

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: 202-493-6937

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7010 0780 0001 8634 1978

5890/DWHZ
18 June 2013

EJ & Joey, Inc


Re: Claim Number: N10036-1947

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 N10036-1947 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 N10036-1947.

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	N10036-1947
Claimant	EJ & Joey, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$66,826.50

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 23 April 2013, Mr. Jose Cuevas, as President of EJ & Joey, Inc. (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$66,826.50 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant is the managing owner of the M/V E.J. & JOEY headquartered in Port Isabel, Texas. The Claimant alleges the M/V E.J. & JOEY fishes in the Gulf of Mexico off the Louisiana coast.

The Claimant alleged that the oil spill caused the company to sustain losses stemming from the boat's limited ability to work in the Gulf of Mexico². The Claimant alleged that they have sustained oil spill related losses in the amount of \$66,826.50.

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 Optional OSLTF Claim Form dated 15 April 2013.

² Optional OSLTF Claim Form dated 15 April 2013.

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 15 April 2013;

- Letter from Claimant to US Coast Guard Claims Adjudication dated 12 April 2013;
- Document titled "Basis for Claim" from Claimant;
- Certificate of Documentation for M/V E.J. & JOEY issued on 18 October 2012;
- Notice of Emergency Advance Payment Determination for check number 00106243;
- 2011 Federal Income Tax Returns, including Form 1120S, showing total income of \$396,871.00;
- 2010 Federal Income Tax Returns, including Form 1120S, showing total income of \$359,695.00;
- 2009 Federal Income Tax Returns, including Form 1120S, showing total income of \$264,565.00.

Prior to presenting this claim to the NPFC, the Claimant attempted to recover damages from the Responsible Party through the GCCF and BP Claims Program. The GCCF awarded an Emergency Advance Payment of \$15,700.00 on 01 November 2010. According to the Claimant's submission, the documentation now provided to the NPFC was presented to BP on 24 August 2011. The assigned claim number and Claimant ID are unknown and any further action taken on this claim was not provided in the Claimant's submission package.

On 23 April 2013, the Claimant presented this claim to the NPFC. Based on the submission date to BP provided by the Claimant (24 August 2011), it is unknown if the contents of that claim varied from the original submission resulting in Emergency Advanced Payment, and because of the lack of documentation on BP's response to 24 August 2011 claim submission, it is unknown if this claim was properly presented to the responsible party prior to submission to NPFC or the results of that submission. Therefore, the Claimant has failed to show he has met the presentment requirements under OPA.³ Although lack of meeting this requirement is grounds for denial, it is not the sole reason in this instance and further rationale will be expanded upon below.

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 documentation sufficient to prove (1) that the claimant experienced 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. In terms of proving causation, it is not sufficient to merely prove that *any* effect of the oil spill and associated events somehow contributed to the claimant's loss. Rather, a claimant must specifically prove that their financial loss was "due to the injury to, destruction of, or loss of real or personal property or natural resources," resulting from the discharge of oil.⁴

³ 33 C.F.R. § 136.231(a).

⁴ 33 C.F.R. § 136.231(a).

The Claimant alleged to have sustained “present and future losses” stemming from the boat’s limited ability to shrimp in the Gulf of Mexico, specifically “Louisiana waters”.⁵

1. Failure to prove the Claimant sustained a financial loss.

The Claimant has not provided financial data sufficient to prove that he sustained a loss during any period following the Deepwater Horizon oil spill. In fact, the 2010 and 2011 tax returns, which would have reflected a time period both during and after the Deepwater Horizon oil spill, indicated a greater total and net income than in 2009. In addition, the Claimant provided a “three year average of shrimp caught” as the basis for the loss calculation. However, no official documentation was provided to support these numbers nor was any documentation provided on shrimp caught in 2010 or beyond, the time period during which the oil spill occurred and the Claimant alleged to have sustained the financial loss.⁶

2. Failure to prove that the alleged loss was caused by the Deepwater Horizon oil spill.

The Claimant has failed to provide evidence to support his boat historically shrimped in the waters effected by the Deepwater Horizon oil spill or was affected by closures in that area, such as trip tickets or landing data.

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 \$66,286.50 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: *6/18/13*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

⁵ Optional OSLTF Claim form dated 15 April 2013.

⁶ Document titled “Basis for Claim” from Claimant.