

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

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 2445 2484

5890/DWHZ
26 October 2012

Ms. Sandra D. Lewis
[REDACTED]

Re: Claim Number: N10036-1866

Dear Ms. Lewis:

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 N10036-1866 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 N10036-1866.

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

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1866
Claimant	Ms. Sandra Lewis
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$25,000.00

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 26 July 2012, Ms. Sandra D. Lewis (the Claimant) submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$25,000 in damages resulting from the Deepwater Horizon incident.¹ The Claimant filed the claim on behalf of herself and her three children, seeking \$10,000 in damages for herself and \$5,000 for each of her three children.

The basis of the Claimant's submission appears to be that oil from the Deepwater Horizon incident contaminated fishing grounds she used for crabbing, though which specific fishing grounds she references are unclear. The Claimant's submission alleges that she could not fish or crab "for 8 or 9 months until the spill was plugged," and that she resumed crabbing two weeks after the oil spill was stopped.² The submission alleges that all of the fish and crab caught "had a funny smell and taste to it."³ As a result her "food supply suffered," because "what we catch we eat."⁴ The Claimant has also indicated that eating the catch from these contaminated grounds caused her and her children to get sick.⁵ Other statements made in the Claimant's submission suggest that she also sold a portion of her catch to finance subsequent fishing efforts.

The nature of the damages sought by the Claimant is unclear. However, the claim might plausibly be for subsistence use damages, personal injury damages, or loss of profits and impairment of earning capacity damages. The claim is analyzed under each damage category in turn.

¹ Optional OSLTF Claim Form, received 26 July 2012.

² Witness Testimonial by Lavern Ladner, dated 09 July 2010.

³ Witness Testimonial by Lavern Ladner, dated 09 July 2010.

⁴ Witness Testimonial by Lavern Ladner, dated 09 July 2010.

⁵ Optional OSLTF Claim Form, received 26 July 2012; Response to NPFC Request for Additional Information, dated 12 September 2012.

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. Among those damages available under OPA are (1) subsistence use damages, and (2) loss of profits and impairment of earning capacity damages.

1. Subsistence Use Damages

Under 33 C.F.R. § 136.221, a claimant seeking compensation for subsistence use damages must establish:

- (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. § 136.223 states:

- (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 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.

2. Loss of Profits and Impairment of Earning Capacity

Under 33 C.F.R. § 136.233, a claimant seeking compensation for loss of profits and impairment of earning capacity damages 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. § 136.235, 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.

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 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

To support this claim, the Claimant submitted the following documentation:

- Optional OSLTF Claim Form, received 26 July 2012;
- Witness Testimonial by Lavern Ladner, dated 09 July 2010;
- Medical Benefits Class Action Settlement Notice, undated (four copies, one copy each for the Claimant and her three children);
- GCCF Correspondence, dated 19 January 2012;
- GCCF Correspondence, dated 31 January 2011 (four copies, one copy each for the Claimant and her three children);
- Photocopy of Louisiana Identification Card for Sandra Lewis and Social Security Cards for Sandra Lewis, Kentrae Lewis, and Tamia Lewis;
- Response to NPFC Request for Additional Information, dated 12 September 2012;
- Letter from Office of Sen. David Vitter, with attached GCCF Claims Summary, dated 24 July 2012;
- Letter from Office of Sen. David Vitter, dated 17 July 2012;
- Deepwater Horizon Claims Center, Confirmation Notice of Receipt of Claim, dated 23 August 2012; and

– Diaz Law Firm Correspondence, dated 08 August 2012.

On 26 July 2012, the Claimant presented this claim to the NPFC, seeking \$25,000 in damages.⁶ The Claimant stated that prior to presenting this claim to the NPFC; she presented a claim to the RP/GCCF,⁷ and has provided documentation to that effect.⁸ It appears that the subject matter for the RP/GCCF claim is identical to the claim now before the NPFC—i.e., that the oil spill contaminated fishing grounds used by the Claimant, thereby impacting her source of food and income causing the Claimant and her children's sickness. Accordingly, this Claim Summary and Determination presumes that the Claimant's RP/GCCF claim satisfies OPA presentation requirements and addresses only those damages sought in the Claimant's prior submission to the RP/GCCF. Any damages not first presented to the RP/GCCF are denied for improper presentment.⁹

Additionally, the NPFC notes that evidence presented in this claim submission indicates that the Claimant is a member of the Deepwater Horizon oil spill economic and property damages 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.

As an initial matter, it appears that the Claimant is a member of the E&PD Settlement. This claim is therefore considered to have been settled, and the Claimant is 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 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 she is a member of the economic damages class of the E&PD Settlement, she should submit evidence to indicate that she has either opted out or is excluded from the E&PD Settlement in a request for reconsideration of this claim.

