

U.S. Department of  
Homeland Security

United States  
Coast Guard



Director  
National Pollution Funds Center  
United States Coast Guard

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US COAST GUARD  
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED  
Number: 7011 1570 0001 2445 2521

5890/DWHZ  
26 October 2012

Ms. Mary Madison



Re: Claim Number: N10036-1835

Dear Ms. Madison:

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 N10036-1835 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 N10036-1835.

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	N10036-1835
Claimant	Lagniappe Creole Cajun Joynt
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$60,000.00

### ***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 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 31 May 2012, Ms. Mary Madison (the Claimant) filed a claim with the Oil Spill Liability Trust Fund on behalf of Lagniappe Creole Cajun Joynt (Lagniappe) seeking \$60,000 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon incident.<sup>1</sup>

The Claimant owns and operates Lagniappe, a Creole and Cajun restaurant with two locations in Chicago specializing in Gulf Coast cuisine.<sup>2</sup> The Claimant alleges that the Deepwater Horizon incident caused a shortage of crawfish, a necessary ingredient for Lagniappe's specialty dish.<sup>3</sup> As a result, the Claimant was unable to procure sufficient amounts of crawfish to serve at Lagniappe and Chicago food festivals. The Claimant alleges that because of this, she suffered reduced revenues and incurred additional expenses to substitute menu items.<sup>4</sup>

As a result, the Claimant filed this claim seeking \$60,000 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon incident.<sup>5</sup>

### ***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

<sup>1</sup> Optional OSLTF Claim Form, signed 12 May 2012.

<sup>2</sup> Lagniappe Executive Summary.

<sup>3</sup> Optional OSLTF Claim Form, signed 12 May 2012;

<sup>4</sup> Response to GCCF inquiries, undated.

<sup>5</sup> Optional OSLTF Claim Form, signed 12 May 2012.

water, adjoining shorelines, or the exclusive economic zone of the United States, as described in § 2702(b) of OPA.

The OSLTF is available to pay claims for uncompensated damages pursuant to 33 U.S.C. § 2712(a)(4), § 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 and impairment of earning capacity due to injury to or destruction of natural resources.

33 C.F.R. § 136.233 requires that a claimant 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**

To support this claim, the Claimant submitted the following documentation:

- Optional OSLTF Claim Form, signed 12 May 2012;
- GCCF Denial Letter, dated 10 February 2012;

- GCCF Claim Packet signed 05(?) July 2011;
- GCCF Supporting Documentation Form, dated 21 December 2011;
- Response to GCCF Inquiries, undated;
- Food Vendor Agreement for 2010 Chicago Blues Festival and 2010 Taste of Chicago, both dated 13 April 2010;
- Email traffic verifying menu changes at 2010 Chicago Blues Festival and 2010 Taste of Chicago, dated 18 August 2010;
- 2009 and 2010 Restaurant Settlement Reports for Chicago Blues Festival;
- 2009 and 2010 Restaurant Settlement Reports for Taste of Chicago
- Email correspondence with Brant McWilliams, dated 24 September 2010;
- Correspondence with Edwin Walker re: Greyhound catering event, dated 5 June 2010;
- Invoice for Greyhound Bus Lines, dated 16 May 2010;
- 2009 and 2010 Profit & Loss Statements;
- Entertainment Contract with Phil Fornett Band, undated;
- Three marketing flyers for Blues & BBQ Thursday (Riverwalk), Jazz Friday (Riverwalk), and Jazz Thursday (1525 West 79th Street);
- Weekly receipts for live music for 03 June 2010 through 29 October 2010;
- Correspondence from Tommye Brown, dated 02 September 2010;
- Email correspondence with Daniel Kurczak, dated 28 May 2010;
- News articles re: anticipated menu and menu change for Lagniappe at Taste of Chicago;
- Lagniappe Executive Summary;
- Attorney information section of GCCF Claim Form; and
- Response to NPFC Request for Additional Information.

On 31 May 2012, the Claimant presented this claim to the NPFC seeking \$60,000 in loss of profits and impairment of earning capacity damages.<sup>6</sup> Prior to presenting this claim to the NPFC, the Claimant presented a claim to the RP/GCCF.<sup>7</sup> It appears that the subject matter for the RP/GCCF claim is identical to the claim now before the NPFC—i.e., that a crawfish shortage, caused by the Deepwater Horizon incident, made the Claimant unable to serve her signature dish at food festivals and in her restaurant, which in turn caused decreased sales. The RP/GCCF denied her claim on 10 February 2012.<sup>8</sup> Accordingly, this claim satisfies OPA presentation requirements and the NPFC may properly adjudicate this claim.

### **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.

This claim is denied, as the Claimant has failed to establish that her alleged financial loss is the result of the Deepwater Horizon incident. In order to prove a claim for loss of profits damages, a claimant must provide documentation sufficiently proving (1) that the claimant sustained an

<sup>6</sup> Optional OSLTF Claim Form, signed 12 May 2012.

<sup>7</sup> GCCF Claim Packet, signed 05(?) July 2009.

<sup>8</sup> GCCF Denial Letter, dated 10 February 2012.

actual financial loss, and (2) that the discharge of oil resulting from the Deepwater Horizon oil spill caused that loss.

### *1. Financial Loss*

The Claimant filed this claim seeking \$60,000 in loss of profits and impairment of earning capacity damages.<sup>9</sup> The actual extent of the Claimant's financial loss is unclear. The Claimant alleged decreased revenues and a number of various expenses incurred as a result of a crawfish shortage caused by the Deepwater Horizon incident, including substantially increased advertising expenses costs associated with implementing a new music program at Lagniappe.

