

U.S. Department of
Homeland Security

**United States
Coast Guard**




Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 800-280-7118
E-mail: arl-pf-npfcclaimsinfo@uscg.mil
Fax: 703-872-6113

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5890/DWHZ
15 June 2012

Mr. Keith Wayne Rachuba


Re: Claim Number: N10036-1781

Dear Mr. Rachuba:

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 N10036-1781 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 N10036-1781.

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	N10036-1781
Claimant	Mr. Keith Wayne Rachuba
Type of Claimant	Private (US)
Type of Claim	Removal Costs/Subsistence Use
Amount Requested	\$11,200.00

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 30 April 2012, Mr. Keith Rachuba (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$11,200.00 in costs and damages resulting from the Deepwater Horizon oil spill.¹

Specifically, the Claimant sought (1) \$4,500.00 in loss of subsistence use damages, (2) \$4,500.00 in natural resources damages, (3) \$1,200 in removal costs, and (4) \$1,000.00 in real or personal property damages.²

All damages asserted in this claim are based on the Claimant's inability to use his fishing boat during the period following the Deepwater Horizon oil spill. The Claimant also alleged that the hull of his vessel became discolored while it was "sitting up over the spill period."³ In a letter to the GCCF, dated 2 November 2010, the Claimant stated that he based his damage calculation on,

a three month period that I lost being on the water and the seafood I could have caught, my boat note that I made and could not use, but still had to keep up with everything such as licenses, registrations and upkeep.⁴

The Claimant noted that his vessel needed more upkeep than it would have, due to the length of time it sat idle following the oil spill, and also that his inability to fish resulted in him having to "purchase seafood at retailers."⁵

Each category of costs and damages presented by the Claimant are separately addressed in this determination.

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

¹ Optional OSLTF Claim Form, signed on 20 April 2012.

² Optional OSLTF Claim Form, signed on 20 April 2012.

³ Optional OSLTF Claim Form, signed on 20 April 2012.

⁴ Letter from the Claimant to the GCCF, 2 November 2010.

⁵ Optional OSLTF Claim Form, signed on 20 April 2012.

waters or adjoining shorelines or the exclusive economic zone, as described in Section 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 U.S.C. § 2702(b)(2)(B) and the promulgating regulations under 33 C.F.R. § 136.213 is a claim for real or personal property damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

Real or Personal Property Damages

33 C.F.R. §136.213 states:

- (a) A claim for injury to, or economic losses resulting from the destruction of real or personal property may be presented only by a claimant either owning or leasing the property.
- (b) Any claim for loss of profits or impairment of earning capacity due to injury to, destruction of, or loss of real or personal property must be included as subpart of the claim under this section and must include the proof required under §136.233.

33 C.F.R. § 136.215 establishes additional proof requirements:

- (a) In addition to the requirements of subparts A and B of this part, a claimant must establish—
 - (1) An ownership or leasehold interest in the property;
 - (2) That the property was injured or destroyed;
 - (3) The cost of repair or replacement; and
 - (4) The value of the property both before and after injury occurred.
- (b) In addition, for each claim for economic loss resulting from destruction of real or personal property, the claimant must establish—
 - (1) That the property was not available for use and, if it had been, the value of that use;
 - (2) Whether or not substitute property was available and, if used, the costs thereof; and
 - (3) That the economic loss claimed was incurred as the result of the injury to or destruction of the property.

Under 33 C.F.R. § 136.217, the amount of compensation allowable for a claim involving real or personal property damage is limited to:

- (a) The amount of compensation allowable for damaged property is the lesser of—
 - (1) Actual or estimated net cost of repairs necessary to restore the property to substantially the same condition which existed immediately before the damage;
 - (2) The difference between value of the property before and after the damage; or
 - (3) The replacement value.
- (b) Compensation for economic loss resulting from the destruction of real or personal property may be allowed in an amount equal to the reasonable costs actually incurred for use of substitute commercial property or, if substitute commercial property was not reasonably available, in an amount equal to the net economic loss which resulted from not having use of the property. When substitute commercial property was reasonably available, but not used, allowable compensation for loss of use is limited to the cost of the substitute commercial property, or the property lost, whichever is less. Compensation for loss of use of noncommercial property is not allowable.

- (c) Compensation for a claim for loss of profits or impairment of earning capacity under §136.213(b) is limited to that allowable under §136.235.

Loss of Subsistence Use Damages

33 C.F.R. § 136.219 states that in order to prove a claim for loss of subsistence use damages, a claimant must provide proof of-

- (a) The identification of each specific natural resource for which compensation for loss of subsistence use is claimed;
- (b) A description of the actual subsistence use made of each specific natural resource by the claimant;
- (c) A description of how and to what extent the claimant's subsistence use was affected by the injury to or loss of each specific natural resource;
- (d) A description of each effort made by the claimant to mitigate the claimant's loss of subsistence use; and
- (e) A description of each alternative source or means of subsistence available to the claimant during the period of time for which loss of subsistence is claimed, and any compensation available to the claimant for loss of subsistence.

