

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: 7011 1150 0000 4636 2465

5890/DWHZ  
26 September 2011

Hy-Tech Landscape & Irrigation, Inc.



Re: Claim Number: N10036-1319

Dear Mr. Rooney:

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 N10036-1319 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 N10036-1319.

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 Form

## CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1319
Claimant	Hy-Tech Landscape & Irrigation, Inc.
Type of Claimant	Corporate (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$550,000.00

### ***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.

### ***CLAIM AND CLAIMANT***

On 22 September 2011, Mr. Thomas Rooney, on behalf of Hy-Tech Landscape and Irrigation, Inc. (collectively the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$550,000.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.<sup>1</sup>

The Claimant is a full service landscaping company in Destin, Florida, offering “services in irrigation, landscape lighting, pavers, grade and drainage, design, landscaping and landscape maintenance.”<sup>2</sup>

The Claimant alleged that “gross sales dropped \$400,000.00 after the spill.”<sup>3</sup> The Claimant seeks \$550,000.00 to cover what he would have made in 2010 and in the first and second quarters of 2011 had his business continued to grow by \$100,000.00, as it had each year since 2006.<sup>4</sup>

### ***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 waters or adjoining shorelines or the exclusive economic zone, as described in Section 2702(b) of OPA.

The OSLTF which is administered by the NPFC, is available, pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, to pay claims for uncompensated damages. 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.

<sup>1</sup> Optional OSLTF Claim Form dated 5 August 2011.

<sup>2</sup> [www.hytechlandscape.com](http://www.hytechlandscape.com), accessed on 22 September 2011.

<sup>3</sup> Optional OSLTF Claim Form, dated 5 August 2011.

<sup>4</sup> PHONECON: NPFC Staff and the Claimant, 19 August 2011.

- (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.
- (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.

## ***DETERMINATION OF LOSS***

### **Claimant's Submission to the OSLTF**

To support this claim, the Claimant submitted the following documentation:

- Optional OSLTF Claim Form, 5 August 2011;
- Letter from Claimant to NPFC, describing losses, 11 August 2011;
- Business Articles of Incorporation;
- Monthly Profit and Loss Statements, 2008;
- Monthly Profit and Loss Statements, 2009;
- Yearly Profit and Loss, 2008;
- Yearly Profit and Loss, 2009;
- Yearly Profit and Loss, 2010;
- Profit and Loss Statement, January 2011;
- Profit and Loss Statement, February 2011;
- Profit and Loss Statement, March 2011;
- Profit and Loss Statement, April 2011;
- Profit and Loss Statement, May 2011;
- Profit and Loss Statement, June 2011;
- Profit and Loss Statement, July 2011;
- Profit and Loss Statement, January – July 2011;
- 2008 Corporate Tax Returns, showing gross sales of \$1,518,766.00;

- 2009 Corporate Tax Returns, showing gross sales of \$1,673,534.00;
- 2010 Corporate Tax Returns, showing gross sales of \$1,283,933.00.

On 21 October 2010, the Claimant presented an Emergency Advance Payment claim (EAP) to the RP/GCCF, seeking \$200,000.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.<sup>5</sup> The Claimant was assigned ID 3145106 and EAP was assigned Claim # 308013. This claim was paid in the amount of \$200,000.00 in October of 2010.<sup>6</sup>

On 5 April 2011, the Claimant presented a Second Quarter Interim Payment Claim (ICQ22011) to the RP/GCCF, seeking \$550,000.00 in loss of profits and impairment of earnings capacity. ICQ22011 was assigned Claim # 9346247. The Claimant also submitted a Full Review Final (FRF) payment claim, which was assigned Claim # 9347772. The Claimant was not offered an Interim payment on ICQ22011, but was offered final payment in the amount of \$79,148.46.<sup>7</sup> The Claimant also submitted a Third Quarter Interim Payment Claim (ICQ32011), which was assigned Claim # 9490741 and remains under review with the RP/GCCF.<sup>8</sup>

As of the date of this letter, the Claimant has accepted the GCCF final payment offer but has not executed a Release and Covenant Not to Sue in return for final payment.<sup>9</sup> Therefore, the Claimant has not received final payment on this claim.

On 18 August 2011, the Claimant presented this claim to the NPFC for \$550,000.00 in loss of profits and impairment of earnings capacity damages. The claim before the NPFC is the same claim as presented to the RP/GCCF in ICQ22011. Therefore, the NPFC may properly adjudicate the entirety of this claim in the amount of \$550,000.00 as presented to the NPFC on 18 August 2011.

### **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 to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support this claim.

In order to prove a claim for loss of profits and impairment of earnings capacity, a claimant must provide documentation or other evidence to demonstrate (1) that the Claimant sustained a loss or reduction in profits or earnings capacity, and (2) that the loss or reduction was caused by the discharge or substantial threat of discharge of oil resulting from the Deepwater Horizon oil spill.

After an initial review, the NPFC contacted the Claimant seeking additional information to further evaluate the claim. In order to establish a causal link between the Claimant's losses and the Deepwater Horizon oil spill, the NPFC requested certain documentation, such as a record of jobs completed in previous years, in order to determine which particular jobs were lost as a result of the oil spill.<sup>10</sup> The letter, dated 22 August 2011, provided the Claimant with 14 days to respond to the NPFC request. To date, the Claimant has not responded.

<sup>5</sup> Emergency Advance Payment Determination, showing payment made on 7 September 2011.

<sup>6</sup> Optional OSLTF Claim Form, dated 5 August 2011.

<sup>7</sup> GCCF Notice of Determination Letter dated 18 August 2011.

<sup>8</sup> GCCF Claimant status, accessed on 22 September 2011.

<sup>9</sup> GCCF Claimant status, accessed on 22 September 2011.

<sup>10</sup> NPFC Request for additional information, dated 22 August 2011.

Having reviewed all information provided in the Claimant's original submission to the NPFC, the Claimant has failed to provide sufficient documentation to demonstrate that any losses incurred were caused by the discharge or substantial threat of discharge of oil resulting from the Deepwater Horizon oil spill.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$550,000.00, and (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 a discharge of oil.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *9/23/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments: