

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

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5890
11/21/2011

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 6241

Mr. Christopher Guillot
[REDACTED]

RE: Claim Number: N10036-1370

Dear Mr. Flood:

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 claim number N10036-1065 involving the Deepwater Horizon oil spill. Please see the enclosed Claim Summary/Determination Form for further explanation.

Per your request, the NPFC is attaching your original photographs that were provided.

Disposition of this reconsideration constitutes final agency action.

If you have any questions or would like to discuss the matter, you may contact me at the above address and phone number.

[REDACTED]
THOMAS D. MORRISON
Chief, Claims Adjudication Division
U.S. Coast Guard

ENCL: Claim Summary / Determination Form

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 6258

cc: Mr. Christopher Guillot
[REDACTED]

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1370
Claimant	: Christopher Guillot
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$119,018.71

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 7 September 2011, the Mr. Peter T. Flood, legal representative of Mr. Christopher Guillot (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$119,018.71 in alleged loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant worked as a tug boat captain for John W. Stone Oil Distribution, LLC, "to captain a tug to deliver oil to rigs in the Gulf."² The Claimant alleged that "on August 20, 2010, [he] was laid off because of the Deep Horizon BP Oil Spill."³ The Claimant has yet to be called back to work.⁴ He also notes that he is a commercial fisherman.

The Claimant seeks \$119,018.71 in loss of profits, which he calculates by doubling his alleged actual losses of \$59,509.35, incurred from 20 August 2010 to 31 December 2010.⁵

Claimant states his wages earned from May – Dec for 2008 was \$132,384.00; May – Dec 2009 was \$113,270.00; and actual earnings May – Dec 2010 was \$48,838.00. The Claimant's worksheet that was provided with his claim, reflects *Projected* (Emphasis added) 2010 wages as \$98,789.76 less actual 2010 lost wages from May – Dec to be \$59,509.35. The Claimant then multiplied his projected 2010 lost wages of \$59,509.35 times a factor of 2 for a total calculated amount of \$119,018.71. He provided no explanation for doubling his projected income to arrive at the sum certain of \$119,018.71.

Claimant provided the following financial documentation with his initial claims submission:

¹ Optional OSLTF Claim Form dated 30 August 2011.

² Letter from the Claimant to the GCCF, 18 April 2011.

³ Letter from the Claimant to the GCCF, 18 April 2011.

⁴ PHONECON: NPFC Staff and legal representative, Peter Flood, 13 Sept. 11.

⁵ Document, "GCCF Claim Worksheet."

- 2008 Income Tax Return which shows wages as \$131,412.00 and an adjusted gross income for the year of \$169,900.00;
- W-2 for 2008 in the amount of \$131,411.86 from John W Stone;
- Form 1099-MISC for 2008 in the amount of \$1,770.00;
- 2009 Income Tax Return which shows was as \$111,724.00 and an adjusted gross income for the year of \$94,309.00;
- W-2 for 2009 in the amount of \$111,723.81 from John W Stone;
- W-2 for 2010 in the amount of \$42,913.24 from John W Stone; and
- Form 1099-MISC for 2010 in the amount of \$3,594.32.

The claim was denied on September 15, 2011, in part because Claimant did not explain how he arrived at the \$119,018.77 in alleged loss of profits. This sum certain was based on projected income that was inexplicably doubled, perhaps for future damages. The denial explained that the Oil Pollution Act of 1990 (OPA 90) provides that the Oil Spill Liability Trust Fund (the Fund) is available for *uncompensated* damages but not available for future or prospective damages. The claim was also denied because the Claimant asserted that he was laid off from his employment because of the moratorium placed on offshore drilling and not due to the oil spill.

REQUEST FOR RECONSIDERATION:

On November 15, 2011, Claimant, through his attorney, Mr. Peter T. Flood⁶, sent a request for reconsideration to the NPFC. Mr. Flood provided a four-page letter requesting reconsideration and attached to the letter was a copy of the following documents:

1. A copy of the NPFC's initial denial determination package dated September 15, 2011 identified as Exhibit A;
2. A copy of the governing claims regulations found at 33 CFR 136 identified as Exhibit B;
3. A copy of a recently litigated case entitled In Re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico 2011 U.S. Dist. LEXIS 96091 (E.D. La., July 29, 2011) identified as Exhibit C; and
4. A copy of a Decision Memorandum dated July 12, 2010 from Ken Salazar, Secretary of the Interior to Michael R. Bromwich, Director, Bureau of Ocean Energy Management, Regulation and Enforcement regarding the suspension of certain offshore permitting and drilling activities on the Outer Continental Shelf identified as Exhibit D.

