

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
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Arlington, VA 20598-7100
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7012 2210 0001 7214 9616

5890/DWHZ
26 June 2013

J. Apolinar Silva


Re: Claim Number: N10036-1913

Dear Mr. Silva:

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 N10036-1913 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 N10036-1913.

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

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1913
Claimant	J. Apolinar Silva
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$64,718.00

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 17 April 2013, Mr. Apolinar Silva, ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$64,718.19 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant works as a commercial shrimper, based in Port Isabel, Texas. After the oil spill, the Claimant alleged that he lost earnings because "the boats were limited to not fishing/shrimping the Louisiana waters."² The Claimant alleged that because of the closure of federal waters off the Louisiana coast, the Claimant "returned to the docks in Port Isabel, TX and lost income during April-May and June 2010."³

In order to calculate his losses, the Claimant took the difference between his fishing earnings in 2011 and 2010, \$21,572.73, and multiplied the result by three. The Claimant thereby calculated that the oil spill caused him to sustain approximately \$64,718.19 in loss of profits damages.⁴

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.

¹ Sum certain statement, received on 16 January 2013.

² GCCF Claim Form.

³ Optional OSLTF Claim Form, signed on 8 April 2013.

⁴ Loss calculation page.

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;
- (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:

- Optional OSLTF Claim Form, signed on 8 April 2013;
- 2011 Form 1040, showing adjusted gross income of \$28,260.00;
- 2011 Schedule C (Form 1040) showing gross sales of \$38,773.00;
- 2011 Schedule SE (Form 1040);

- 2010 Form 1040, showing adjusted gross income of \$13,689.00;
- 2010 Schedule C-EZ (Form 1040) showing gross sales of \$17,200.00;
- 2010 Schedule SE (Form 1040);
- 2010 Schedule M (Form 1040A or 1040);
- 2010 Form 1099-MISC, showing earnings from Silmen Trawlers, Inc. of \$17,200.00;
- 2009 Form 1040, showing adjusted gross income of \$28,461.00;
- 2009 Schedule C-EZ (Form 1040), showing gross sales of \$34,775.00;
- 2009 Schedule M (Form 1040A or 1040);
- 2009 Form 1099-MISC, showing earnings from Silmen Trawlers, Inc. of \$34,775.00;
- GCCF Full Review Final Payment Claim Form;
- Lost earnings calculation sheet.

The Claimant alleged that this claim was first presented to the Responsible Party through the GCCF, who denied payment on the claim.⁵

On 17 April 2013, the Claimant submitted this claim to the NPFC seeking \$64,718.19 in loss of profits or impairment of earning capacity damages.⁶ A copy of a GCCF claim form allegedly submitted by the Claimant indicates that the same claim concerning the same damages was first presented to the Responsible Party. As such, the NPFC deems OPA presentment requirements to have been satisfied.⁷

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 damages, a Claimant must provide evidence sufficient to prove (1) that the Claimant sustained a loss or reduction in income, and (2) that the financial loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

The Claimant alleged that he was unable to fish in certain Gulf waters during April, May and June of 2010, thereby incurring a loss of earnings of \$21,572.73. The Claimant multiplied this amount by three to reach his sum certain of \$64,718.19. The Claimant's submission to the NPFC provided evidence documenting his yearly earnings in 2009, 2010 and 2011, but failed to provide any proof to show that he indeed lost income as a result of the Deepwater Horizon oil spill.

In order to assist in substantiating this claim, the NPFC sent the Claimant a letter requesting certain additional information. Among other requests, the NPFC asked that the Claimant provide records of shrimp catch in affected areas of the Gulf of Mexico in years other than the year in which waters were closed due to the oil spill. The Claimant was asked to respond to the NPFC additional information request within 14 days of the date of the request. As of the date of this determination, the Claimant has failed to respond. As such, because the Claimant failed to include any evidence to prove (1) that he had indeed intending on fishing in Gulf waters closed a

⁵ Optional OSLTF Claim Form, signed on 8 April 2013.

⁶ Optional OSLTF Claim Form, signed on 8 April 2013.

⁷ 33 C.F.R. § 136.103(c)(2).

result of the oil spill, or (2) that the Claimant's inability to fish in these waters resulted in a loss of earnings which the Claimant was unable to mitigate with other employment, the Claimant has failed to prove that he sustained a compensable loss of profits under OPA.

This claim is therefore denied because the Claimant has failed to provide evidence sufficient to prove (1) that she sustained a financial loss in the amount \$64,718.19, or (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 discharge of oil.

Claim Supervisor:  *NPTC Claims Adjudication Division*

Date of Supervisor's Review: *6/26/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments: