

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 1570 0001 2445 3078

5890/DWHZ
30 January 2013

Edgewater Inn, Inc.



Re: Claim Number: N10036-1886

Dear Mr. Bennett,

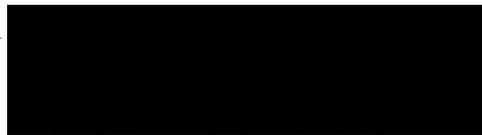
The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on the claim number N10036-1886 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination 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 N10036-1886.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100



National Pollution Funds Center
U.S. Coast Guard

Enclosure: Claim Summary/Determination

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1886
Claimant	Edgewater Inn, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$800,000.00

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 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 18 January 2013, Mr. Robert Bennett, on behalf of Edgewater Inn, Inc. (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$800,000.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the effects of the Deepwater Horizon oil spill.¹

The Claimant owns and operates Edgewater Inn, in Biloxi, Mississippi. The Claimant alleged that the oil spill drove tourists out of the area causing the Inn to lose business in 2010 and 2011. The Claimant alleges that the loss of "word of mouth advertising"² due to the loss of tourist customers, are likely to affect profits "for up to 20 years."³ Furthermore, the Claimant alleged that although the oil spill generated "over \$204,000.00 in contractor business" this amount should be deducted from the Claimant's 2010 earnings in order to understand the extent of the Claimant's losses. As explained by the Claimant, contractors were accommodated at a reduced rate and are not likely to be repeat customers. Furthermore, the Claimant alleged that rooms used by contractors were damaged and required renovations.

It is unclear exactly how the Claimant calculated their losses to reach their sum certain amount of \$800,000.00, which includes \$50,000.00 in allegedly cancelled reservations, as well as \$204,000.00 in revenue generated by the oil spill response.⁴

¹ Claim Cover Letter.

² Claim Cover Letter, pg. 2.

³ Claim Cover Letter, pg. 2.

⁴ Claim Cover Letter, pg. 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. 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:

- Claim cover letter, received on 18 January 2013;
- Wikipedia entry, *Deepwater Horizon oil spill*, printed 11 January 2013;
- 2010 Form 1120S, showing gross sales of \$604,352.00;
- 2010 Form 4562;
- 2010 Supporting statements/attachments;
- 2011 Form 1120, showing gross sales of \$559,230.00;
- 2011 Form 1125-A;
- 2011 Supporting statements/attachments;
- Lease Contract, signed on 1 May 1991;
- 2010 Form 1040, showing adjusted gross income of -\$66,428.00;
- 2010 Schedule A (Form 1040);
- 2010 Schedule B (Form 1040A or 1040);
- 2010 Schedule D (Form 1040);
- 2010 Schedule E (Form 1040);
- 2010 Form 4562;
- 2010 Form 8582;
- 2011 Form 1040, showing adjusted gross income of -\$75,435.00;
- 2011 Schedule A (Form 1040);
- 2011 Schedule B (Form 1040A or 1040);
- 2011 Schedule B (Form 1040A or 1040);
- 2011 Schedule D (Form 1040);
- 2011 Form 8949;
- 2011 Schedule E (Form 1040);
- 2011 Form 4797;
- 2011 Form 8582;
- Form 8283 (Rev 12-2006);
- 2011 Form 4562;
- GCCF Deficiency Letter on Interim Payment/Final Payment Claim, 13 February 2012;
- Incompleteness Notice, Deepwater Horizon Economic Settlement, 26 October 2012;

Prior to presenting this claim to the NPFC, the Claimant attempted to recover these losses from BP through the GCCF. According to the Claimant's submission, this claim was presented first to the GCCF, where the Claimant was assigned ID # 1132045.⁵ It appears, however, that the Claimant presented a claim for \$250,000.00 to the GCCF, which accounted for losses sustained by the Claimant's business.⁶ The Claimant alleged that these claims were denied because the GCCF determined that the Claimant had not sustained a bottom-line loss.⁷

On 18 January 2013, the Claimant submitted this claim to the NPFC, seeking \$800,000.00 in loss of profits or impairment of earning capacity damages, which includes both business and personal losses.⁸ It appears that the damages now presented to the NPFC may exceed damages previously presented to and denied by BP or its agent. As such, this claim is denied to the extent that the damages now before the NPFC exceed the amount previously considered by the Responsible Party.⁹ The remainder of this determination addresses damages now before the NPFC which

⁵ Claim Cover Letter, pg. 2.

⁶ Claim Cover Letter, pg. 3.

⁷ Claim Cover Letter, pg. 3.

⁸ Claim Cover Letter, pg. 2.

⁹ 33 C.F.R. § 136.103(a).

were first presented to and denied by the Responsible Party in accordance with OPA presentment requirements.¹⁰

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).¹¹

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. 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 they are a member of the economic damages class of the E&PD Settlement, they should submit evidence to indicate that they have either opted out or are excluded from the E&PD Settlement in their request for reconsideration of this claim.

Furthermore, this claim is also denied on its merits. 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 financial loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill. The Claimant has failed to prove that they have sustained a financial loss as a result of the Deepwater Horizon oil spill.

The Claimant argues that although oil spill response workers generated substantial revenue for the Inn in 2010, these revenues should not be considered when determining the extent of the Claimant's loss. According to the Claimant, these customers are not likely to be repeat customers and do not generate the same "word-of-mouth" advertising as tourist-customers. Furthermore, the Claimant alleged that rooms were provided to contractors at reduced rates, causing the Claimant not to earn what they would have, had the rooms been rented by tourists.

According to tax documentation provided in this submission, the Claimant reported gross sales of \$604,352.00 in 2010 and \$559,230.00 in 2011. Implementing claims regulations specifically require that any compensation potentially available to a claimant be reduced by "all income resulting from the incident" as well as "all income from alternative employment or business undertaken."¹² Therefore, the NPFC is required to take into account any income earned by the

¹⁰ 33 C.F.R. § 136.103(a).

¹¹ Claim Cover Letter, pg. 4, Claimant states, "it was in my best interest to opt out of the claims process and pursue litigation."

¹² 33 C.F.R. § 136.235(a),(b).

Claimant as a result of the oil spill in order to determine whether or not the Claimant sustained an actual financial loss within the meaning of OPA. Although the Claimant alleged to have sustained approximately \$50,000.00 in losses as a result of cancelled reservations, it appears that the revenue generated by response workers more than compensated any losses due to allegedly cancelled reservations.

The Claimant also asserted that tourism in Biloxi continued to be affected by the oil spill throughout 2011. However, the Claimant has not provided evidence to show that booking rates decreased in 2011, or that any decrease in booking rates was indeed caused by the oil spill.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that they sustained a financial loss in the amount \$800,000.00, 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.

Claim Supervisor: *NPFC Claims* / 

Date of Supervisor's Review: *1/30/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments: