

FINAL POLICY

POLICY 467: ECONOMIC LOSS: THE DEFINITION OF “FACILITY”

I. Introduction.

The Claims Administrator must determine the location of a Business Entity for four purposes under the Settlement Agreement¹: 1) to determine whether an Entity is within the Class Definition, 2) to determine the Economic Loss Zone for Economic Loss Claims, 3) to determine whether a BEL Claimant is a Multi-Facility Business, and 4) to determine the Economic Loss Zone for IEL Claimants. The location of a Business Entity turns upon where its Facilit[ies] can be found. This document sets out the policies previously adopted by the Claims Administrator regarding the meaning of Facility in the Settlement Agreement, adopts a definition for what constitutes a Facility, and provides examples of how to apply this definition.

II. The Purposes for Which the Claims Administrator Must Determine the Location of a Business Entity.

A. Whether a Business Entity is within the Settlement Class Definition.

Section 1.2.1 of the Settlement Agreement includes in the Settlement Class “[a]ll Entities doing business or operating in the Gulf Coast Areas or Specified Gulf Waters that . . . at any time from April 20, 2010 to April 16, 2012, owned, operated, or leased a physical facility in the Gulf Coast Areas or Specified Gulf Waters” and sold products in the Gulf Coast Areas or Specified Gulf Waters or regularly purchased Seafood harvested from Specified Gulf Waters to produce goods for resale. The Claims Administrator must determine the location of an entity’s “physical facility” for purposes of applying this definition. The Settlement Agreement does not define “physical facility.”

Section 1.2.3 of the Settlement Agreement also includes in the Settlement Class “[a]ll Entities doing business or operating in the Gulf Coast Areas or Specified Gulf Waters that . . . owned, operated, or leased a vessel that (1) was Home Ported in the Gulf Coast Areas at any time from April 20, 2010 to April 16, 2012, or (2) landed Seafood in the Gulf Coast Areas at any time from April 20, 2009 to April 16, 2012.”² The Settlement Agreement thus speaks of a “physical facility” and a “vessel” as different things.

B. Economic Loss Zone for Economic Loss Claims.

The Claims Administrator must assign an Economic Loss Zone before it can determine the Causation requirements and Risk Transfer Premium (“RTP”) applicable to an Economic Loss Claim. This is because the Causation requirements and RTP are contingent on a combination of the claimant’s Economic Loss Zone, Industry Designation, and Claim Type. The Settlement Agreement is not explicit as to how to place a claim within an Economic Loss Zone, but the

¹ Section 38.15 states that “Business Claimant or Business Economic Loss Claimant shall mean an Entity, or a self-employed Natural Person who filed a Form 1040 Schedule C, E or F, which or who is an Economic Class Member.”

² Section 38.82 of the Settlement Agreement defines “Home Ported” as “the home port of a vessel as documented by a 2009 or 2010 government-issued vessel registration.”

Claims Administrator generally determines a claimant's Economic Loss Zone based on the Facility owned or operated by the claimant or by the claimant's employer.

C. Whether a Claimant is a Multi-Facility Business.

Exhibit 5 to the Settlement Agreement sets out the compensation framework for Multi-Facility Businesses. Section I of Exhibit 5 defines a Multi-Facility Business as a "business entity that, during the period April 1, 2010 through December 31, 2010, maintained **Facilities** in more than one location and had at least one **Facility** within the Gulf Coast Areas." Section I then provides the only definition of "Facility" in the Settlement Agreement:

Facility: A separate and distinct physical location of a **Multi-Facility Business** at which it performs or manages its operations.

The Claims Administrator must determine whether a business has "separate and distinct physical location[s]" at which it "performs or manages its operations" to assess whether it may proceed with a Multi-Facility claim and must locate each facility as within or without the Gulf Coast Areas and within a Zone for purposes of such a claim.

D. Economic Loss Zone for Individual Economic Loss Claims.

Exhibit 8A to the Settlement Agreement states in six places how to assign a Zone to an IEL claimant:

For purposes of this Framework for Individual Economic Loss Claims, the presumption shall be that the location of economic loss for the Claiming Job is the location of the claimant's employer within the Class Definition geographic area, not the claimant's residence. Claimants may establish an alternative location of economic loss for the Claiming Job other than their employer's location by providing evidence that their primary employment activities and responsibilities occur in a location different from their employer's business address, and that the claimed DWH Spill-related economic loss occurred at such location. For example, the claimant works for a housekeeping company located in Zone C that services households in Zones A, B and C, including vacation condominiums located in Zone A, and the claimant establishes that she works primarily in Zone A.

(Ex. 8A fn 4; fn 12; fn 16; fn 21; fn 23; fn 24.). While the location of a Business Entity is limited to its facility, an IEL claimant has the opportunity to provide evidence showing that his or her employment activities are in a more preferential Zone than the employer's "business address." There is no similar provision for BEL claimants that allows an entity to show that its "primary" activities occur in a location different from its "business address."

III. Previously Issued Claims Administration Policies.

The Claims Administrator has adopted several policies related to Zone assignment after receiving input from the Parties.

A. Economic Loss Zones for Claimants with Multiple Locations.

No. 347. *Economic Loss Zones for Business Economic Loss Claimants with Multiple Locations.* If a BEL Claimant is physically located in one Zone, but the claimant's business activity, sales or service activity, or revenue source is located in a different Zone, the Claims Administrator will assign the claimant the Economic Loss Zone where the claimant is physically located. (Adopted 8/12/12.)

B. Business Entities in the Class but with No Physical Location in the Gulf Coast Areas.

No. 264. *Zone Classification for Businesses in the Class But Not Located in the Gulf Coast Areas.* Under the definition of the Class in Section 1.2 of the Settlement Agreement, a business that is physically located outside of the Eligibility Zone is a member of the Class if it engaged in certain activities during the Class Period in the Gulf Coast Areas or Specified Gulf Waters. Such a business has no physical location in any one of the Economic Loss Zones A through D. For purposes of the assignment of a Risk Transfer Premium and the Causation review process required under the Settlement Agreement, the Claims Administrator will place such a business in Zone D. This approach will replicate the rule applied to businesses that are located in Zone A, B, C, or D, but have activities that cross Zones. Under that rule, such a business is classified in the Zone of the primary physical location of the business. Allowing businesses with no physical location in the Gulf Coast Areas to use the Zone where the activities occurred that placed them in the Class would treat them more favorably than businesses with physical locations in the Gulf Coast Areas in Zones less favorable than the Zones in which certain activities of the business occurred. In order to apply the Zone considerations in the most consistent and equitable manner, the Claims Administrator will default to Zone D for businesses in the Class but with no physical location in any Zone. (Adopted 10/10/12.)

C. Time Period Used to Determine the Applicable Zone.

No. 331. *Economic Loss Claims: Time Period Used to Determine the Applicable Zone.* The Settlement Agreement requires the Claims Administrator to determine the Zone applicable to each Economic Loss claimant for purposes of causation and compensation. The Settlement Agreement, however, does not specify the time period used to make this determination for any claimant. In every instance, the Settlement Agreement uses the present tense when describing the impact of the Zone on causation of the RTP applicable to the claim. See, e.g., Ex. 4B Sec. I.1 (“If you are a business in Zone A . . .”); Ex. 15 (“Businesses . . . located in Zone A . . .”); Ex. 8A fn 4 (“Claimants may establish an alternative location of economic loss for the Claiming Job other than their employer’s location by providing evidence that their primary activities and responsibilities occur in a location different from their employer’s business address”). With no temporal element prescribed by the Settlement Agreement for the Zone determination, it provides no guidance on how the Claims Administrator is to assign a Zone to an Entity that has changed its physical location at any time after 4/20/10 or to an individual whose work area changed at after that date. After reviewing the Settlement Agreement and the responses of the Parties to a request for their positions on this issue, the Claims Administrator has adopted these rules of decision to address this issue:

- (a) The Claims Administrator will assign an Entity the Zone in which the claimant was located at any time during the Compensation Period applicable to the claimant that is most favorable to the claimant.
- (b) The Claims Administrator will assign an individual the Zone in which the claimant's primary activities and responsibilities occurred at any time during the Compensation Period applicable to the claimant that is most favorable to the claimant.
- (c) Because the Class Period defined in Section 38.28 of the Settlement Agreement extends through 4/16/12, which is beyond the Compensation Period of any claimant, certain claimants are Class Members but had no physical location in any Zone or did not work in any Zone during the claimant's Compensation Period. The Claims Administrator will assign Zone D to such claimants.

(Adopted 1/13/13.)

