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: 7012 2210 0001 7215 0353

5890/DWHZ
24 May 2013

El Gran Carnal, Inc.
[redacted]

Re: Claim Number: N10036-1915

Dear Mr. Toland:

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 N10036-1915 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 N10036-1915.

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
cc: [redacted]

By Certified Mail:
No. 7012 2210 0001 7215 0346

CLAIM SUMMARY/DETERMINATION FORM

| | |
|---|---|
| Claim Number | N10036-1915 |
| Claimant | El Gran Carnal |
| Type of Claimant | Private (US) |
| Type of Claim | Loss of Profits or Impairment of Earning Capacity |
| Amount Requested | $103,208.00 |

***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 16 April 2013, Cary M. Toland, legal representative for El Gran Carnal, Inc, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for $103,208.00 in loss of profits or impairment of earning capacity allegedly resulting from the Deepwater Horizon oil spill.[1]

The Claimant owns and operates a commercial freezer fishing vessel which has its home port in Brownsville, Texas. The Claimant alleged that the vessel "has historically shrimped the [Deepwater Horizon oil spill] affected waters" and that the "closure of the fishing grounds at a time when Texas season was closed, in addition to the damage and depletion of shrimp stock, caused significant losses."[2]

It is unclear exactly how the Claimant calculated their losses to arrive at the sum certain of $103,208.00. However, this amount represents the Claimant's alleged loss of income due to the inability to fish certain Gulf of Mexico fisheries during the Deepwater Horizon oil spill.

***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:

---

[1] Sum certain statement, received on 16 January 2013.
[2] Optional OSLTF Claim Form, singed on 12 April 2013.

(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;
- OSLTF Instructions;
- Vessel Certificate of Documentation;
- TLC Customer Maintenance Application, Commercial fishing licenses 2006 – 2013;
- Letter from the Claimant's attorney to the Deepwater Horizon Economic Settlement Fund;
- 2010 Federal Tax Returns, including form 1120S, showing gross sales of $248,578.00;
- 2011 Federal Tax Returns;
- Gulf Shrimp Database, Vessel Report for FV MISS CATHY, 2007 – 2011;
- 2007 Federal Tax Returns, including form 1120S, showing gross sales of $265,208.00;
- 2008 Federal Tax Returns, including form 1120S, showing gross sales of $382,888.00;
- 2010 Federal Tax Returns, including form 1120S, showing gross sales of $248,578.00;
- 2011 Federal Tax Returns, including form 1120S, showing gross sales of $423,723.00;
- Notice of MDL Joinder, 10 April 2013.

Prior to presenting this claim the NPFC, the Claimant attempted to recover these alleged losses from the Responsible Party through the GCCF, the CSSP and the BP Claims Program. Each entity denied payment on the claim.[3]

[3] RP-USCG Claim Status Report.

On 16 April 2013, the Claimant presented this claim to the NPFC, for $103,208.00 in loss of profit and impairment of earning capacity damages.[4] Because this claim was first presented to and then denied by the Responsible Party, the Claimant has satisfied presentment requirements under OPA.[5]

The NPFC notes that evidence in this claim submission indicates that the Claimant has joined in an action in the U.S. District Court for the Eastern District of Louisiana to pursue this claim against the Responsible Party.[6]

**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.

For the reasons explained below, this claim is not compensable under OPA.

1. <u>The claim is currently the subject of an action in court by the Claimant to recover the same damages as now before the NPFC</u>.

In accordance with OPA's implementing regulations, the NPFC may not make payment on a claim "during the pendency of an action by the person in court to recover costs which are the subject of the claim."[7] A letter included in this claim submission indicates that the Claimant has joined an action in the U.S. District Court for the Eastern District of Louisiana to recover the damages that are presented in this claim. As such, the NPFC would be precluded from making a payment on this claim.

The remainder of this determination addresses the substantive reasons for denial.

2. <u>The Claimant has not demonstrated that they lost income as a result of the discharge of oil caused by the Deepwater Horizon oil spill</u>.

The Claimant alleged that the closure of certain Gulf of Mexico fishing grounds caused the Claimant to lose expected income in 2010. In support of this assertion, the Claimant provided records from the National Oceanic and Atmospheric Administration (NOAA), documenting the dates of the Claimant's fishing trips and the areas where the Claimant caught shrimp. These records however, fail to indicate that the Claimant routinely fished in waters that were actually closed as a result of the Deepwater Horizon oil spill.

According to data provided by NOAA, fishery closures began in early May of 2010 and stretched almost as far west as the Texas-Louisiana border from mid-July to early August, extending approximately 25 to 50 miles off the coast.[8] Historically, it appears as though the Claimant did not fish from approximately late February until about June or July of each year. A vessel report for 2008 shows that the Claimant did not fish from 27 February until 2 June of that year. In 2009, the Claimant did not fish from 24 March until 15 July. In 2010, however, the Claimant fished in the waters near Brownsville, Texas from 29 April until May 13, before moving east towards Louisiana in June and July of 2010.

---

[4] Optional OSLTF Claim Form, signed on 12 April 2013.
[5] 33 C.F.R. § 136.103(a).
[6] MDL Joinder Notice.
[7] 33 C.F.R. § 136.103(d).
[8] See, Maps of Fishery Closure Boundaries, NOAA. Available at, http://sero.nmfs.noaa.gov/deepwater_horizon/closure_info/index.html, accessed on 23 May 2013.

Small parts of fishing areas 16 and 17 off the coast of Louisiana briefly closed in July and August of 2010, but it does not appear that the Claimant usually fished these areas during those months.[9] For example, in July in 2009, the Claimant reported its catch from areas 19, 20 and 21, which are west of any of the closure areas. In July 2008, the Claimant fished exclusively in area 21. In 2011, the Claimant did fish in zones 16 and 17 in June and July, but moved west to zones 20 and 21 by mid July.

Furthermore, at the time of the oil spill, the Claimant was fishing in Brownsville, Texas after having traveled south from Galveston. The Claimant has not provided evidence sufficient to prove that they ever fished in waters that were closed as a result of the Deepwater Horizon oil spill, nor have they proven that they indeed intended to fish these areas during closure periods in 2010. Rather, there does not appear to be any gap at all in the Claimant's fishing season in 2010, unlike in previous years when the Claimant often did not fish for several months. Taking into account the Claimant's fishing history prior to the oil spill and fishing patterns in the year of the oil spill, the Claimant has not demonstrated that fishing closures prompted by the Deepwater Horizon oil spill caused the Claimant to sustain a loss of income.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that they sustained a financial loss in the amount $103,208.00, 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. Additionally, the OSLTF is not available to compensate the Claimant because damages that are subject of this claim are currently being pursued in an action in federal court.

[redacted]

Claim Supervisor: ***NPFC Claims Adjudication Division***

Date of Supervisor's Review: ***5/24/13***

Supervisor's Action: ***Denial approved***

Supervisor's Comments:

[9] See, Maps of Fishery Closure Boundaries, NOAA. Available at, http://sero.nmfs.noaa.gov/deepwater_horizon/closure_info/index.html, accessed on 23 May 2013.