

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd., Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 800-280-7118
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Fax: 202-493-6937

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1150 0000 4666 9786

5890/DWHZ
Claim # N10036-1200
12 September 2011

Luke's Solutions
C/O Catherine Gauthier
Smitko & Ory
622 Belanger Street
Houma, LA 70360

Dear Ms. Gauthier:

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 N10036-1200 involving Deepwater Horizon. 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 N10036-1200.

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

Copy to: Tommy Luke
1713 Grand Caillou Road
Houma, LA 70363
Certified Receipt 7011 1150 0000 4666 9779
Enclosure: Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1200
Claimant	Luke's Solution; Mr. Tommy Luke, Owner
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$35,000.00

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 was 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 claims for certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT

On 27 May 2011, Luke's Solutions, owned in part by Mr. Tommy Luke and hereby collectively referred to as the Claimant, presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$35,000.00¹ for loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.

The Claimant is located in Houma, Louisiana and supplies chemical products that its customers use to clean oilfield, marine and industrial equipment.² The Claimant stated that, "because of the oil spill, customers that would generally use chemical cleaning products have not had the need for these products. Thus, losses have been great."³

The Claimant engaged Catherine Gauthier, an attorney with Smitko & Ory in Houma, Louisiana. The firm represents the Claimant in the Eastern District of Louisiana, MDL-2179 "Oil Spill by the Oil Rig Deepwater Horizon."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 waters or adjoining shorelines or the exclusive economic zone, as described in Section 2702(b) of OPA.

The OSLTF which is administered by the NPFC, is available, pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part

¹ The OSLTF Claim Form had claim amount of \$115,000.00. The Claimant changed the amount to \$35,000.00 in an e-mail to NPFC dated 29 August 2011. See paragraph 7.

² Email dated 02 September 2011 from Catherine Gauthier with Smitko-Ory in responded to NPFC's request for additional information of 31 August 2011

³ OSLTF Claim Form dated 19 May 2011 and signed by the Claimant

⁴ OSLTF Claim Form dated 19 May 2011 and signed by the Claimant

136, to pay claims for uncompensated damages. 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.
- (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.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support this claim, Claimant submitted the following documentation:

- OSLTF Claim Form dated 19 May 2011 and signed by the Claimant
- Sales by Item Summary April 1 through November 15, 2009 and 2010 for Luke's Solutions
- Profit & Loss Budget Performances January through December 2007, 2008 and 2009 for Luke's Solutions
- Profit & Loss Previous Year Comparison January 1 through 22 November 2010 for Luke's Solutions

- Profit & Loss for November and December 2010 and January 2011 for Luke's Solutions
- Form 1065 US Return of Partnership Income for Luke's Solutions for 2007, 2008 and 2009
- Customer Phone List 17 November 2010 for Luke's Solutions
- Terrebonne Parish Occupational License for Luke's Solutions for year ended 31 December 2010
- Email dated 29 August 2011 from Catherine Gauthier with Smitko-Ory in response to NPFC's letter requesting for additional information dated 04 August 2011
- Email dated 02 September 2011 from Catherine Gauthier with Smitko-Ory in responded to NPFC's request for additional information of 31 August 2011

On 04 August 2011, the NPFC sent the Claimant a letter requesting additional information in order to evaluate the claim. On 29 August 2011, the Claimant responded to the request.

Claimant seeks lost earnings and wages in the amount of \$35,000.00.

Before presenting the claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) with the GCCF on 19 November 2010 in the amount of \$39,500.00.⁵ The claim was assigned Claimant ID #3395387 and claim #500095. The EAP claim was denied.⁶ Additionally, Claimant filed a Full Review Final (FRF) claim with the GCCF on 14 March 2011 in the amount of \$115,000.00.⁷ The FRF claim was assigned claim #9321887. The FRF claim was denied.⁸

Based upon the evidence provided by the Claimant, it appears that the subject matter of the GCCF claims is the same as the subject matter of the claim before the NPFC, i.e., Claimant lost earnings as a result of the Deepwater Horizon oil spill. The NPFC deems the GCCF claims to be properly presented to the Responsible Party and to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1200 considers and addresses the loss of earnings in all claims presented to the Responsible Party, specifically: GCCF Claim #500095 EAP and #9321887 FRF.

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 the injury or destruction or loss of real or personal property or 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 to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

The Claimant alleges a loss of profits of \$35,000.00 for the period of May through December 2010.⁹ The NPFC requested the Claimant provide details of the loss calculation.

⁵ Report from the GCCF dated 22 August 2011

⁶ Report from the GCCF dated 22 August 2011

⁷ Report from the GCCF dated 22 August 2011

⁸ Report from the GCCF dated 22 August 2011

⁹ Email dated 02 September 2011 from Catherine Gauthier with Smitko-Ory in responded to NPFC's request for additional information of 31 August 2011

The details that the Claimant provided were inconclusive. The Claimant's income tax returns for recent years all show net losses in ordinary business income.¹⁰ The Claimant requested a filing extension for the 2010 tax return.¹¹ Instead, the Claimant provided Profit & Loss Statements for 2010. These Statements were incomplete, since they ended on 22 November 2010.¹² The Claimant cannot support the loss of profits of \$35,000.00 based on the documentation provided.

The Claimant stated that the demand for the cleaning products declined due to the Deepwater Horizon oil spill.¹³ The Claimant provided the names for three of his major customers.¹⁴ The NPFC Staff contacted these customers¹⁵ and, based on the conversations, concluded that the Claimant's loss of profits is due to the drilling moratorium and permitting delays in force after the moratorium, which forced these customers to decrease or discontinue their supply orders.

Based on the foregoing, this claim is denied because the Claimant failed to meet the burden to demonstrate (1) that there was an alleged loss in the amount claimed, and (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 a discharge of oil.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *12 September 2011*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁰ Net Losses per Form 1065 US Return of Partnership Income: 2007 was \$97,134; 2008 was \$45,667; 2009 was \$56,857

¹¹ Email dated 29 August 2011 from Catherine Gauthier with Smitko-Ory in response to NPFC's letter requesting for additional information dated 04 August 2011

¹² The Claimant provided a Profit & Loss Statement for 01 January through 22 November 2010 and a Statement for the month of December 2010.

¹³ OSLTF Claim Form dated 19 May 2011 and signed by the Claimant

¹⁴ Three major customers: Redfish Rentals, Gulfstream Services and Cetco Oilfield. All are located in Houma, Louisiana.

¹⁵ NPFC Staff contacted the customers on 06 September 2011