

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: 1-800-280-7118
E-mail: arl-pf-npfcclaimsinfo@uscg.mil
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CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 9617

5890/DWHZ
30 April 2012

Arthur S. Barksdale IV, Esq.



Re: Claim Number: N10036-1723

Dear Mr. Barksdale:

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 your claim number N10036-1723 involving the Deepwater Horizon oil spill. Please see the enclosed 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. If, however 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 N10036-1723.

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: Barbara Lambert
8200 W Hwy 98 Ste B
Pensacola, FL 32506

USPS Certified Receipt: 7011 1570 0001 4802 9624

Enclosures: (1) Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1723
Claimant	Barbara Lambert
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$136,069.00

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 certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT

On 21 March 2012, Arthur S. Barksdale IV, on behalf of Barbara Lambert and Havana West Cafe (collectively, the Claimant), presented an optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$136,069.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

The Claimant is a small restaurant located in Pensacola, Florida.¹ The Claimant stated that the restaurant opened for business on 23 August 2010, with initial planning for the restaurant starting in October of 2009.² The Claimant asserted that, due to the Deepwater Horizon oil spill, the restaurant has not gotten as many patrons as expected to the restaurant, resulting in a drastic loss of earnings.³ Based on the expectation of receiving \$800.00 a day in lunch sales, the Claimant expected to have \$82,400.00 in gross receipts from August to December 2010, but only had \$36,798.00 in actual receipts.⁴ Likewise, the Claimant expected to have gross receipts of \$182,400.00 from 1 January 2011 through 16 October 2011, but only had actual gross receipts of \$91,933.00.⁵

APPLICABLE LAW

The Oil Pollution Act of 1990 (OPA) provides that each responsible party for a vessel or facility from which oil is discharged into or upon the navigable waters or adjoining shorelines or exclusive economic zone is liable for removal costs and damages. 33 U.S.C. § 2702(a). Damages include the loss of profits or impairment of earning capacity due to the injury, destruction or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant. 33 U.S.C. § 2702(b)(2)(E).

The OSLTF, which is administered by the NPFC, 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. With certain exceptions a claim must first be presented to the responsible party. 33

¹ Letter of claim explanation from the Claimant, dated 16 October 2011.

² Letter of claim explanation from the Claimant, dated 16 October 2011.

³ Letter of claim explanation from the Claimant, dated 16 October 2011.

⁴ Letter of claim explanation from the Claimant, dated 16 October 2011.

⁵ Letter of claim explanation from the Claimant, dated 16 October 2011.

U.S.C. § 2713(a). If the claim is either denied or not settled by any person by payment within 90 days after the date on which it was presented, the claimant may elect to commence an action in court or present the claim to the OSLTF. 33 U.S.C. § 2713(c).

Pursuant to the claims regulations, 33 C.F.R. § 136.233, a claimant must establish the following to prove loss of profits or impairment of earning capacity:

- (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 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 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

The Claimant's Submission to the OSLTF

In support of the claim, the Claimant presented the following documentation to the NPFC:

- Letter from Arthur S. Barksdale IV, Esq. to the NPFC, dated 20 March 2012;
- NPFC Authorization Agreement, signed by the Claimant on 19 March 2012;
- GCCF Full Review Final Payment Claim Form, 30 August 2011;
- Copy of Florida's Driver's License;
- Letter of claim explanation from the Claimant, dated 16 October 2011;
- Profit and Loss Statement for Havana West Café for the period 31 January 2010 through 31 December 2010;
- Profit and Loss Statement for Havana West Café for the period 01 January 2011 through 16 October 2011; and
- GCCF Client Authorization Form, signed by the Claimant on 30 August 2011.

Prior to presenting this claim to the NPFC, the Claimant filed a Full Review Final (FRF) claim with the GCCF for loss of earnings on 14 December 2011 in the amount of \$136,069.00.⁶ He was assigned Claimant ID # 1638412 and Claim # 9548285. This claim is still under review with the GCCF.⁷

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant's GCCF claim is the same as the subject matter of the claim before the NPFC, i.e., that due to the Deepwater Horizon oil spill, the restaurant experienced a loss of earnings. The NPFC deems that the Claimant's GCCF claim was properly presented to the responsible party and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1723 considers and addresses the earnings claimed in the claim presented to the responsible, specifically; GCCF Claim # 9548285 (FRF).

NPFC Determination

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 NPFC considered all documentation presented by the Claimant.

The Claimant has not provided financial information-- including expenses, profits, or earnings-- in comparable periods to the time when the claimed loss was suffered, as this was a start up business with no prior historical data. 33 C.F.R. § 136.233(c). Nor has the Claimant provided to the NPFC any projections or calculations listing the basis for the anticipated earnings of the restaurant. It has not shown, through the preponderance of the evidence, that the lack of sales for the restaurant occurred as a result of the Deepwater Horizon oil spill, as opposed to other factors such as a negative economic climate, miscalculation of expected sales, or inadequate marketing of a new business. Additionally, OPA does not pay for "projected losses;" rather, only real and documented damages incurred as a result of injury to, destruction of, or loss of property or natural resources. 33 C.F.R. § 136.233(b).

This claim is denied because the Claimant failed to meet its 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.

Claims Supervisor: *N [REDACTED] ication Division*

Date of Supervisor's Review: *4/30/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

⁶ Report from the GCCF dated 17 April 2012.

⁷ Report from the GCCF dated 17 April 2012.