Despite the Claimant's characterization of her claim as a subsistence use damages claim, certain statements in the Claimant's submission made the nature of her claim unclear. During a phone conversation with the NPFC, however, the Claimant indicated that the basis of her claim was based on her inability to sell crab that she caught, as well as her and her children's medical issues caused by eating crabs in waters contaminated by the Deepwater Horizon incident.¹⁰ Subsequent statements, suggest that at least a portion of this claim may indeed be for subsistence loss damages.¹¹ As such, the NPFC will adjudicate this claim as a claim for (1) loss of subsistence

⁶ Optional OSLTF Claim Form, received 26 July 2012.

⁷ Optional OSLTF Claim Form, received 26 July 2012.

⁸ Letter from Office of Sen. David Vitter, with attached GCCF Claims Summary, dated 24 July 2012.

⁹ 33 C.F.R. § 136.103(a).

¹⁰ PHONECON: NPFC Staff and Claimant, 09 August 2012 JBH.

¹¹ Response to NPFC Request for Additional Information, dated 12 September 2012.

use damages; (2) personal injury damages; and (3) loss of profits and impairment of earning capacity damages. Each possible basis for this claim is discussed in turn.

1. Subsistence Use

To the extent that this claim is for subsistence use damages, it is denied for improper presentment. OPA requires that claimants first file claims for costs or damages with the RP before seeking compensation from the OSLTF.¹² The Claimant's submissions indicate, however, that her GCCF claim rested entirely on physical injury and that she "did not submit any documents related to crabbing."¹³

This claim is also denied on its merits as the Claimant has not provided any documentation establishing the required showings for a claim for subsistence use damages. The Claimant has failed to provide any documentation or other evidence showing (1) that she relied on crabbing for subsistence aside from her assertion; (2) how much, if any, crabs the Claimant regularly caught, and where she caught it; (3) how the oil spill affected the Claimant's regular fishing practices; (4) any attempts to mitigate her alleged losses; or (5) evidence to show how the Claimant calculated her damages to reach \$5,000 for each child and \$10,000 for herself.

2. Personal Injury

The Claimant's submission also suggests that her claim seeks compensation for illness caused by consuming crabs caught in contaminated waters.¹⁴ In other words, the Claimant seeks, at least in part, compensation for personal injury for herself and her three children resulting from the Deepwater Horizon incident.

Private Citizens may only seek recovery for real or personal property damages, subsistence use damages, or loss of profits and impairment of earning capacity damages.¹⁵ Personal injury damages are not compensable under OPA and its associated regulations. Accordingly, this claim is denied to the extent that this claim seeks recovery for personal injury damages, as personal injury is not an OPA compensable damage.

3. Loss of Profits and Impairment of Earning Capacity

This claim is also denied to the extent that it seeks compensation for loss of profits and impairment of earning capacity damages because the Claimant has failed to establish that her alleged financial loss is the result of the Deepwater Horizon incident. In order to prove a claim for loss of profits damages, a claimant must provide documentation sufficiently proving (1) that the claimant sustained an actual financial loss, and (2) that the discharge of oil resulting from the Deepwater Horizon oil spill caused that loss.

Under OPA, recovery for a loss of profits and impairment of earning capacity damages "is limited to the actual net reduction or loss of earnings or profits suffered."¹⁶ The Claimant has not provided any financial documentation by which to measure any financial loss she may have suffered. In a letter dated 29 August 2012, the NPFC requested that the Claimant provide federal income tax returns, copies of sales receipts for any fish or crab sold, and current contact information for her regular customers in the time period leading up to the Deepwater Horizon

¹² 33 U.S.C. § 2713(a).

¹³ Letter from Office of Sen. David Vitter, with attached GCCF Claims Summary, dated 24 July 2012.

¹⁴ Response to NPFC Request for Additional Information, dated 12 September 2012.

¹⁵ 33 U.S.C. § 2702(b).

¹⁶ 33 C.F.R. § 136.235.

incident.¹⁷ The Claimant responded by stating that she does not file taxes and therefore could not provide tax returns, that “seafood consumption has been our livelihood and feeding for family [sic] since I have been in Louisiana for years,”¹⁸ and that the request for customer contact information “does not apply” to her.¹⁹ The Claimant has therefore not provided sufficient documentation to establish a financial loss.

Similarly, the Claimant has failed to establish that the Deepwater Horizon incident caused her alleged financial loss. The Claimant has not provided documentation or other evidence linking the Deepwater Horizon incident to her losses except for an allegation that the Deepwater Horizon incident contaminated fishing grounds, impacting her food supply and income. This allegation, without more, is insufficient to establish this required causal link.

CONCLUSION

This claim of \$25,000 is denied in its entirety because the Claimant has not provided documentation establishing the required showings for a subsistence use damages or a loss of profits and impairment of earning capacity damages. Additionally, the OSLTF is not available to compensate for personal injury claims. Finally, this claim is considered to have been settled by virtue of the Claimant belonging to the E&PD Settlement, and is therefore not eligible for OSLTF compensation.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor’s Review: *10/26/12*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

¹⁷ NPFC Request for Additional Information, dated 29 August 2012.

¹⁸ This statement, among others, was the basis for the NPFC suspicion that the Claimant might in fact be seeking compensation for subsistence use damages.

¹⁹ Response to Request for Additional Information, dated 12 September 2012.