

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

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NPFCCCLAIMSINFO@uscg.mil

5890
September 20, 2013

CERTIFIED MAIL: 7011 1570 0001 4803 5076

Gar Shrimp Corporation



RE: N10036-1970

Dear Mr. Garcia:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number N10036-1970 involving the DEEPWATER HORIZON oil spill.

This determination is based on an analysis of the information submitted. Please see the attached determination for further details regarding the rationale for this decision.

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 N10036-1970.

Mail reconsideration request to:

Director
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Boulevard
Arlington, VA 20598-7100

Sincerely,



Claims Adjudication Division
National Pollution Funds Center
United States Coast Guard

Enclosures: Claim Summary / Determination

Copy to: The Chau Law Firm, PC



CERTIFIED NUMBER: 7011 1570 0001 4803 5601

CLAIM SUMMARY / DETERMINATION

Claim Number:	N10036-1970
Claimant:	Gar Shrimp Corporation
Type of Claimant:	Corporate
Type of Claim:	Loss of Profits and Earnings
Amount Requested:	\$5,659,494.00

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 was 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 8 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 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 2 May 2012, and the CSSP began processing claims on 4 June, 2012.

CLAIM AND CLAIMANT:

On 31 July 2013, Ms. Jennifer Chau, on behalf of Gar Shrimp Corporation, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$5,659,494.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant's primary place of business was located in the City of Palacios, Texas. The Claimant states that they are in the business of providing fuel, supplies and other essentials to shrimping vessels that fish in the Gulf of Mexico, and in return they have exclusive rights to unload and also have first rights to purchase the catch from those vessels."² Claimant further states that they sell the shrimp that they receive from the respective vessels to either a shrimp wholesaler or consumers.³

The Claimant seeks to recover \$5,659,494.00 in loss of profits or impairment of earning capacity damages resulting from the Deepwater Horizon oil spill. Claimant states that the claim is made under the Oil Pollution Act (OPA) and that butfor the business's physical location, it would have qualified under the Deepwater Horizon Court Economic and Property Damages Settlement Agreement as a class member and as such, the Claimant requests that it receives the same

¹ Optional OSLTF Claim Form, signed on 10 July 2013.

² See Section 2, page 2 of Gar Shrimp Corporation OPA Claim.

³ See Section 2, page 3 of Gar Shrimp Corporation OPA Claim.

treatment as a class member by the NPFC applying the terms, conditions, and calculations of the EP&D Settlement Agreement to this claim.

Additionally, Claimant states that it has been unable to earn an expected profit margin as a direct result of the conditions in the Gulf of Mexico; that the Claimant has suffered a significant impairment of profit as a direct result of the conditions in the Gulf of Mexico; and that the Claimant is eligible to recover damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction or loss of real property, personal property, or natural resources.

Claimant asserts that this claim submission is exclusive of interest beginning on the thirtieth (30) day following the date on which the claim is presented and ending on the date the claim is paid. Claimant asserts that its demand includes interest in accordance with §2705(b)(1) and that the interest shall be calculated at the average of the highest rate for commercial and finance company paper of maturities of 180 days or less obtaining on each of the days included within the period for which interest must be paid to the Claimant as published by the Federal Reserve Bulletin located at §2705(4).⁴

Claimant states its sum certain for damages were calculated by utilizing the formula set forth in the EP&D Settlement Agreement and that Claimant chose to compare the 2010 profits with the 2009 and 2008 profits. Claimant argues that adjustments and consideration for variable and fixed expenses are documented, as well as an *Incremental Revenue* comparison between the inclining profits margins for 2010 and two years preceding the oil spill.

The Claimant has calculated its alleged loss as follows:⁵

Claimant has chosen the comparison period as May 2010 through September 2010 and therefore states Step 1 of its calculation is based upon the Variable Profit Comparison Period less the Variable Profit of the Benchmark Period and as such, the Claimant states the Total Variable Profit Loss is \$1,746,065.00.

The Claimant then states for Step 2 of its calculation, it uses the comparison period of May through September as identified in Step 1. Claimant then takes the total revenue of January through April 2010 less the total revenue of January through April of 2009 which they then use as the revenue change figure. That figure is \$164,809.00.

Claimant then takes the revenue change figure divided by the total revenue of January through April of the Benchmark Period to calculate a Claimant Specific Factor <-2% to +10%>. Claimant calculates the Claimant Specific Factor as +10%.

Claimant then calculates the Incremental Revenue by taking the Total Revenue of the Benchmark Period selected months times the Claimant Specific Factor plus a General Adjustment Factor of 2% which the Claimant identifies the Incremental Revenue as \$365,574.00.

⁴ See Section 1, page 2 of Gar Shrimp Corporation OPA Claim.

⁵ See Accounting Report of Gar Shrimp Corporation OPA Claim, Section 10, pages 6-7.

Claimant then takes the Incremental Revenue times the Variable Margin of the Benchmark Period in order to come to a Total Incremental Revenue Loss which they state is \$-4,682.00. Claimant's final compensation is calculated as follows:

Claimant takes the total from Step 1 above plus the total from Step 2 above less any prior payments to come to a Base Compensation figure which they identify as \$1,741,383.00 and then they take the Base Compensation figure plus Base Compensation times Risk Transfer Premium for a total sum certain requested: $\$1,741,383.00 + \$3,918,111.00 = \$5,659,494.00$.

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. 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

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

- OSLTF Claim Form dated 7/10/13;
- Attorney cover letter dated July 25, 2013 with disc attached;
- 74-page Summary Report of Business Economic Losses for Gar Shrimp Corp.;
- Articles of Incorporation for business;
- Operating Licenses;
- BP Claim Form;
- Redacted Attorney-client fee contract;
- Monthly P & L statements for 2008, 2009, and 2010; and
- Gar Shrimp Corp. Accompanying P & L Worksheet;

Prior to presenting this claim to the NPFC, the Claimant attempted to recover these damages from the Responsible Party through the GCCF and BP Claims Program. According to the Claimant's submission, the documentation now provided to the NPFC was presented to GCCF/BP on 18 Nov. 2012. The Claimant was assigned GCCF number 3225714 and BP Counsel reports the BP claimant ID is 1001166.⁶ Both claims were denied by the GCCF and the BP Claims Program. As such, because more than 90 days have passed since the presentment of this claim to the Responsible Party, OPA presentment requirements have been met and the NPFC may properly adjudicate this claim.⁷

Furthermore, evidence in this claim submission indicates that the Claimant is geographically excluded from the Economic and Property Damage Class Action Settlement. (the 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.

⁶ Deepwater Horizon Claims Center Denial Notice dated 22 August 2013

⁷ 33 C.F.R. § 136.103(c)(2).

⁸ Claimant is headquartered in City of Palacios, Texas.

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 uncompensated loss or reduction in income, and (2) that the financial loss was caused by damage to real property or natural resources caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

The Claimant alleged to have sustained losses stemming from the inability to earn an expected profit margin as a direct result of the conditions in the Gulf of Mexico and that the Claimant has suffered a significant impairment of profit as a direct result of the conditions in the Gulf of Mexico. The Claimant also asserts this claim should be calculated utilizing the terms, conditions, and calculations of the EP&D Settlement Agreement to this claim just as if it were a member of the class action..

1. Product Unavailability

The Claimant alleged that certain shrimp products became unavailable after the oil spill, causing the Claimant to lose profits associated with the business activity of unloading and purchasing shrimp acquired from the respective shrimp vessels it normally services. The Claimant provided, profit and loss statements, Articles of Incorporation and operating licenses for the services it provides in support of their claim.

In order to prove that the Claimant sustained a loss based on the inability to unload shrimp vessels and the unavailability of shrimp, the Claimant would have to provide evidence to prove that they purchased certain shrimp products from affected areas of the Gulf of Mexico, and were no longer able to purchase those products due to fishery closures caused by the spill. Furthermore, the Claimant would have to prove that the inability to purchase certain shrimp products actually impacted the Claimant's overall sales.

The Claimant has not provided any evidence, such as purchase receipts or trip tickets, names and locations of shrimp vessels serviced, historical data associated with each vessel it allegedly lost profit from, and that the shrimp they were unable to obtain was indeed purchased from Gulf of Mexico waters which were affected by fishery closures in 2010. Additionally, the Claimant did not provide financial documentation for the year 2011 to allow the NPFC to compare the Claimant's earnings during the allegedly affected period, with the Claimant's earnings prior to as well as following the oil spill.

Furthermore, the Claimant's federal tax returns were not produced in their entirety so as to enable the NPFC to evaluate the overall corporate financial status for 2009, 2010 and 2011. In 2008, 2009 and 2010, the Claimant reported overall annual Profit and/or Loss as (-\$451,654.21) for 2008, (-\$2,389,452.47) for 2009, and (-\$2,362,441.13) for 2010 respectively.⁹ The Claimant has not provided any evidence that might indicate that the factors causing the Claimant's profit loss from 2009 prior to the oil spill, was no longer affecting the Claimant's overall annual financial status in 2010. Additionally it is important to note that the Claimant experienced a decrease in overall loss between 2009 and 2010 which would indicate the Claimant fared overall better the year of the spill than the year prior. Additionally, without financial records for 2011, the NPFC cannot determine what financial change occurred post spill.

⁹ 2008–2010, Monthly P & L statements.

Having considered this evidence, the NPFC has determined that the Claimant has not proven that they sustained losses due to the inability to unload respective shrimp vessels or from the unavailability of certain shrimp purchases caused by the Deepwater Horizon oil spill.

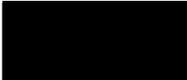
2. Calculation Methodology for Determining Lost Profits

The Claimant states that the claim is made under the Oil Pollution Act (OPA) and that butfor the business's physical location, it would have qualified under the Deepwater Horizon Court Economic and Property Damages (E&PD) Settlement Agreement as a class member and as such, the Claimant requests that it receives the same treatment as a class member by the NPFC applying the terms, conditions, and calculations of the EP&D Settlement Agreement to this claim.

The Claimant seeks to recover the value of lost profits and earnings due to its inability to unload respective shrimp vessels and the reduced product availability of shrimp from said respective vessels in certain Gulf of Mexico waters following the oil spill. The amount of compensation potentially available to any Claimant seeking loss of profits damages is limited to the "actual net reduction or loss of earnings or profits suffered."¹⁰

Speculative and future losses are therefore not compensable under OPA. Based on the governing claims regulations by which the NPFC is bound, can be found at § 136.235. As such, the NPFC will not apply the same calculation methodology used by the E&PD or BP to adjudicate claims and determine values presented and as such, the amount requested by the Claimant as lost profits is not supported by actual financial documentation and is therefore denied as unsupported by the record.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that it sustained an uncompensated financial loss in the amount of \$5,659,494.00 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: *NPFC Claims Adjudication Division* 

Date of Supervisor's review: *9/20/13*

Supervisor Action: *Denial approved*

Supervisor's Comments:

¹⁰ 33 C.F.R. § 136.235.