33 C.F.R. § 136.233 states that,

- (a) 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 source or means of subsistence available.
- (b) The amount of compensation allowable under paragraph (a) of this section must be reduced by –
 - (1) All compensation made available to the claimant to compensate for subsistence loss;
 - (2) All income which was derived by utilizing the time which otherwise would have been used to obtain natural resources for subsistence use; and
 - (3) Overheads or other normal expenses of subsistence use not incurred as a result of the incident.

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.

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 20 April 2012;
- Letter from the NPFC to the Claimant, advising of NPFC claims process, 18 October 2011;
- Letter from GulfStudy to the Claimant, 14 March 2012;
- Letter from the Claimant, regarding history of dealings with GCCF, 21 April 2012;

- GulfStudy program FAQ;
- Letter from the Claimant to the GCCF, 30 August 2010;
- Letter from BP to the Claimant, 19 July 2010;
- Letter from the Claimant to BP Representative, 24 August 2010, containing copies of the Claimant's Driver's license and social security card;
- Copies of fishing licenses and boat registration certificates, Mississippi;
- Copies of fishing licenses and boat registration certificates, Louisiana;
- Manufacturer's certificate of origin for a boat/vessel;
- 2008 Federal Return Recap;
- 2009 Individual Diagnostic Summary;
- 2011-2012, Louisiana and Mississippi Department of Wildlife and Fisher's vessel registrations and fishing licenses;
- Letter from the Claimant to the GCCF, 2 November 2010;
- Letter from the GCCF to the Claimant, 28 October 2010;
- Fax Transmission Error Report, 3 November 2010, sent to 1-866-821-758;
- GCCF Claim Form (2000-C), seeking \$5,000.00 for Loss of Subsistence Use of Natural Resources;
- GCCF Form 2000-C, Exhibit A;
- Copy of the Claimant's Boat Note, Bank of America;
- Bank of America, Insurance Verification;
- Receipt for fishing gear;
- GCCF Form 2000-C, Exhibit A;
- GCCF Full Review Final Payment Claim Form;
- GCCF Deficiency Letter on Interim Payment/Final Payment Claim, 26 April 2011;
- Quotes for cleaning hull of vessel, and wax restoration, 5/1/11;
- Receipt showing cost to refuel vessel on 10/11/2010;
- Academy Sports receipts, 4/11/11, 4/26/11;
- Quality Repair receipts;
- 7 Seas Marine Receipts;
- 4 photographs of vessel and fishing reels;
- Response to NPFC request for additional information, received on 1 June 2012, and including the following:
 - Three photographs;
 - Two page item-by-item response to NPFC additional information request.

On 1 July 2010, the Claimant submitted a claim for damages to BP, who did not issue payment to the Claimant.⁶ On 3 September 2010, the Claimant submitted an Emergency Advance Payment (EAP) claim to the RP/GCCF, seeking an unspecified amount of loss of subsistence use damages.⁷ The Claimant was assigned Claimant ID 1040215 and the EAP claim was assigned claim # 3002387. The GCCF denied payment on this claim.

On 20 December 2010, the Claimant submitted a final payment claim to the RP/GCCF, seeking \$5,000.00 in loss of subsistence use damages. The final payment claim was assigned claim # 9258221 and was also denied by the GCCF.⁸

On 29 December 2010, the Claimant presented a Full Review Final (FRF) Payment claim to the RP/GCCF, this time seeking \$1,000.00 in Real or Personal Property damages, as well as

⁶ Transition Program, United States Coast Guard Report, 13 May 2012.

⁷ Transition Program, United States Coast Guard Report, 13 May 2012.

⁸ Transition Program, United States Coast Guard Report, 13 May 2012.

\$8,000.00 in loss of subsistence use damages. The FRF claim was assigned claim # 9136374 and was also denied.⁹

On 30 April 2012, the Claimant presented this claim to the NPFC, seeking a total of \$11,200.00 in costs and damages, including (1) \$4,500.00 in loss of subsistence use damages, (2) \$4,500.00 in natural resources damages, (3) \$1,200.00 in removal costs, and (4) \$1,000.00 in real or personal property damages.¹⁰ According to the requirements of OPA, all claims for oil spill related costs or damages must be presented first to the RP prior to presentment to the NPFC.¹¹ Should the RP deny payment, or fail to issue payment within 90 days of presentment of a claim, the NPFC may properly adjudicate a claim for the same costs or damages as previously presented to the RP.¹²

The Claimant has previously presented claims for loss of subsistence use damages, as well as real or personal property damages. Previously presented subsistence use damages total \$13,000.00; claims for real or personal property damages total \$1,000.00.

The NPFC therefore may adjudicate claims for (1) real or personal property damages in the amount of \$1,000.00, as well as (2) loss of subsistence use damages in the amount of \$4,500.00, as previously presented to and denied by the GCCF. All claims now presented to the NPFC, which were not first presented to the RP/GCCF, are denied for improper presentment, as described in the following section.¹³

NPFC Determination

Under 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136, a claimant must prove that a certain loss was incurred 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.

According to OPA presentment requirements, all claims presented to the NPFC must have been first presented to the RP/GCCF.¹⁴ Certain components of this claim, including claims for natural resources damages as well as removal costs, were not first presented to the RP/GCCF. Therefore, these damages are denied in the amount of \$5,700.00.

However, had the Claimant first presented these claims to the GCCF, they would be denied on their merits, as the Claimant (1) does not have the authority to present a natural resource damages claim, and (2) the Claimant has not incurred removal costs as defined under OPA.

Furthermore, the Claimant's alleged loss of subsistence use damages, as well as real or personal property damages are also denied, because the Claimant has failed to provide documentation sufficient to prove that the Claimant incurred either type of costs or damages. Each component of this claim is more fully explained below.

⁹ Transition Program, United States Coast Guard Report, 13 May 2012.

¹⁰ Optional OSLTF Claim Form, signed on 20 April 2012.

¹¹ 33 C.F.R. § 136.103(a).

¹² 33 C.F.R. § 136.103(c)(2).

¹³ 33 C.F.R. § 136.103(a).

¹⁴ 33 C.F.R. § 136.103(a).

1. Natural Resources Damages

Claims for natural resources damages may only be presented by “an appropriate natural resources trustee”¹⁵ as appointed by the Federal Government. A trustee “may present a claim for the reasonable cost of assessing natural resources damages.”¹⁶

Here, the Claimant is a private individual, seeking damages based on his inability to use his fishing boat for a certain period of time following the oil spill. Because he is not an authorized trustee seeking to recover assessment costs, this claim for natural resources damages is denied because (1) it was not properly presented to the RP/GCCF and (2) the Claimant is not a natural resource trustee and is therefore not a proper Claimant.

2. Removal Costs

In order to prove a claim for removal costs, a claimant must prove that the removal actions (1) were necessary to prevent, minimize, or mitigate the effects of the oil spill incident, (2) that certain costs were incurred, and (3) that the removal actions were coordinated with the Federal On Scene Coordinator (FOSC).¹⁷

Here, it seems that the Claimant is asserting that the costs to clean the hull of his vessel constitute removal costs under OPA. However, the Claimant has not provided documentation to meet any of the requirements of law listed above. Furthermore, he has not provided evidence to indicate that the hull of his vessel was actually oiled and that the FOSC determined his response actions to be consistent with the National Contingency Plan (NCP). Based on the foregoing, this claim for removal costs is denied because (1) the Claimant has failed to first present his claim to the RP/GCCF, (2) the Claimant failed to demonstrate he incurred response costs, (3) the Claimant failed to demonstrate his actions were coordinated with the FOSC pursuant to the governing claims regulations.

3. Loss of Subsistence Use Damages.

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.¹⁸ Furthermore, 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.¹⁹

In a letter dated 14 May 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) evidence that the Claimant usually fished in waters that were closed for a particular

¹⁵ 33 C.F.R. § 136.207(a).

¹⁶ 33 C.F.R. § 136.207

¹⁷ 33 C.F.R. § 136.203.

¹⁸ 33 C.F.R. § 136.221(c).

¹⁹ 33 C.F.R. § 136.223(a).

period of time following the oil spill, and (3) trip tickets, landing data, or other evidence showing the extent and location of the Claimant's catch prior to the oil spill.²⁰

The Claimant responded to the NPFC's letter on 1 June 2012, but failed to provide any of the requested documentation listed above. The Claimant has therefore failed to prove that the Claimant relied on particular natural resources for subsistence purposes, or that he incurred certain costs to replace fish he was unable to catch following the oil spill.

This claim for loss of subsistence use damages in the amount of \$4,500.00 is therefore denied.

4. Real or Personal Property Damages.

The Claimant seeks \$4,500.00 in real or personal property damages resulting from the Deepwater Horizon oil spill. The Claimant alleged that his fishing boat was damaged due to his inability to use it for approximately three months following the oil spill. The Claimant stated that the vessel sustained "hull discoloration and mechanical problems with its engine from sitting up over the spill period."²¹

In order to prove a claim for real or personal property damages under OPA, a claimant must prove that property was actually injured or destroyed by the discharge of oil resulting from the Deepwater Horizon oil spill. More importantly, "[c]ompensation for loss of use of noncommercial property is not allowable."²²

Here, the Claimant has alleged that his fishing boat was damaged when it sat idle over a period of about three months following the oil spill. However, damage that may have been due to its non-use is not damage caused by the oil spill. Furthermore, as noted above, the Claimant's loss of use and enjoyment of his vessel is not a compensable loss under OPA. Based on the foregoing, the claim for real or personal property damage is denied.

Overall, this claim is denied in its entirety because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$14,747.00, (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, (3) that he properly presented all costs first to the RP/GCCF for each respective claim type, (4) that the Claimant incurred certain uncompensated removal costs, (5) that the Claimant is authorized to present claims for natural resource damages, and (6) that the actions undertaken by the Claimant associated with removal actions were coordinated with the EOSC.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *6/15/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

²⁰ NPFC request for additional information, 14 May 2012.

²¹ Optional OSLTF Claim Form, signed on 20 April 2012.

²² 33 C.F.R. § 136.217(c).