, (referred to as "the Claimant") presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for $23,027.72 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.[1]

The Claimant is a commercial fisherman who reportedly fishes the waters west of the Florida Keys.[2] The loss being asserted resulted from the Claimant's decision to cancel his order for 600 replacement traps because federal fishing bans due to the Deepwater Horizon oil spill had been announced[3] and forecasts predicted oiling to extend further into the Keys.[4] The Claimant cancelled that order for traps on the day following NOAA's extension of Gulf of Mexico fishing closures to the Dry Tortugas.[5] The Claimant then reordered those traps after it became clear that oil would not reach the Keys and finished the last months of 2010 using 1800 traps.[6] The Claimant asserts that his action was prudent in the face of these reports and NOAA's announced fishing ban.[7]

[1] Optional OSLTF Claim Form signed on 4 April 2012 and received on 12 April 2012.

[2] Claimant's letter to GCCF dated 24 January 2011 explaining his interim payment claim #3127197 and Federal Fisheries Permits for Spiny Lobster Tailing, Commercial Spiny Lobster, & King Mackerel issued to Pedro Jesus Almansa on 5/26/2010 (2010-2011 season).

[3] http://sero.nmfs.noaa.gov/sf/deepwater_horizon/BP_OilSpill_FisheryClosureMap_060210.pdf, last accessed on 3 August 2012.

[4] Claimant's undated explanation letter to the NPFC attached to his Optional OSLTF Claim Form and Claimant's letter to GCCF dated 24 January 2011 explaining his interim payment claim #3127197.

[5] Claimant's letter to Toledo Sales, Inc. dated 3 June 2010 and acknowledged by Toledo Sales, Inc.'s letter to Claimant dated 15 June 2010. NOAA-National Marine Fisheries' Southeast Regional Bulletin 10-050, dated 2 June 2010, extended closures to the state-federal waters line at the Dry Tortugas.

[6] Claimant's letter to Toledo Sale, Inc. dated 19 September 2010 and Description of damages attached to Optional OSLTF Claim Form.

[7] Description of damages attached to Optional OSLTF Claim Form.

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 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 undertake, 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.

Pursuant to 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 OSLTF

Based upon the information received from the Claimant, the NPFC determined that the Claimant presented three claims to the GCCF, all three of which were assigned under GCCF Claimant Identification No. 3129497.[8] On 8 October 2010, the Claimant presented an Emergency Advance Payment (EAP) Claim in the amount of $71,000.00 for loss of profits/earnings.[9] GCCF Claim No. 182152 was assigned to this EAP Claim.

On 14 February 2011, the Claimant presented two Interim Payment (IP) Claims, each in the amount of $23,027.72. GCCF Claim No. 182152 was assigned to the IP Claim for loss of profits/earnings and GCCF Claim No. 9251800 was assigned to the IP Claim for loss of subsistence use of natural resources.[10] The GCCF has denied payment on IP Claim No. 182152.[11] Because the subsistence claim does not bear on the Claimant's loss of profits/earnings claim before the NPFC, it is not addressed further.

Based upon the information provided, this claim before the NPFC can be adjudicated in the full amount of damages presented to the NPFC, $23,027.72. Further, because subject matter of the Claimant's EAP Claim No. 182152 and IP Claim No. 182152 appear to be based upon the same subject matter as the claim before the NPFC, i.e. that he loss of profits/earnings resulted from the Deepwater Horizon oil spill, the NPFC deems this Claim Summary Determination as being outcome determinative for the all claims of the same subject matter to the amount of $23,027.72.

Evidence presented in this claim submission indicates that the Claimant is a member of the economic damages class of the Deepwater Horizon oil spill class action settlement (the BP 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 or destruction or loss of real or personal property or 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 the claim. The NPFC considered all the documentation submitted by the Claimant.

a. <u>E&PD Settlement</u>

As an initial matter, it appears that the Claimant is a member of the Deepwater Horizon oil spill economic and property damages class action settlement (E&PD Settlement). This claim is therefore considered to have been settled, and the Claimant is therefore ineligible to recover funds from the OSLTF. According to OPA, the payment of any claim by the NPFC is subject to the NPFC's ability to obtain, by subrogation, the rights to recover all costs and damages from the

[8] GCCF letter to Claimant dated 23 August 2010 and GCCF Interim Payment Claim Form dated 24 January 2011, bearing The Garden City Group' Inc.'s date stamp of 14 February 2011.