The root of this claim is the Claimant's allegation that the Deepwater Horizon incident caused a crawfish shortage. As a result, the Claimant alleged that she was unable to serve a crawfish boil—Lagniappe's signature dish—at major food Chicago festivals.<sup>10</sup> The Claimant was unable to substitute a dish for the 2010 Chicago Blues Festival, but was able to substitute pulled pork sandwiches—an offering with more competitors—for the 2010 Taste of Chicago. The Claimant's submissions do in fact demonstrate that her income from the food festivals dropped 28.7 percent (\$25,900.31) in 2010 from her 2009 receipts (a year in which the crawfish boil was offered).<sup>11</sup>

The Claimant also alleged that the Deepwater Horizon incident caused Lagniappe's business to suffer. The Claimant's financial documentation shows that Lagniappe's net income was \$2,902 lower in 2010 than in 2009.<sup>12</sup> It is not clear, however, if the Claimant's financial documentation incorporates the revenues received from the Chicago food festivals—i.e., losses already accounted for—or if it reflects only those revenues received in the restaurant's two permanent locations. Without such information, the NPFC is unable to determine what, if any, loss in day-to-day operations is unaccounted for.

To combat Lagniappe's declining business, the Claimant alleged that she incurred substantial costs associated with implementing and promoting a weekly live music program.<sup>13</sup> The Claimant alleged that these costs totaled \$34,500 plus an additional \$3,000 in printed and promotional materials.<sup>14</sup> The Claimant has not provided documentation establishing these amounts, however. The entertainment contract is unsigned and undated.<sup>15</sup> As such, the NPFC is unable to verify when the Claimant actually began the music program. Further, the Claimant has not provided any documentation substantiating her claim for costs associated with promoting and printing. Without such documentation, the Claimant has not established that she incurred these costs.

The Claimant has therefore not established that she indeed suffered a financial loss in the full amount alleged. She has only provided sufficient documentation to establish that she suffered a financial loss of \$25,900.31 from reduced net payments from the Chicago food festivals. As such, the difference between the amount claimed and the loss established—a total of \$34,099.69—is denied for failure to establish a financial loss.

<sup>9</sup> Optional OSLTF Claim Form, dated 12 May 2012.

<sup>10</sup> Optional OSLTF Claim Form, dated 12 May 2012; Response to GCCF Inquiries, undated.

<sup>11</sup> In 2009 the Claimant received a total of \$90,139.48 from the Chicago Blues Festival and Taste of Chicago. Her 2010 income from those two festivals totaled \$64,239.17. 2009 Chicago Blues Festival Restaurant Settlement Report; 2009 Taste of Chicago Restaurant Settlement Report; 2010 Chicago Blues Festival Restaurant Settlement Report; 2010 Taste of Chicago Restaurant Settlement Report.

<sup>12</sup> Lagniappe's net income was \$179,509 in 2009 and \$176,607 in 2010. 2009 Income Statement; 2010 Income Statement. Lagniappe did suffer a \$1,370 loss in January 2010 (\$1,619 less than January 2009), which predates the Deepwater Horizon incident. 2009 Income Statement; 2010 Income Statement.

<sup>13</sup> Response to GCCF Inquiries, undated.

<sup>14</sup> Response to GCCF Inquiries, undated.

<sup>15</sup> Entertainment Contract, undated.

## 2. *Failure to Prove Deepwater Horizon Incident Caused Alleged Loss*

Additionally, the Claimant has not established that the Deepwater Horizon incident caused her alleged financial loss. The Claimant has provided documentation establishing that her food purveyors did indeed have difficulty procuring enough crawfish to fill her orders for two Chicago food festivals (which were significantly larger than her typical orders needed to supply Lagniappe's permanent locations).<sup>16</sup> The Claimant has not, however, established that the Deepwater Horizon incident caused this crawfish shortage.

Crawfish are freshwater crustaceans farmed and harvested inland, far from areas impacted by the Deepwater Horizon incident. The Louisiana Department of Agriculture & Forestry (LDAF) stated publicly that "crawfish is a freshwater seafood and will not be affected by the Deepwater Horizon oil spill."<sup>17</sup> In the LDAF statement, Professor Robert Romaine of the LSU AgCenter stated, "There are no crawfish ponds sufficiently close to the coast that can be impacted by the oil spill."<sup>18</sup> The Claimant has not provided evidence establishing the causal link between the Deepwater Horizon incident and an inability to procure sufficient amounts of crawfish to supply her needs for Lagniappe's operations or the Chicago food festivals aside from her food purveyors' allegations that it was the Deepwater Horizon incident that made them unable to procure enough crawfish to fill the Claimant's orders. These allegations, without more, do not establish the necessary causal link, particularly in light of official pronouncements directly contradicting these allegations.

As noted above, there may have been a crawfish shortage although the Claimant has not, however, established that the crawfish shortage was a result of the Deepwater Horizon incident and is therefore not an OPA compensable loss.

This claim of \$60,000 is denied in its entirety because the Claimant has not demonstrated (1) a financial loss in the amount alleged, 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: *10/26/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

<sup>16</sup> Correspondence from Tommye Brown, dated 02 September 2010; PHONECON: NPFC Staff and Tommye Brown, 08 June 2012; Email Correspondence from Daniel Kurczak, dated 27 May 2010.

<sup>17</sup> Press Release, Louisiana Department of Agriculture & Forestry, *Louisiana Crawfish Crop Unaffected by Oil Spill*, 10 May 2010.

<sup>18</sup> Press Release, Louisiana Department of Agriculture & Forestry, *Louisiana Crawfish Crop Unaffected by Oil Spill*, 10 May 2010.