

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: 7012 2210 0001 7214 9586

5890/DWHZ
21 June 2013

Phi Van Nguyen


Re: Claim Number: N10036-1933

Dear Mr. Nguyen,

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 N10036-1933 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 N10036-1933.

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	N10036-1933
Claimant	Phi Van Nguyen
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$53,806.00

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 29 April 2013, Mr. Phi Van Nguyen, ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$53,806.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

Starting in January of 2010, the Claimant alleged to have been employed as "a deckhand on a shrimp boat" operating out of Panama City, Florida.² As a result of the closure of federal fishing waters following the spill, the Claimant alleged to have lost fishing opportunities he otherwise would have had, resulting in a loss of profits of \$53,806.00. Specifically, the Claimant alleged that "[a]s a result of the Oil spill, many fishing/shrimping zones were closed resulting in greatly reduced fishing/shrimping areas, and greatly affecting the ability to fish/shrimp at all."³

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 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.

¹ Optional OSLTF Claim Form, received on 15 May 2013.

² Claim Cover Letter, undated.

³ Letter from Claimant received 15 May 2013.

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, received on 15 May 2013;
- Letter describing loss of income, received on 15 May 2013;
- Employer's sworn statement, signed 29 April 2013;
- Sum certain calculation;
- Pay receipts 4/3/2010 through 6/5/2010;
- Form W-2 2008 and 2009;
- IRS tax return forms 2008 and 2009.

The Claimant alleged that this claim was first presented to the Responsible Party on 05 January 2013.⁴ The Claimant stated that the Responsible Party denied their claim and they have not commenced an action in court to recover costs.⁵ The NPFC does not have the information necessary to verify these assertions.

On 15 May 2013 the Claimant submitted this claim to the NPFC asserting to have sustained \$53,806.00 in loss of profits or impairment of earning capacity damages. The NPFC will adjudicate this claim to the extent that presentment requirements have been satisfied. If any of the damages subject of this claim were not presented to and denied by the Responsible Party, these damages are denied for failing to meet presentment requirements.⁶

Furthermore, evidence 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).⁷

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 E&PD Settlement class. 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.

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. If the Claimant disagrees that he is a member of the economic damages class of the E&PD Settlement, he should submit evidence to indicate that he has either opted out or is excluded from the E&PD Settlement in his request for reconsideration of this claim.

Furthermore, this claim would also be denied on its merits. In order to prove a claim for loss of profits damages, a Claimant must provide evidence sufficient to prove (1) that the Claimant sustained a loss or reduction in income, and (2) that the financial loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

The Claimant seeks to recover three years of earnings for the periods of April through June, 2010 through 2012. However, the Claimant has not provided evidence to document his actual earnings in any of these years. The OSLTF is available to compensate a claimant's "net reduction or loss of earnings or profits suffered" not including future damages, or damages

⁴ Optional OSLTF Claim Form, received on 15 May 2013.

⁵ Optional OSLTF Claim Form, received on 15 May 2013.

⁶ 33 C.F.R. § 136.103(a).

⁷ The Claimant has not indicated that they have either opted out or are excluded from the E&PD Settlement Class. See, e.g., Seafood Compensation Program, <http://www.deepwaterhorizoneconomicsettlement.com/>.

otherwise mitigated by the Claimant.⁸ Because the Claimant has not provided a record of earnings during the entirety of his claimed loss period, the Claimant's estimated loss over a three year period, is unsubstantiated and cannot be compensated.

Regarding the Claimant's alleged losses in 2010, totaling \$6,344.00, the Claimant has not provided evidence sufficient to prove that he actually lost this amount of income as a result of the Deepwater Horizon oil spill. The Claimant has provided no verifiable evidence of his earnings as a deckhand at any time, nor has he proven that the vessel on which he alleged to have been working at the time of the oil spill had ever fished in waters affected by the Deepwater Horizon oil spill.

Should the Claimant wish to pursue this claim on reconsideration, the Claimant should provide, in addition to proof of his status in the E&PD Settlement class, copies of fishing licenses, indicating that the Claimant was authorized to fish in affected waters in 2010, copies of prior and subsequent years' catch in the affected waters, and proof of all earnings during his claimed loss period. The Claimant should also specifically indicate the location of the vessel at the time of the oil spill.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that she sustained a financial loss in the amount \$53,806.00, 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. Additionally, this claim is considered to have been settled by virtue of the Claimant belonging to the E&PD Settlement, and is therefore not eligible for OSLTF compensation.

Claim Supervisor: *NPFC Claims Adjudication Division* 

Date of Supervisor's Review: *6/17/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

⁸ 33 C.F.R. § 136.235.