

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 8640

5890/DWHZ
24 August 2012

BioMarine Technologies, Inc.



Re: Claim Number: N10036-1851

Dear Ms. McDougal:

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 N10036-1851 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 N10036-1851.

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

cc: BioMarine Technologies, Inc.
100 Northcliff Drive, # 776
Gulf Breeze, FL 32562-0776

By Certified Mail:
No. 7011 1570 0001 4803 8633

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1851
Claimant	BioMarine Technologies, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$250,000,000.00

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 25 June 2012, the law firm of Baron & Budd, P.C., on behalf of BioMarine Technologies, Inc. (collectively, "the Claimant") presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$250,000,000.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

BioMarine Technologies, Inc., was incorporated in 1989, and "set out to create an oceanic fish farm, utilizing the Gulf's natural marine salt water environment to produce organic . . . fish and other aquatic animals for human consumption through the use of offshore fish hatcheries and large open-ocean cages."² The farm was to be located in the Gulf of Mexico, approximately 9.9 miles south of Perdido Pass, Alabama.³ Over the next 21 years, the Claimant took various steps toward development of the business, including securing site permits from the United States Environmental Protection Agency and the U.S. Army Corps. of Engineers. However, as of the date of the oil spill, the Claimant had not actually begun site development and had not established a proposed operating base near Perdido Pass.

The Claimant alleged, however, that on May 2, 2010, when the National Oceanic and Atmospheric Administration (NOAA) closed federal fishing waters, including the waters encompassing the Claimant's proposed operating site, the Claimant was "within months of launching its aquaculture operations in the Gulf of Mexico."⁴ Although these waters reopened to fishing later that summer, the Claimant did not proceed with its business plan, citing fears of seafood contamination and the possibility that consumers would not want to purchase Gulf

¹ Optional OSLTF Claim Form, received on 25 June 2012.

² GCCF Hardship Letter, dated 1 December 2011.

³ GCCF Hardship Letter, dated 1 December 2011.

⁴ Brief in Support of Claim Under Oil Pollution Act.

seafood. As a result, the Claimant seeks recovery of \$250,000,000.00 in potential business losses allegedly already incurred and expected to be incurred over a ten year period.

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 § 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.
- (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.

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 OSLTF

To support this claim, Claimant submitted the following documentation:

- Optional OSLTF Claim Form, signed on 21 June 2012;
- Authorization for Representation by Baron & Budd, P.C., signed by John D. Ericsson, 25 June 2012;
- Claim cover letter, 21 June 2012;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 31 May 2012;
- Claim cover letter re GCCF claim, 30 December 2011;
- Claim index
- Hardship Letter, 1 December 2011;
- Document entitled, "Final Claim Summary";
- GCCF Full Review Final Payment Claim Form, Claimant # 3438063, including supplementary documentation;
- List of References;
- Map of Gulf of Mexico Fishery Closure, 21 June 2010;
- Brief supporting claim under OPA;
- Loss of Profits Report, Herod Consulting;
- Florabama Offshore marine Sea Farming power point presentation;
- Gulf of Mexico Sea Farming Project Assumptions;
- Florabama 7 Year Project Proforma;
- Audited Financials, Inception to September 2007;
- Unaudited Financials, 2007 to 2010;
- USACOE Site Permit Documents;
- USEPA Site Permit Documents;
- Florabama Sea Farming Site Drawings with Modifications for 56 Cages (Phases I, IIA, and IIB);
- Photographs of Equipment;
- Various articles regarding the Deepwater Horizon oil spill and presented in support of claim for future damages.

On 30 December 2011, the Claimant submitted an Interim Payment/Final Payment claim to the RP/GCCF, seeking \$250,000,000.00 in loss of profits or impairment of earning capacity damages, allegedly incurred as a result of the Deepwater Horizon oil spill.⁵ The Claimant was assigned Claimant ID 3438063. The GCCF denied payment on the claim in a determination letter dated 31 May 2012.⁶

On 25 June 2012, the Claimant submitted this claim to the NPFC, seeking \$250,000,000.00 in loss of profits or impairment of earning capacity damages incurred as a result of the Deepwater Horizon oil spill.⁷ Information in this claim submission indicates that the Claimant properly first submitted this claim to the GCCF, prior to its submission to the NPFC. Any damages presented in this claim which were not first presented to the GCCF, however, would be denied for improper presentment.⁸

⁵ Optional OSLTF Claim Form, signed on 21 June 2012; GCCF Hardship Letter, 1 December 2011.

⁶ GCCF Determination Letter, dated 31 May 2012.

⁷ Optional OSLTF Claim Form, signed on 16 July 2012.

⁸ 33 C.F.R. S 136.103(a).

Additionally, the NPFC notes that evidence presented in this claim submission indicates that the Claimant is a member of the Deepwater Horizon oil spill economic and property damages class action settlement (the E&PD Settlement).

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.

As an initial matter, it appears that the Claimant is a member of the economic damages class of the E&PD Settlement. This claim is therefore considered to have been settled, and the Claimant is ineligible to recover funds from the OSLTF. According to OPA, the payment of any claim by the NPFC is subject to the NPFC's ability to obtain, by subrogation, the rights to recover all costs and damages from the responsible party. If a claim has been settled, the Claimant no longer has rights to the claim and therefore cannot subrogate the NPFC to those rights. Accordingly, while this claim may not have been quantified or paid, it is considered to have been settled by virtue of the Court's preliminary approval of the settlement agreement.

Further, even if the Claimant was excluded from the E&PD Settlement, they have presented evidence indicating that they are currently involved in litigation regarding the damages that are the subject of this claim.⁹ Pursuant to 33 U.S.C. §2713(b)(2), no claim of a person against the Fund may be approved or certified during the pendency of an action by the person in court to recover costs which are the subject of the claim.

However, even if this claim had not been settled or is not currently involved in litigation, it would nonetheless be denied under OPA's loss of profits damage category as the Claimant has failed to provide evidence sufficient to prove that they have sustained an actual financial loss as a result of the Deepwater Horizon oil spill.

Loss of Profits or Impairment of Earning Capacity Damage analysis

In order to prove a claim for loss of profits damages, a claimant must provide evidence sufficient to prove (1) that the claimant sustained an actual financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill. Here, as explained in more detail below, the Claimant has proved neither.

Before addressing the merits of the Claimant's lost profits and earnings claim, it must be noted that speculative and future damages are not compensable under OPA's loss of profits damage category, which limits potentially available compensation to "the actual net reduction or loss of earnings or profits *suffered*" [emphasis added].¹⁰ Included in the Claimant's damage calculations are ten years of future damages.¹¹ This claim is therefore denied to the extent that at the time of this claim presentment, the Claimant has not actually incurred the damages that are the subject of this claim.

⁹ Optional OSLTF Claim Form, received on 25 June 2012, referencing Case 2:10-cv-08888-CJB-SS, Short Form Document 57892, Filed 4/18/2011.

¹⁰ 33 C.F.R. § 136.235.

¹¹ GCCF Hardship Letter, 1 December 2011.

Regarding the merits of the Claimant's lost profits and earnings claim, any remaining damages presented in this claim are likewise denied, as the Claimant has failed to provide evidence sufficient to prove that the discharge of oil resulting from the Deepwater Horizon oil spill actually caused the Claimant to be unable to launch its proposed aquaculture business.

The Claimant alleged that at the time of the oil spill, they "were within months of launching [their] aquaculture operations."¹² The Claimant specifically states that due to the oil spill, the business was "unable to secure the necessary crop, livestock and product liability insurance for its operations."¹³ However, the Claimant has failed to provide evidence sufficient to prove that they had actually attempted and were unable to secure crop, livestock and insurance following the Deepwater Horizon oil spill. Rather, documentation provided by the Claimant indicates that the company had initially begun planning its aquaculture farm at least as early as 1989, but that operations had not yet begun in 2010.

The Claimant also states that "[a]lthough BioMarine had all of the necessary permits, platforms, personnel, and equipment to operate, investors and insurers retracted their commitments after the Spill."¹⁴ In addition to failing to provide proof that the Claimant had actually sought these necessities, the Claimant has also not provided any evidence to show that investors and insurers actually withdrew their support of the Claimant's project following and because of the oil spill.

The Claimant has presented various documents regarding the development plan for the proposed aquaculture business. For example, in a document entitled "Gulf of Mexico Sea Farming Project Assumptions", the Claimant identifies "Phase 1" as an initial research and development stage, encompassing certain activities over a two year period. In unidentified "Year 1," the Claimant intends to "start building hatchery and install up to 5 Bridgestone sea cages with goal of one growout cycle of 50,000 fish per cage." In Year 2, the Claimant plans to "start fingerling production & continue R & D with goal of 75,000 fish per Bridgestone sea cage and add five sea cages." Then in Year 3, the Claimant plans to begin commercial development.¹⁵ The Claimant's business plan also states that "[n]ew facilities will be acquired, expanded and remodeled for offices, laboratory, hatchery, nursery, and education and research labs."¹⁶ The Claimant has failed to provide evidence that any of these activities had actually taken place prior to the oil spill, nor has the Claimant shown that any of these activities have since taken place in the years following the spill. This claim submission therefore fails to contain evidence sufficient to prove that the Claimant was actually prepared to begin operations at the time of the oil spill.

Furthermore, audits of the Claimant's financial statements indicate that for several years preceding the oil spill, the Claimant had been sustaining substantial business losses. An auditor's report of December 1, 2007, states that,

[a]s shown in the financial statements, [the Claimant] has incurred net losses since its inception and has experienced severe liquidity problems. Those conditions raise substantial doubt about the Company's ability to continue as a going concern.¹⁷

¹² Brief in support claim under Oil Pollution Act, at 1.

¹³ Final claim summary, BioMarine Technologies, Inc.

¹⁴ Brief in support of claim under Oil Pollution Act, at 2.

¹⁵ Florabama Site, Gulf of Mexico Sea Farming Project Assumptions.

¹⁶ Florabama Site, Gulf of Mexico Sea Farming Project Assumptions.

¹⁷ DRDA Auditors' Report, 1 December 2007.

This report was compiled approximately 19 years following the incorporation of the company, and at that time, the Claimant had not initiated "Phase 1" of the development plan. Although the Claimant has stated that other infusions of capital were available to the company after the report, and have demonstrated that they had secured a site permit to develop the aquaculture farm, this is insufficient to prove that the Deepwater Horizon oil spill had any affect on the Claimant's operations, especially considering that over 23 years have elapsed since the incorporation of the Claimant's business.

As such, the Claimant has failed to provide evidence sufficient to prove that the Deepwater Horizon oil spill and not other factors which had delayed the start of operations for many years, caused the Claimant to be unable to earn income operating an oceanic fish farm in the Gulf of Mexico.

Based on the foregoing, this claim is denied because the Claimant has failed to meet their burden to demonstrate (1) that they sustained an actual financial loss in the amount of \$250,000,000.00, 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. Furthermore, this claim is considered to have been settled by virtue of Claimant belonging to the economic damages class associated with the CSSP.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *8/24/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments: