

U.S. Department of
Homeland Security

United States
Coast Guard



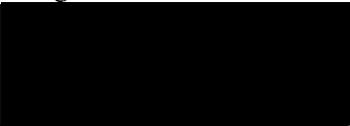
Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 8831

5890/DWHZ
13 November 2012

Highland Fish Market



Re: Claim Number: N10036-1867

Dear Mr. Hirsch:

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 N10036-1867 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 N10036-1867.

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: (1) Claim Summary/Determination
(2) Evidence Presented in Support of N10036-1867

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1867
Claimant	Highland Fish Market
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$674,275.05

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 8 August 2012, Mr. Gary Hirsch, on behalf of Highland Fish Market (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking a total of \$674,275.05 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

The Claimant is the owner of Highland Fish Market, located in Louisville, Kentucky.² The business specializes in the sale of fresh seafood and wine. The Claimant alleged that "[f]rom approximately one week after the BP Oil Spill until [approximately January 1, 2011], the Highland Fish Market Incorporated became unprofitable as margins and consumer confidence has been dismantled."³ Although the Claimant does not allege that his seafood supply was affected by the oil spill, he asserts that the oil spill caused a nation-wide decrease in seafood consumption in general.

The Claimant alleged that the value of his business decreased by \$595,000.00 and that he sustained a revenue loss of \$79,275.05 as a result of allegedly lower seafood sales resulting from the Deepwater Horizon oil spill.⁴

APPLICABLE LAW

¹ Optional OSLTF Claim Form, received on 16 October 2012.

² Supplier List, provided in response to NPFC Request for Additional Information.

³ Letter from the Claimant to the NPFC, describing claim, received by the NPFC on 10 January 2011.

⁴ Letter from the Claimant to the NPFC, describing claim, received on 14 January 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:
See Enclosure.

On 8 August 2012, the Claimant submitted this claim to the NPFC, seeking a total of \$674,275.05 in loss of profits or impairment of earning capacity damages. This includes a claim for \$79,275.05 in lost revenue, as well as \$595,000.00 for the loss of value of the Claimant's business.⁵

Prior to presentment of this claim to the NPFC, the Claimant submitted the claim to both BP and the GCCF. BP initially issued payment to the Claimant in the amount of \$34,531.10 on 7 August 2010. The claims process was then transferred to the GCCF.

Subsequent claims filed by the Claimant with the GCCF were denied for the Claimant's failure to prove that his losses were caused by the Deepwater Horizon oil spill. All claims submitted by the Claimant with the GCCF were under the Claimant ID # 1064848. Because the Claimant has previously presented claims for loss of profits or impairment of earning capacity damages, concerning the same losses as now presented to the NPFC, these damages may be properly adjudicated by the NPFC.⁶

In a letter to the NPFC on 23 October 2010, the Claimant confirmed that due to the geographic location of his business, this claim is excluded from 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.

In order to prove a claim for loss of profits or impairment of earning capacity damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an identifiable financial loss, and (2) that the loss was caused by damage to property or natural resources resulting from the Deepwater Horizon oil spill.

This determination shall address each type of damage allegedly sustained by the Claimant, including his claim for loss of revenue as well as a claim for the loss of value of the Claimant's business.

Regarding this claim for \$79,275.05 based on a decrease in seafood sales following the oil spill, the Claimant has failed to prove that this alleged loss was the result of the oil spill.⁷ In terms of proving causation, it is not sufficient to merely prove that *any* effect of the oil spill and associated events somehow contributed to the Claimant's loss. Rather, a Claimant must specifically prove that their financial loss was "due to the injury to, destruction of, or loss of real or personal property or natural resources," resulting from the discharge of oil.⁸

The Claimant alleged that although he did not necessarily sell seafood from the Gulf, the oil spill caused a generalized fear throughout the country regarding the safety of seafood consumption, regardless of the source of the seafood. The Claimant has presented various articles and studies in support of this contention. However, the Claimant has not proven that his business was actually affected by the oil spill, for example, by proving that he was unable to buy seafood as a result of the closure of fishing waters

⁵ Letter from the Claimant to the NPFC, describing claim, received on 14 January 2012.

⁶ 33 C.F.R. § 136.103(a).

⁷ 33 C.F.R. § 136.1, The OSLTF is available to pay "certain uncompensated removal costs or uncompensated damages resulting from the discharge or substantial threat of discharge, of oil from a vessel or facility into or upon the navigable waters, adjoining shorelines, or the exclusive economic zone."

⁸ 33 C.F.R. § 136.231(a).

following the spill. Therefore, this loss is not compensable under OPA, as it is not the result of “injury to, destruction of, or loss of real or personal property or natural resource” caused by the discharge or substantial threat of discharge of oil resulting from the Deepwater Horizon oil spill.

The Claimant also claimed to have sustained a loss of \$595,000.00 based on the alleged loss of value of his business. However, losses based on value diminution, which have not resulted in a realized loss, are not compensable under OPA’s loss of profits or impairment of earning capacity damage category, which limits potentially available compensation to “the actual net reduction or loss of earnings or profits suffered.”⁹ Because the Claimant has not sold his business, he has not realized a loss. Furthermore, even if he had sold the business at a lower price, thereby realizing a loss, this claim would be denied as the Claimant has failed to provide evidence that might prove that the discharge of oil from the Deepwater Horizon oil spill was the cause of the decrease in the Claimant’s business value.

Based on the foregoing, the Claimant has failed to provide evidence sufficient to prove (1) that he sustained a financial loss in the amount \$674,275.05, 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: *NPI*

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

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

⁹ 33 C.F.R. § 136.235.

Enclosure
Evidence Presented in Support of
NPFC Claim # N10036-1867

- Letter from the Claimant regarding resubmission of withdrawn claim, received on 8 August 2012;
- Optional OSLTF Claim Form, received on 8 August 2012;
- Optional OSLTF Claim Form, claim N10036-0476;
- Letter from the Claimant regarding non-inclusion in E&PD Settlement, 23 October 2012;
- Article, *Oil Spill, One Year Later*, Seafood Business, June 2011;
- LSU Seafood Study, December 2010;
- Article, *Survey Measures Post-oil Spill Seafood Attitudes*, wrq.com, 31 January 2011;
- Article, *U of Minnesota Study: Americans worried about the quality of Gulf seafood*, 28 June 2010;
- Article, *Gulf Spill Fix Part 2: Consumer Confidence*, HuffPost Food, 12 April 2011;
- Article, *Gulf Oil Spill – Can Region Keep its Seafood on America’s Dinner Tables?*, The Christian Science Monitor, 24 September 2010;
- Article, *Gulf Oil Spill Affects Shrimp Business, From Boat to Table*, MetroWest Daily News, received on 24 March 2011;
- Letters from Gary Hirsch to the NPFC, describing claim, received on 14 January 2011, 10 January 2011;
- Deepwater Horizon oil spill, Wikipedia, 14 December 2010;
- Letter from ESIS to the Claimant, 14 July 2010;
- Income/Expense Comparisons by Category, 2008, 2009, 2010;
- Letter from BP to the Claimant, 06 August 2010, re payment of \$34,531.10;
- Documentation of payment to the Claimant, 08/07/2010;
- Letter from the Claimant to BP, requesting additional payment, 2 November 2010;
- GCCF Supplemental Request Form For Emergency Advance Payments for Lost Earnings or Profits, Claimant #: 1064848;
- Letter from the GCCF to the Claimant, 23 August 2010;
- Letter from the GCCF to the Claimant, 18 November 2010 regarding lock of documentation illustrating percentage of sales attributable to Gulf seafood;
- Letter from the GCCF to the Claimant, 4 December 2010, denying payment on Emergency Advance Payment claim;
- Letter from the GCCF to the Claimant, 7 December 2010, denying payment on Supplemental Emergency Advance Payment claim;
- Consultation Fee Agreement, 26 February, 2010;
- Email from Michael Macaуда, 20 July 2010;
- Article, *Impact on Seafood Prices is Limited*, wsj.com, undated;
- Email from Michael Macaуда, 21 October 2010;
- Article, *Oil Spill Compensation for Gulf Businesses not coming Easy Enough*, The Republic, undated;
- Article, *Experts: Gulf Coast seafood industry faces perception problem*, gulflive.com, 28 November, 2010 (article mostly illegible);
- Article, *Experts Disagree on Seafood Safety*, sunherald.com, undated;
- Articles of Incorporation, of Highland Fish Market, Inc.;
- Certificate of Trademark Renewal, 11 April 2007;

- Response to questions regarding business operations, received on 24 February 2010;
- Yearly cash flow chart, 2010;
- Seafood Supplier list;
- Chart of monthly sales, 2007 – February 2011;
- 2007 Form 1120, showing gross sales of \$450,622.00;
- 2007 Form 4562;
- 2007 Kentucky Corporation Income Tax and LLET Return;
- 2008 Form 1120, showing gross sales of \$ 421,152.00;
- 2008 Kentucky Corporation Income Tax and LLET Return;
- Documentation of the fluctuation of seafood prices following the Deepwater Horizon oil spill;
- 2009 Form 1120, showing gross sales of \$464,960.00;
- 2009 Form 4562.