

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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US COAST GUARD
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
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5890/DWHZ
22 July 2013

Mr. Joes Cuevas


Re: Claim Number: N10036-1945

Dear Mr. Cuevas:

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 N10036-1945 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 N10036-1945.

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	N10036-1945
Claimant	Jose Cuevas
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$91,812.50

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 29 May 2013, Mr. Jose Cuevas ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$91,812.50 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant owns the fishing vessel, Cuevas Pride, Inc, which is based in Port Isabel, Texas. The Claimant alleged that after the oil spill, the vessel was unable to shrimp in the Gulf of Mexico, and sustained losses of \$91,812.50 as a result.

In determining the extent of his losses, the Claimant calculated the average poundage of his catch in "Louisiana-Gulf of Mexico" over a three year period and then multiplied his losses by \$6.50, which he identifies as the average price of shrimp in 2010, for a total alleged loss of \$91,812.50.²

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.

¹ Optional OSLTF Claim Form, unsigned.

² Document, "Basis for Claim."

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:

- Claim Cover Letter, 12 April 2013;
- Document, "Basis for claim";
- Certificate of Vessel Documentation, issued 19 March 2013;
- Notice of Emergency Advance Payment Determination, \$45,000.00, issued on 30 November 2010;
- 2011 Federal Income Tax Returns with schedules and attachments;
- 2011 Form 1120S, showing gross sales of \$433,842.00 and ordinary business income of \$48,510.00;
- 2010 Federal Income Tax Returns with schedules and attachments;

- 2010 Form 1120S, showing gross sales of \$395,764.00 and ordinary business income of \$45,975.00;
 - 2009 Federal Income Tax Returns with schedules and attachments;
 - 2009 Form 1120S, showing gross sales of \$279,401.00 and ordinary business income of -\$109,484.00;
- OSLTF Claim Form, signed on 16 April 2013.

Prior to presenting this claim the NPFC, the Claimant submitted various claims to the GCCF, including a claim for an Emergency Advance Payment (EAP). The GCCF compensated the Claimant's EAP claim in a determination dated 30 November 2010, with payment of \$45,000.00.³ The Claimant does not provide evidence indicating the amount of other claims submitted to BP, the GCCF or the CSSP.

On 29 May 2013, the Claimant submitted this claim to the NPFC, seeking to recover \$91,812.50 in loss of profits or impairment of earning capacity damages resulting from the Deepwater Horizon oil spill. The NPFC will adjudicate this claim to the extent presentment requirements have been satisfied. If any of the damages now presented to the NPFC, were not first presented to and denied by the RP or an agent acting on its behalf, these damages are denied for improper presentment.⁴

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 an uncompensated loss or reduction in income, and (2) that the financial loss was caused by damage to real property or natural resources caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

The Claimant seeks to recover the value of one year of lost earnings due to his inability to shrimp in certain Gulf of Mexico waters following the oil spill. The amount of compensation potentially available to any claimant seeking loss of profits damages is limited to the "actual net reduction or loss of earnings or profits suffered."⁵ Speculative future losses are therefore not compensable under OPA.

Financial documentation included with this claim submission fails to indicate that the Claimant sustained an uncompensated loss of earnings after the oil spill. Rather, the Claimant's tax returns document the Claimant's earnings increasing in 2010 and 2011 as compared to the Claimant's earnings in prior years. The Claimant reported profits of -\$109,484.00, \$45,975.00 and \$48,510.00 in 2009, 2010 and 2011.⁶ Having presented no other financial documentation to support this claim, the Claimant has failed to demonstrate that he sustained an uncompensated financial loss in either 2010 or 2011.

³ Notice of Emergency Advance Payment Determination, 30 November 2010.

⁴ 33 C.F.R. § 136.103(a).

⁵ 33 C.F.R. § 136.235.

⁶ 2010 income includes EAP payment by GCCF.

Furthermore, the Claimant has not provided any evidence to prove that he routinely caught shrimp in fisheries affected by federal fishing closures resulting from the Deepwater Horizon oil spill. On 29 April 2013, the NPFC sent the Claimant a letter requesting certain information to substantiate his claim, including trip tickets and landing data to document the location and amount of the Claimant's catch in years prior to the oil spill.⁷ The Claimant failed to provide this requested evidence or any other evidence to indicate the locations where he usually fished, or that he was prepared to, but unable to fish in waters closed as a result of the oil spill.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that he sustained an uncompensated financial loss in the amount of \$91,812.50 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: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *7/22/2013*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

⁷ NPFC additional information request, 29 April 2013.