[9] Transition Program – U.S. Coast Guard Report as of 21 May 2012 and Claimant's Emergency Advance Payment Claim Form dated 8 October 2010.

[10] GCCF Interim Payment Claim Form dated 24 January 2011 and bearing The Garden City Group' Inc.'s date stamp of 14 February 2011.

[11] Transition Program – U.S. Coast Guard Report as of 21 May 2012.

responsible party. If a claim has been settled, the Claimant no longer has rights to the claim and therefore cannot subrogate rights to the NPFC.

While this claim may not have been quantified or paid, it is considered to have been settled by virtue of the Court's preliminary approval of the settlement agreement. If the Claimant disagrees that he is a member of the economic damages class of the E&PD Settlement, he should submit evidence to indicate that he has either opted out or is excluded from the E&PD Settlement in his request for reconsideration of this claim.

b. <u>Loss of Profits and Impairment of Earning Capacity Damages $23,027.72</u>

In order to prove a claim for loss of profits and impairment of earning capacity 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.

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 undertake, 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.

The Claimant alleges lost profits by stating that he earned $25,861.46[12] in August and September 2010, while using 1200 lobster traps. He allegedly earned $48,889.18[13] in October and November 2010, while using 1800 lobster traps. The Claimant alleges he would have bought the 600 traps before the August and September months and would have earned the difference of $23,027.72[14] if not for the Deepwater Horizon oil spill.[15] The NPFC finds the logic used in the calculation to be incorrect. If the numbers were validated and causation evidenced, the proper method would be to figure out 1/3 more profits for August and September using those numbers as a baseline rather than use 2 distinct months in the eight month lobster season.

The Claimant's monthly profit numbers referenced above are from Fishbusterz Fisheries located in Key West Florida.[16] The Claimant receives 40% off the principal payment then the remainder is subtracted by the expenses and he receives 1/3 of the deduced amount.[17] The Claimant submitted 2 other financial documents that show there is a numerical problem with the amount of loss claimed. First, the Claimant's 2010 S Corp Tax Return shows the Claimant only earned $14,906.00 in profit after cost of goods sold and business deductions were calculated for the whole year of 2010.[18] Thus for the Claimant to allege $32,337.49 earned in the month of November 2010 is disingenuous when looking at deductions for expenses according to his

[12] $14,992.67 for August plus $10,868.79 for September equals $25,861.46.
[13] $16,551.69 for October plus $32, 337.49 for November equals $48,889.18.
[14] $48,889.18-$25,861.46 equals $23,027.72.
[15] Explanation letter from the Claimant to the NPFC undated at page 2.
[16] Fishbusterz Fisheries Boat Settlement documents.
[17] Fishbusterz Fisheries Boat Settlement documents & Explanation letter from the Claimant to the NPFC undated at page 1&2.
[18] 2010 U.S. Income Tax Return for an S Corporation at line 21.

federal tax returns. The Fishbusterz Fisheries boat settlements, merely show expenses deducted for fuel and bait, and thus are not a complete record for overhead and other fixed and variable expenses incurred by the Claimant.

Second, the Claimant submitted Monthly profit and loss numbers for each month.[19] Costs for August 2010 were $21,027.40 and for September were listed as $31,868.57,[20] thus far outweighing the submitted $25,861.46[21] allegedly earned for the combination of August plus September 2010. Therefore it is not evident to the NPFC that the Claimant earned any profit in August or September 2010. The Claimant has not specified the associated costs that make up the numbers submitted, thus the NPFC is unable to calculate saved fixed expenses with the addition of 600 more traps, which would further reduce the net income.

Furthermore, the Claimant alleges that if he had ordered the 600 traps, he would have been put in debt to the amount of "sixty to seventy thousand dollars."[22] NPFC staff contacted the company the Claimant ordered the traps from and spoke with Manny Toledo, owner of Toledo Sales, Inc. on 01 June 2012.[23] The owner of the store stated that "for complete traps the price range is $19.00 to $35.00 a trap, and the self assembly kits range from $9.00 to $15.00 each."[24] Thus if the Claimant had ordered 600 traps from Toledo Sales Inc. the total cost would have been between $5,400.00[25] to $21,000.00[26] not $60,000.00 to $70,000.00 as alleged.[27] The Claimant stated in a phone conversation with NPFC staff on 25 June 2012 that he is building the traps himself, thus the lower part of the range is more appropriately applied to the instant facts.

In conclusion, a more detailed submission from the Claimant would be needed, showing what constitutes the costs provided on the monthly costs sheet[28], and the accounting for the yearly costs associated with the Claimant's 2010 S Corp Tax Returns. A calculation for saved expenses would need to be provided, i.e. fuel, bait, materials, labor costs etc associated with building, putting out, and retrieving the traps that was saved by not putting out the traps for August and September 2010. Further the Claimant would need to provide more monthly statements from Fishbusterz Fisheries for the complete 2010 year, and receipts, date of delivery, and proof of payment for the 600 trap materials. The Claimant would also need to specify which areas west of Key West he fishes at.

Accordingly, the Claimant has not established his sum certain as presented to the NPFC by a preponderance of the evidence.

c. <u>Causation</u>

The Claimant asserts that his alleged loss of income is due to the oil spill.[29] The NPFC will not presume causation or lack thereof based upon business type or location. Causation is an element

[19] 2010 Cost & Income Monthly Statement.
[20] 2010 Cost & Income Monthly Statement.
[21] $14,992.67 for August plus $10,868.79 for September equals $25,861.46.
[22] Letter to the GCCF dated 01 November 2010 for claim #3127197.
[23] NPFC call log with Toledo Sales Inc. on 01 June 2012.
[24] NPFC call log with Toledo Sales Inc. on 01 June 2012.
[25] 600 traps multiplied by $9.00 a trap equals $5,400.00.
[26] 600 traps multiplied by $35.00 a trap equals $21,000.00.
[27] Letter to the GCCF dated 01 November 2010 for claim #3127197.
[28] Based on the Claimant's submitted Cost & Income Monthly numbers submitted total costs equal $152,763.50 and total revenue equaled $178,202.75 leaving a difference of $25,439.25 in net income for 2010. (this includes stone crab, mackerel, and spiny lobster)
[29] Optional OSLTF Claim Form signed 4 April 2012 and received on 16 May 2012.

of every claim that must be proven by the Claimant. Statements without supporting documentation are not satisfactory to prove that the alleged loss was caused by the oil spill.

Claimant states that he and other fishermen were aware of reports that parts of the Gulf of Mexico were being closed to the oils spill.[30] The Claimant states that he had ordered trap kits for 600 new traps, but cancelled that order on 3 June 2010, when NOAA closed additional portions of the Gulf of Mexico, including the [Dry] Tortugas.[31] The Claimant stated that on June 3rd, parts of the Dry Tortugas were closed, making 38% of the Gulf of Mexico closed to commercial fishing.

The Claimant provided documentation that, on 19 September 2010, he contacted Toledo Sales to release as soon as possible the 600 traps he had previously ordered stating, "It does not appear that we will be affected by oil." [32]

The NPFC notes that first closure was made by an emergency rule published in the Federal Register on 6 June 2010, but effective on 2 June 2010.[33] Beginning with the second amendment to the emergency rule creating emergency closures, NOAA stated that revisions to the emergency closure areas would be announced by NOAA Weather Radio, fishery bulletin, and NOAA Web site updates.[34] This stated intent for announcing closures is consistent with the Claimant's assertion that he and other fishermen were aware of reports that parts of the Gulf of Mexico were being closed.

Further, the second amendment to the emergency rule also states the reason for the closures as—

> Fish and shellfish in oil affected waters may be contaminated with levels of hydrocarbons above baseline levels. The U.S. Food and Drug Administration considers such seafood to be adulterated. The intent of the emergency rule is to prohibit the harvest of adulterated seafood and for public safety.[35]

The NPFC confirmed that, in response to the Deepwater Horizon oil spill, NOAA revised previous fishing closures in the Gulf of Mexico Exclusive Economic Zone (Gulf EEZ) on 2 June 2010 to include 88,522 square miles, or 37 percent of the total area of the Gulf EEZ.[36] This extent of closure was in place until 4 June 2010, when it was revised to cover 78,182 square miles, or 32 percent of the Gulf EEZ.[37] Although NOAA continued to revise the closures, the area did not fall below that 32 percent until 22 July 2010, when it was revised to cover 57,539 square miles, or 24 percent of the Gulf EEZ.[38] On 3 September 2010, the closure area was first revised to less than 40,000 square miles, more precisely 39,885 square miles, or 17 percent of the

[30] Phone conversation between Claimant and NPFC Staff on 25 June 2012.
[31] Claimant' letter to Toledo Sales, Inc. dated 3 June 2010 cancelled his order until further notice, acknowledged by Toledo Sales, Inc., letter to Claimant dated 15 June 2010.
[32] Claimant's letter to Toledo Sales, Inc. dated 19 September 2010.
[33] Federal Register dated 6 May 2010; Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Emergency Fisheries Closure in the Gulf of Mexico Due to the Deepwater Horizon Oil Spill (75 FR 24822).
[34] Federal Register dated 14 May 2010; Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Emergency Fisheries Closure in the Gulf of Mexico Due to the Deepwater Horizon Oil Spill; Amendment 2 (75 FR 27217).
[35] Federal Register Notice on 14 May 2010 (75 FR 27217); Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Emergency Closures in the Gulf of Mexico Due to the Deepwater Horizon Oil Spill.
[36] http://sero.nmfs.noaa.gov/bulletins/pdfs/2010/FB10-050_BP_Oil_Spill_Closure_060210.pdf, last accessed on 10 August 2010.
[37] http://sero.nmfs.noaa.gov/bulletins/pdfs/2010/FB10-051_BP_Oil_Spill_Closure_060410.pdf, last accessed on 10 August 2010.
[38] http://sero.nmfs.noaa.gov/bulletins/pdfs/2010/FB10-066_BP_Oil_Spill_Closure_072210.pdf, last accessed on 10 August 2010.

Gulf EEZ.[39] The 2 June 2010 closures were put in place before the lobster season opened, but it was the middle of the lobster season before significant reductions to the closure area were made.

As a matter of background, the Claimant asserts that he must regularly replace traps on an annual basis; it varies by year. For the 2010-2011 seasons, he states that he replaced 600 of his 1800 traps.[40] For the 2012-2013 seasons, he is replacing 800 traps.[41]

The NPFC contacted the Claimant's supplier of traps[42] and confirmed that fishermen regularly have to replace a portion of their traps. How long traps last depends on a number of factors. On the low end, they can last only 2-3 years. On the high end, they can last 6-7 years. The length of time depends on weather events that can beat up the traps, move them from where they were set, or separate the marker buoys from the traps. The replacement cycle also depends on the type of bottom where they are set. Different bottoms have more or less of what they [fishermen] call 'termites', but are actually wood boring worms that destroy the wooden traps.[43] Based on that confirmation, the NPFC believes that the Claimant having to replace 600 traps for a new season would not be unreasonable.

The NPFC investigated the price of spiny lobster in 2010 and confirmed that it was significantly higher than 2009 prices. The NPFC notes that the price of lobster appears to have been driven, not by the Deepwater Horizon oil spill, but by increased global demand, primarily from China.

The Claimant has not shown when his order of traps or trap kits was delivered, but the Claimant does indicate that he was able to place most of the [new] traps by 2 October 2010.[44] If the Claimant decides to request reconsideration, he should be prepared to show when the new traps in 2010 were delivered.

This claim is therefore denied because the Claimant failed to meet his burden to demonstrate (1) that the Claimant has not been settled by virtue of belonging to the economic damages class associated with the CSSP, (2) that he sustained a loss in the amount of $23,027.72, and (3) 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 Clai[redacted]ivision***

Date of Supervisor's Review: ***9/20/12***

Supervisor's Actions: ***Denial approved***

Supervisor's Comments:

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[39] http://sero.nmfs.noaa.gov/bulletins/pdfs/2010/FB10-078_Reopening_pan_offshore_090310.pdf, last accessed on 10 August 2010.
[40] Description of damages attached to Optional OSLTF Claim Form.
[41] Phone conversation between Claimant and NPFC Staff on 25 June 2012.
[42] Toledo Sales, Inc, Miami, FL (305) 389-3441.
[43] Phone conversation with Manny Toledo of Toledo Sales and NPFC Staff on 1 June 2012.
[44] Claimant's letter to the NPFC dated 24 June 2012.