D. Charter Fishing Businesses.

No. 352. *The Appropriate Eligibility Zone for Charter Fishing Businesses.* To determine the Eligibility Zone for a Business Entity, the Claims Administrator determines the location where that Entity "owned, operated, or leased a physical facility" (Section 1.2.1 of the Settlement Agreement). The Settlement Agreement defines "facility" in the context of Multi-Facility Businesses. We use that provision to define a single "facility" as "a . . . distinct physical location of a . . . Business at which it performs or manages its operations." (Exhibit 5, Section I). Therefore, the Zone assigned to a Business Entity corresponds to the location of a physical facility owned, operated, or leased by the Entity, at which it performs or manages its operations.

Charter Fishing businesses, whether organized as a sole proprietorship or as a formal business entity, generally do not maintain any separate physical facility to manage or operate the business but instead use the owner's or captain's home address to receive mail, file tax returns, and register, organize, or incorporate the business entity. The owners perform all business operations aboard the vessel used to "carry Passenger(s) for Hire to engage in Recreational Fishing." (Section 38.18 of the Settlement Agreement). The location of the vessel, rather than the home address of the owner or captain, is the most accurate reflection of the entity's location, and of the claimant's loss. Accordingly, for any Business Entity that meets the definition of Charter Fishing under Section 38.18 of the Settlement Agreement, the Claims Administrator will assign the Zone where the Charter Fishing Vessel was docked, harbored, or Home Ported at any time during the Compensation Period applicable to the claimant that is most favorable to the claimant. This policy only applies to charter fishing and does not apply to land-based facilities.

(Adopted 3/27/13.)

In applying this policy, the Claims Administrator considers the location of the Zone to be where the Charter Fishing Vessel was primarily docked or Home Ported during the Compensation Period.

Those policies shall remain in force. This policy complements and does not supersede them.

IV. The General Definition of Facility and its Application.

The Claims Administrator uses the following guidelines to determine whether a potential facility is a Facility under the Settlement Agreement.

A. Definition of Facility.

The Claims Administrator defines a Facility of a Business Entity as:

- (a) A separate and distinct physical structure or premises;
- (b) Owned, leased or operated by the Business Entity;
- (c) At which the Business Entity performs and/or manages its operations.

A potential facility must satisfy all three elements of this definition to constitute a Facility for the purposes of Class membership, Zone assignment, Multi-Facility BEL claims and the location of an IEL claimant's employer.

B. Definition of "Performs or Manages."

1. **Performs:** An Entity "performs" operations at a location if, in the normal course of its business, it has employees or agents who perform their work at that location and/or it provides services or products at that location.
2. **Manages:** An Entity "manages" its operations at a location if, in the normal course of its business, it has employees or agents present at the location, on a full-time or part-time basis, who are responsible for the management, supervision, or direction of the operations of the Entity.
3. **Overall Criterion:** An Entity does not "perform" or "manage" operations at a location unless it can identify the expenses and revenues, if any, associated with the operations at that location separately from the expenses and revenues of other locations owned, leased or operated by the Entity.

C. Determining the Location of a Business Entity.

1. **Basic Rule:** The location of a Business Entity is determined by the location of its Facility.
2. **Address of the Facility:** The Claims Administrator uses the street address of the physical structure to determine the location of a Facility.
3. **Entity With Registered Mailing Address:** If a Business Entity has a registered mailing address but performs or manages its operations in or from a structure at a different address, the Claims Administrator uses the address of that structure as the location of the Facility.

- 4. Multiple Structures:** If a Business Entity owns, leases or operates multiple structures and performs or manages operations in or from more than one structure but does not file as a Multi-Facility Business or submits the claim as a consolidated Multi-Facility claim, the Claims Administrator assigns to the Business Entity the address of the primary or headquarters Facility of the business. If the claimant submits separate Multi-Facility BEL claims for each structure, the Claims Administrator assigns a Zone to each Facility included in the claim based on the address of the structure that constitutes the facility.
- 5. Location of Customers, Employees, Contractors or Other Representatives:** The Claims Administrator does not locate a Business Entity on the basis of the location of the customers, employees, contractors or other representatives of the business apart from the location of the structure owned, leased or operated by the business.
- 6. Change in Locations:** If a Business Entity has moved from one structure to another at any time during the Compensation Period, the Claims Administrator considers any and all evidence of the move provided by the claimant. Documents that clearly demonstrate that a location has changed include new business licenses or permits, formal lease agreements, deeds or land titles, and State Sales and Use Records. The Claims Administrator does not accept the subjective assertion by a claimant or claimant's counsel alone of a move from one structure to another.

