

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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5890/DWHZ
12 September 2014

L-800-Radiator Franchise,, Inc.


Re: Claim Number: N10036-2032

Dear Mr. Rippey:

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 N10036-2032 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 N10036-2032.

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	N10036-2032
Claimant	1-800-Radiator Franchise, Inc..
Type of Claimant	Corporate
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$2,008,422.00

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 August 2014, Mr. Ted Rippey, on behalf of 1-800-Radiator Franchise, Co. ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$2,008,422.00 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 states it was a franchisor of 1-800-Radiator warehouse outlets that distribute auto parts to auto body and repair shops. The Company had franchisees that independently owned and operated twelve 1-800-Radiator warehouses located in Louisiana, Alabama, Mississippi and in Leon County, Florida. At this time, the Company's primary source of revenue was a royalty and marketing fee that charged franchisees 10% of their gross sales. Allegedly as a result of the incident in the Gulf, damages incurred by the local franchisees have extended to the Claimant in the form of reduced royalties and marketing fees from lower sales, uncollectible losses and marketing/support expenditures. The Claimant asserts remediation efforts began to solidify and take shape between 2012 and 2013, and estimated these to total \$2,008,422.00 in damages and loss of profits.

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.

¹ Optional OSLF Claim Form, 20 August 2014.

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 with addendum, 20 August 2014;
- Claimant Summary of Damages;
- Claimant Montgomery, AL Franchisee Documentation;
- Claimant Dothan, AL Franchisee Documentation;
- Claimant Bossier City, AL Franchisee Documentation;
- Claimant Baton Rouge, LA Franchisee Documentation;
- Claimant Birmingham, AL Franchisee Documentation.

The Claimant alleged that this claim was first presented in full to the Responsible Party via the BP Claims program and that the RP denied payment on this claim.² On 29 August 2014, the Claimant presented this claim to the NPFC, seeking \$2,008,422.00 in loss of profits or impairment of earning capacity. The NPFC will adjudicate the claim to the extent presentment requirements have been satisfied. If any damages subject of this claim were not first presented to and denied by the RP, these damages are denied for improper presentment.³

Evidence in this claim submission indicates that the Claimant is not a member of the Deepwater Horizon Economic and Property Damage Class Action Settlement (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.

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].⁴ Included in the Claimant's damage calculations are four years of future damages.⁵ This claim is therefore denied to the extent that at the time of this claim presentment, the Claimant has not actually incurred all of the alleged damages that are the subject of this claim.

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's alleged losses.

In order to prove a claim for loss of profits or impairment of earning capacity damages, a claimant must provide evidence sufficient to prove (1) that the claimant sustained a loss or reduction in income, and (2) that the loss was caused by damage to real or personal property or natural resources caused by the discharge of oil during the Deepwater Horizon oil spill.

The Claimant alleged that, as a result of the oil spill, its franchisees lost business in the Gulf, and, therefore, it did as well. Claimant submitted a number of spreadsheets and cost documents that included analyses on lost royalties and marketing fees for each of its affected franchisees, marketing expenses/techniques used to mitigate damages, and uncollected debt costs from the franchisees that

² See BP Claims Program Denial Letter to Claimant, 8 July 2014, as well as the Optional OSLTF Claim Form, signed by the Claimant on 20 August 2014.

³ 33 C.F.R. § 136.103(c)(2).

⁴ 33 C.F.R. § 136.235.

⁵ See Franchise Sales (Royalty and Marketing Fees) Impact – Pg. 1 of 2.

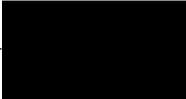
closed. However, simply stating that it experienced a loss, without providing concrete documentation does not prove the oil spill caused it to lose profits for the time period claimed.

In order to show that damages incurred by the franchisees (and thus the Claimant) were a direct result of the oil spill, the Claimant would have to show that it was the spill and not a result of other economic factors. There are many economic and environmental factors why a company increases or decreases its earnings over any given period of time. Based on the evidence presented in this claim submission, the NPFC is not able to ascertain that the Claimant suffered losses due to damage to property or natural resources caused by the discharge or substantial threat of discharge of oil.

In linking losses to the oil spill, the Claimant assumes that franchisees experienced losses due to the oil spill merely because of their geographic location compounded by reduced profits. However, the Claimant does not provide any evidence to support this conclusion. The location of the Claimant's customers does not, in and of itself, prove that the Claimant's business sustained losses caused by damage to property or natural resources resulting from oil discharged into the Gulf of Mexico during the Deepwater Horizon oil spill.

Additionally, the Claimant is seeking compensation in the amount of \$33,056.00 for marketing expenses it asserts was for the mitigation of alleged damages and the Claimant is seeking compensation in the amount of \$363,340.00 in uncollected debts from franchisees that closed for which it contends were spill affected locations. As an initial matter, the Claimant has not demonstrated that any alleged losses were the direct result of the oil spill and are therefore denied and secondly, debts incurred by a business franchise are not OPA compensable damages.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that it sustained a financial loss in the amount of \$2,008,422.00, 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: *9/12/14*

Supervisor's Action: *Denial approved*

Supervisor's Comments: