

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
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 800-280-7118
E-mail: arl-pf-npfcclaimsinfo@uscg.mil
Fax: 703-872-6113

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

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5890/DWHZ

13 November 2012

Total Refrigerated Services, Inc.



Re: Claim Number: N10036-1858

Dear Mr. Weber:

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 N10036-1858 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 N10036-1858.

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	N10036-1858
Claimant	Total Refrigerated Services, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity/Real Property
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 6 July 2012, Mr. Michael Weber on behalf of Total Refrigerated Services (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$60,000,00 in loss of profits or impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

The Claimant owns a "public cold storage facility" in Fort Lauderdale, Florida.² The business services a wide variety of clientele, including those in the "fishing/bait" and restaurant industries. The Claimant alleged that "[t]he bait caught in the Gulf was severely affected by the spill due to restrictions imposed by authorities . . . tourists that would normally visit Florida to fish, and use the bait, were canceling their vacations."³ The Claimant also alleged that general decreases in tourism in the Fort Lauderdale area caused restaurant customers to decrease their business with the Claimant.

The Claimant calculated that the oil spill caused him to sustain a loss of approximately \$60,000.00 over a four-month period as a result of effects of the Deepwater Horizon oil spill.⁴

APPLICABLE LAW

¹ Optional OSLTF Claim Form, signed on 28 June 2012.

² Letter from the Claimant to the NPFC, 28 June 2012.

³ Letter from the Claimant to the NPFC, 28 June 2012.

⁴ Letter from the Claimant to the NPFC, 28 June 2012.

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 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) and § 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 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; 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

The Claimant submitted the following documentation in support of this claim:

- Optional OSLTF Claim Form, signed on 28 June 2012;
- Letter from the Claimant explaining losses, 28 June 2012;
- Letter from Karen L. Bell in support of this claim, 9 January 2012;
- Letter from Tim Monroe in support of this claim, 19 January 2012;
- Letter from Carl Raffield in support of this claim, 2 February 2012;
- 2009 Form 1120S, showing ordinary business income of \$5,577.00;
- 2009 Form 4797;
- 2009 Federal Depreciation Schedule;
- 2010 Form 1120S, showing ordinary business income of \$30,326.00;
- 2010 Form 8941;
- 2010 Form 4562;
- 2011 Form 1120S, showing ordinary business income of \$28,082.00;
- 2011 Form 4562.

On 6 July 2012, the Claimant presented this claim to the NPFC, seeking \$60,000.00 in loss of profits or impairment of earning capacity damages.⁵ The Claimant alleged to have presented this claim to both BP and the GCCF prior to its presentment to the NPFC.⁶ The NPFC does not have evidence to independently verify this assertion. However, the NPFC will adjudicate this claim to the extent that it has been first presented to, and denied by the responsible party.⁷ Any damages now before the NPFC which have not been properly presented are denied.

In a letter dated 23 July 2012, the Claimant stated that due to the location of his business, he is not a member of the Deepwater Horizon Economic and Property Damage Settlement class (E&PD Settlement).⁸

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.

In order to prove a claim for loss of profits damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an "actual net reduction or loss of earnings or profits"⁹ and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill. Here, where the Claimant is a business, the Claimant must prove that he sustained an actual reduction in profits as a result of the Deepwater Horizon oil spill. The

⁵ Optional OSLTF Claim Form.

⁶ Letter from the Claimant to the NPFC describing losses, 28 June 2012.

⁷ 33 C.F.R. § 136.103(c)(2).

⁸ Letter from the Claimant to the NPFC, 23 July 2012.

⁹ 33 C.F.R. § 136.235.

reduction in profits must be evident when comparing the Claimant's earnings during the claimed loss period, with his earnings in a similar, but unaffected period.¹⁰

The Claimant alleged to have sustained a loss of \$60,000.00 as a result of losses related to the fishing water closures in the Gulf of Mexico, as well as due to decreases in tourism in and around Fort Lauderdale following the Deepwater Horizon oil spill. However, financial documentation provided by the Claimant fails to prove that he sustained an actual loss of profits in any period following the oil spill.

The Claimant points to 2009 and 2010 income tax returns, which the Claimant states indicates a total income "decrease of \$101,243.00."¹¹ However, tax returns fail to prove that any variations in the Claimant's gross income from 2009 through 2011 actually resulted in the Claimant incurring a loss of profits. Rather, it appears that the Claimant earned substantially higher profits in 2010 as compared to 2009; \$30,326.00 in 2010 and \$5,577.00 in 2009.¹² Furthermore, the Claimant has not provided evidence to indicate when his alleged losses began. The only financial data provided by the Claimant indicates that in 2010 and 2011, he earned substantially higher profits than in 2009.

Based on the foregoing, the Claimant has failed to provide evidence sufficient to prove (1) that he sustained a loss of profits in the amount \$60,000.00, or (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 discharge of oil.

Claim Supervisor: *NP* 

Date of Supervisor's Review: *11/13/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁰ 33 C.F.R. § 136.233(c).

¹¹ Letter from the Claimant to the NPFC, 28 June 2012.

¹² 2009, 2010 Forms 1120S.