CLAIMANT'S ARGUMENT ON RECONSIDERATION:

On behalf of the Claimant, Mr. Flood asserted the following arguments on reconsideration:

- Claimant argues that he provided sufficient information of financial loss as a result of the Deepwater Horizon Oil Spill. He further states that the underlying basis for the NPFC's denial of his claim is "The claimant has not sufficiently demonstrated that the loss was direct result of the discharge or substantial threat of discharge of oil" is flawed. The Claimant asserts that a review of current case laws and status concerning OPA ACT of 1990 clearly demonstrates the NPFC denial determination was erroneously issued. He relies on the Oil Pollution Act of 1990, the claims regulations and In Re Oil Spill by The

⁶ See jointly signed OSLTF Claim Form dated 30 Aug. 11.

Oil Rig "Deepwater Horizon" in the Gulf of Mexico 2011 U.S. Dist. LEXIS 96091 (E.D. La., July 29, 2011)⁷ to support his argument.

The Claimant states: "The court in the above referenced case in addressing the issue of proximate cause concluded there is no requirement of "a direct result" set forth in 33 U.S.C.S. (sic) 2701 claim to be it (sic) valid loss is due to or resulting from the Oil Spill." The Claimant states the Coast Guard denied the claim applying the wrong legal test and as such, the denial needs to be reconsidered in context within the current law.

- Claimant next argues that "this claimant was not subject to a moratorium and a denial based on citing moratorium as a basis for denial of payment is erroneous, not supported by the case law, and or the language of the moratorium."

The Claimant attached a copy of a Decision Memorandum issued by Ken Salazar suspending certain offshore permitting and drilling activities in the Gulf of Mexico and Pacific regions dated July 12, 2010. The Claimant states that a review of the Decision Memorandum "indicates specific activity that the Claimant was employed in was in fact exempted from the moratorium. This Claimant was laid off as a result of reduced business for operations that were permitted to continue. This Claimant was not subject to the effects of the moratorium and a denial based on citing the moratorium as a basis for denial of payment is erroneous, not supported by the case law, and or the language of the moratorium." He states that "reading the Memorandum of July 12, 2010 in conjunction with 33 CFR 136 and the OPA, that the "claim complies with existing law and Federal Status."

NPFC Determination on Reconsideration

Under 33 CFR 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 CFR § 136.233, a claimant must establish loss of profits or impairment of earning capacity and that the loss was due to the destruction or injury to real or personal property or natural resources. The NPFC considered all the documentation submitted by the Claimant. Further, the request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 CFR 136.115(d).

The NPFC performed a *de novo* review of the entire claim submission upon reconsideration. The NPFC analyzes the Claimant's reconsideration arguments below.

Adequacy of Claimant's Financial Documentation:

While Claimant argues that he has provided sufficient information to demonstrate his alleged financial loss of \$119,018.71 as a result of the BP Deepwater Horizon oil spill he did not provide additional financial information with his request for reconsideration. The NPFC denied the claim on September 15, 2011, in part because Claimant's sum certain included prospective or potential/projected damages. The Fund is available to reimburse claimants who establish that their damages were uncompensated. Claimant did not amend his sum certain or provide

⁷ The correct date of this decision is August 26, 2011.

information to establish that the \$119,018.71 was for uncompensated damages or damages already suffered.

The claims regulations require that a claimant must establish his loss of profits by providing documentation reflecting his profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered by income tax returns, financial statements, and similar documents. 33 CFR 136.233. 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 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.

Based on 33 CFR 136.233 (b) – (d), the Claimant has not met his burden in providing sufficient documentation to support his alleged loss. The Claimant did not provide a complete copy of his 2010 Income Tax Return which is a vital part of demonstrating his complete income status the year of the spill. More importantly, pursuant to 33 CFR 136.235(b) it states that the Claimant must establish all income from alternative employment or business undertaken. Because the Claimant did not provide his 2010 Income Tax Return, the NPFC cannot confirm whether or not the Claimant applied for and received unemployment compensation following his lay off or whether or not he had any business income since his prior year tax returns do identify both business income and (loss) in 2008 and 2009; Further the Claimant must establish any saved overhead or normal expenses not incurred as a result of the incident. The Claimant has failed to demonstrate any saved expenses that may have been associated with Business income since he has not addressed his business income for the year of the spill.

Additionally, pursuant to 33 CFR 136.233(c), the Claimant has not demonstrated the amount of his earnings in comparable periods by way of financial documents (i.e., pay stubs by pay period) which would enable the NPFC to independently confirm the figures provided by the Claimant in his “claim worksheet” that identifies wages earned in certain periods (i.e., May – Dec) for 2008 – 2010; therefore, the NPFC cannot determine, without supporting documentation, that the amounts provided in the “claim worksheet” are in fact accurate. Thus, Claimant has not established his alleged loss of income or lost profits.