V. Examples of What Constitutes a Facility for Specific Categories of Entities.

- A. Vending, Gaming and ATM Machines:** The Facility of a Business Entity that leases and/or services vending or gaming machines or ATMs is the physical structure at which the business performs or manages its operations (*e.g.*, purchasing machines and inventory, contacting customers to arrange leasing and servicing, maintaining business records, and storing or repairing its inventory of machines or product inventory). The machine is not a physical structure.
- B. Vehicles and Other Mobile Machines:** Each of the following is not a Facility because it is not a physical structure: (a) an automobile, truck, bus or other vehicle; (b) a mobile home or other recreational vehicle; (c) an airplane, helicopter, balloon or other aerial device; or (d) a crane, bulldozer or other equipment.
- C. Advertising Billboards:** An advertising billboard will typically be considered a Facility provided it is a fixed structure and has identifiable revenues and expenses associated with it.
- D. Self-Storage Facilities:** A facility owned, operated or leased by an Entity that provides storage space to third parties will typically be considered a Facility.
- E. Warehouses:** A warehouse owned, operated or leased by an Entity and used in the normal course of its operations will typically be considered a Facility.

- F. Vessel-Based Businesses Other than Charter Fishing:** Because the Settlement Agreement distinguishes “vessel” from “facility,” a vessel cannot be seen as a Facility for purposes of Multi-Facility BEL claims. However, the vessel may be the location of operations that is owned or leased or otherwise operated by a Business Entity at which it performs or manages its operations. As a result, if a claimant performs and manages its operations from a marine vessel, with no separate physical facility from which it manages its operations, the Claims Administrator will typically consider the vessel to be within the Zone where the vessel is primarily docked or Home Ported. If the claimant operates its business from a marine vessel but manages its operations from a land-based physical structure, that structure shall typically be considered to be the Facility of the business for purposes of Zone assignment.
- G. Independent Contractors:** If a Business Entity uses independent contractors to provide services in structures or locations not owned, leased or operated by the business, the location of each contractor is not a separate Facility of the business. However, if the Business Entity owns, leases or operates a physical structure in which independent contractors perform or manage the operations of the Business Entity, that structure will typically be considered a Facility of the business.
- H. Non-Corporate Owned Stores:** A franchise location is not a Facility of the franchisor Entity if the franchisor does not own or lease the real property on which the franchise is located. A franchise location will typically be considered a Facility of the franchisor Entity if the franchisor owns or leases the real property on which the franchise is located.
- I. Electric Power Companies:** Electric power generation and/or distribution Entities are comprised of one or more central offices, power lines, and power meters. The offices will typically be considered Facilities because they are structures where business operations are actively performed and managed. Power lines are not Facilities because transforming voltage and transmitting electricity does not constitute performing or managing business operations. In addition, power meters are not Facilities because they are personal property, not fixtures at which business operations are performed or managed. These rules apply regardless of whether the claimant owns the real property or has an easement granting rights to use the real property on which the power lines or power meters are located.
- J. Construction Office Trailer:** A trailer placed at a construction site and used as a permanent office for the duration of the construction project will typically be considered a Facility if the claimant owns, leases or operates the trailer and performs or manages its operations there. Such construction office trailers are more analogous to a building or fixture than they are to a mobile machine.

- K. Retail Space in Shopping Malls:** Retail shops and storefront locations within shopping malls will typically be considered separate Facilities, even if the locations are owned, leased or operated by the same Business Entity, if customers are required to exit one location and use common areas of the shopping center such as walkways or hallways to access other retail locations. In contrast, if multiple retail shops that are owned, leased or operated by the same Business Entity are connected by internal doors that allow customers to travel between locations without using common areas of the shopping center, those locations would typically be considered one Facility. Additionally, retail operations owned, leased or operated by the same Business Entity that are within different areas of the same store, such as a department store, will typically be considered one Facility.
- L. Automobile Dealership with Service Department.** An automobile dealership with more than one department, including but not limited to sales, service, parts, and/or financing departments, that is owned, leased or operated by the same Business Entity will typically be considered one Facility. This rule applies whether the various departments are in the same physical building or in separate physical buildings on the same parcel of real property.