

U.S. Department of
Homeland Security

**United States
Coast Guard**

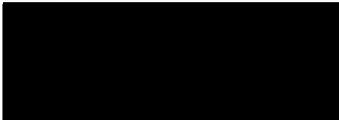


Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1150 0000 4636 2090

5890/DWHZ
21 September 2011

Red Creek Inn


Re: Claim Number: N10036-1320

Dear Dr. Mertz

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 N10036-1320 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 N10036-1320.

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 Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-0895
Claimant	Red Creek Inn
Type of Claimant	Corporate
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$65,600.00

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 19 August 2011, Dr. Karl Mertz, on behalf of the Red Creek Inn (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$65,600.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.¹

The Claimant is the proprietor of a bed and breakfast in Long Beach, Mississippi.² The Claimant alleged that he lost income when “inquiries about stays dropped by 66% to 75%, because of the public’s perception that the beaches of the MS Gulf Coast were unsafe and unusable.”³

The Claimant alleged that he has sustained uncompensated loss of profits and impairment of earnings capacity in the amount of \$65,600.00 due to decreased bookings which were due to the effects of the 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 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 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.

¹ Optional OSLTF Claim Form dated 19 August 2011.

² Optional OSLTF Claim Form, dated 19 August 2011.

³ Optional OSLTF Claim Form, dated 19 August 2011.

- (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:

- Optional OSLTF Claim Form, dated 19 August 2011;
- Emails between the Claimant and the NPFC, 17 August, 23 August, 12 September, ;
- All documentation included in the Claimant's GCCF Submission, including emails and letter between the Claimant and the GCCF.

Prior to presentment to the NPFC, the Claimant presented an Emergency Advance Payment (EAP) claim to the RP/GCCF seeking loss of profits and earnings capacity in the amount of \$17,000.00.⁴ The Claimant was assigned Claimant ID 1136463 and EAP was assigned Claim # 44394. This claim was paid in full on 10 August 2011.⁵ Prior to payment on the EAP, the Claimant had been compensated \$5,894.58 by BP.⁶

The Claimant then filed a Full Review Final claim (FRF) seeking loss of profits and impairment of earnings capacity. FRF was assigned Claim # 9020805. Upon final determination, the RP/GCCF found that the Claimant had been fully compensated for any losses that the Claimant may have incurred, and offered the Claimant full and final payment in the amount of \$25,000.00, which the Claimant has not accepted to date.⁷

⁴ Emergency Advance Payment Determination, 10 August 2011.

⁵ Emergency Advance Payment Determination, 10 August 2011.

⁶ GCCF Re-Review Determination Letter on Final Payment Claim, 11 August 2011.

⁷ GCCF Re-Review Determination Letter on Final Payment Claim, 11 August 2011.

On 19 August 2011, the Claimant presented this claim to the NPFC for loss of profits and impairment of earnings capacity in the amount of \$65,600.00.⁸ This NPFC determination shall address this claim for loss of profits and earnings capacity to the extent that this claimed damage amount of \$65,600.00 has been previously presented to the RP/GCCF. Any claimed damage amount now before the NPFC, which was not first presented to the RP/GCCF is denied for failure to make proper presentment.⁹

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 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 this claim.

In order to prove a claim for loss of profits and impairment of earnings capacity, a claimant must demonstrate (1) that he suffered a loss or reduction in profits or earnings capacity, and (2) that the loss or reduction was a direct result of the injury, destruction or loss of property or natural resource as a result of a discharge or substantial threat of a discharge of oil.

This claim is denied because the Claimant (1) has not provided documentation to support his alleged loss in the amount of \$65,600.00, (2) has been fully compensated for any losses he might have incurred, and (3) has not provided documentation to indicate a causal link between his alleged losses and the Deepwater Horizon oil spill.

1. The Claimant has failed to provide documentation to support his alleged loss of \$65,600.00.

The Claimant has not provided sufficient documentation to substantiate his claim of \$65,600.00 in loss of profits & impairment of earnings capacity. The OSLTF is available to compensate losses for reductions in *profits* only to the extent that the losses were caused by the injury to, destruction or loss of real or personal property or natural resource as a result of a discharge or substantial threat of a discharge of oil.¹⁰

Due to a variety of personal circumstances, the Claimant notes that his 2006, rather than 2008 or 2009 earnings are most indicative of what his 2010 earnings would have been, had the oil spill not occurred.¹¹ However, the Claimant's tax returns indicated that the Claimant's 2006 profits totaled \$22,704.13, while 2007 profits came to \$(-13,311.74).¹² Even considering 2006, which the Claimant alleged to be a more accurate reflection of potential earnings in 2010 and 2011, the Claimant has not provided documentation or other evidence that might substantiate his claim for \$65,600.00 in loss of profits & impairment of earnings capacity.

⁸ Optional OSLTF Claim Form, dated 19 August 2011.

⁹ 33 C.F.R. § 136.103(a) requires "all claims for removal costs or damages must be presented first to the responsible party."

¹⁰ 33 C.F.R. § 136.235 states that, "the amount of compensation allowable is limited to the actual net reduction or loss of earnings or *profits* suffered" (emphasis added).

¹¹ Hardship letters provided by the Claimant to NPFC, GCCF, Emails from the Claimant to the NPFC, 17 August 2011.

¹² 2006, 2007, Schedule C, Form 1040.

2. The Claimant has been fully compensated for any alleged losses.

The NPFC notes that the OSLTF is available to pay damages which have not already been compensated by the RP/GCCF or another party.¹³ The Claimant's submission indicates that the Claimant has been compensated a total of \$22,894.58 in payments from BP and the GCCF.¹⁴ Based on trends in the Claimant's prior earnings, and considering 2006 as the Claimant's most profitable year,¹⁵ the NPFC notes that based upon the information provided, the Claimant has been compensated in excess of any losses he might have incurred.

3. The Claimant has not provided documentation to demonstrate that his losses were caused by the Deepwater Horizon oil spill.

The Claimant has not provided documentation to indicate that any losses he may have suffered were a direct result of the Deepwater Horizon oil spill. The Claimant has not provided documentation to demonstrate that 2010 bookings were continuing at a steady rate and that his bookings only dropped off in the period following the oil spill. The Claimant has also failed to provide documentation to show that bookings during the 2010 summer were lower than bookings during the summers of previous years. Most importantly, the Claimant has not provided evidence, such as reservation records, to show that guests who would have otherwise patronized the Claimant's bed and breakfast, cancelled reservations due to effects of the Deepwater Horizon oil spill.

Should the Claimant choose to pursue this claim on reconsideration, the Claimant should provide records of guests' cancellations that may have been due to the oil spill, as well as contact information for the cancelling parties. The Claimant should also provide booking records for comparable periods of previous years in order to demonstrate that 2010 booking might have been affected by the oil spill.

The NPFC reviewed all information and documentation provided by the Claimant.

Based on the foregoing, this claim is denied because the Claimant (1) has failed to meet his burden to demonstrate that he suffered a loss of profits in the amount of \$65,600.00, (2) has been fully compensated for any losses allegedly incurred, and (3) has failed to demonstrate that his alleged losses are the result of 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 ~~Investigation Division~~*

Date of Supervisor's Review: *9/20/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹³ 33 C.F.R. §136.1 states in part that claims may be paid from the OSLTF for *uncompensated* damages.

¹⁴ EAP in the amount \$17,000.00 plus BP payments of \$5,894.58.

¹⁵ The Claimant reported profits of \$22,704.13 in 2006, Schedule C, Form 1040.