Claimant's Argument re Loss Due to the Oil Spill

The Claimant argues that the NPFC's denial on the grounds that the claimant has not sufficiently demonstrated that the loss was the direct result of the discharge or substantial threat of discharge of oil, is flawed. He relies on the Claims Regulations at 33 CFR Part 136, stating that the regulations do not require that a claimant must demonstrate the loss is a direct result of the discharge or substantial threat of oil.

Claimant is in error. First, OPA provides that “damages for loss of profits or impairment of earning capacity *due to* the injury, destruction, or loss of real property, personal property, or natural resources shall be recoverable by any claimant.” 33 U.S.C. 2702(b)(2)(E). Also, the governing claims regulations located at 33 CFR 136.233(b), state that the Claimant must establish that the Claimant's income was reduced as a *consequence* of injury to, destruction of, or loss of the property or natural resources. Thus both OPA and the associated claims regulations require a direct relationship between the oil spill and a claimant's damages.

The Claimant cites In Re Oil Spill by The Oil Rig "Deepwater Horizon" in the Gulf of Mexico, 2011 U.S. Dist. LEXIS 96091, stating that "[T]he court in the above referenced case in addressing the issue of proximate cause concluded there is no requirement of "a direct result" set forth in 33 U.S.C.S. (sic) 2701 claim to be it valid loss is due to or resulting from the Oil Spill." The NPFC disagrees that the court concluded that there is no requirement of a direct result to seek damages from the Fund. Instead the court stated that it "need not define causation under OPA – necessarily a highly factual analysis – at this stage of the proceedings."

The NPFC agrees that determining "causation" or "due to" under OPA is a highly factual analysis. In this case the facts presented by the Claimant do not establish that he met his burden to establish that his alleged loss was due to the Deepwater Horizon oil spill. Claimant submitted a letter dated August 24, 2010 from his employer, John W. Stone Oil Distributor, L.L.C., that stated that the moratorium placed on offshore drilling in the Gulf of Mexico resulted in a large decrease of business for the company; therefore, the company reduced operating expenses by laying off several crews. The letter also stated that after the moratorium was lifted and normal business resumed, the company planned to restore both offshore and in Port Fourchon operations.⁸

In a second letter dated May 24, 2011, nearly six months after the moratorium was lifted, the Claimant's employer issued a second letter stating that the Gulf of Mexico spill resulted in a large decrease of business and that even though the Fourchon area was the hardest hit because of its large offshore customer base, the entire company felt the impact of the situation and the company was continuing to reduce operating expenses to maintain the company's financial well being.⁹

The well was capped on July 15, 2010; the moratorium was lifted on November 30, 2010. Yet according to the May 24, 2011 letter the company business had not returned to its normal operations. The letter noted that the company, in order to maintain financial well being, was continuing reduced operations more than one year after the oil spill. Thus it appears the company made a business decision to continue reduced operations based on factors other than the oil spill.

Claimant presented his claim to the NPFC on September 7, 2011, more than 17 months after the oil spill and more than a year after the well was capped. He maintains that he had not been called back from the layoffs. While the May 24, 2011 letter states that the oil spill caused the company's reduced operations and employee layoffs it is clear from the letter that other factors, such as economic conditions, may have been involved. The letter reflects that his employer made a business decision to continue reduced operations long after the well was capped and the moratorium was lifted. Thus, the facts presented by the Claimant do not establish that his continuing layoff was due to the oil spill.

In his original submission the Claimant provided a letter from his employer citing the moratorium as the reason for his layoff and alleged loss of profits; he provided no other reason. Thus the NPFC denied the claim, in part, on that basis. Only in his request for reconsideration does he note that his alleged loss of profits was not due to the moratorium but that he was "laid off as a result of reduced business operations that were permitted to continue." As discussed above it does not appear that the Claimant's continued layoff from his employer, John W. Stone Oil Distributor, L.L.C., was due to the oil spill, but due to a business decision to continue reduced operations in order to maintain financial stability for the company.

Based on the foregoing, the NPFC determines that the Claimant has again failed to demonstrate (1) that he has suffered a loss of profits in the amount claimed, and (2) that his alleged loss of

⁸ *Id*

⁹ *Id*

profits was 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.

This claim is denied upon reconsideration.

Claim Supervisor

Date of Supervisor's review: *11/21/11*

Supervisor Action: *Denial on reconsideration approved*

Supervisor's Comments: