

U.S. Department
of Homeland
Security

United States
Coast Guard



Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd., Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 1-800-280-7118
E-mail: [REDACTED]
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5890

06 December 2010

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7010 1060 0001 7083 1614

[REDACTED]
Miami, FL 33157

Email: [REDACTED]

Claim Number: N10036-0009

Dear [REDACTED]

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies your claim. The NPFC is unable to establish that the loss of profits you presented in your claim were a result of the Deepwater Horizon oil spill. Please see the attached claim summary 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 N10036-0009.

Mail reconsideration requests to:

Director (ca)

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

Sincerely,

[REDACTED]
U.S. Coast Guard
Claims Manager

Attachment: (1) Claim Summary/Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Date 03 December 2010
Claim Number N10036-0009
Claimant [REDACTED]
Type of Claimant Private (US)
Type of Claim Loss of Profits and Earning Capacity
Claim Manager [REDACTED]
Amount Requested \$314,000

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 from an offshore facility associated with the Deepwater Horizon and located on the Mississippi Canyon, Block 252 (the Deepwater Horizon oil spill). This area was leased by BP Exploration and Production, Inc. (BP). The Coast Guard designated the offshore facility as the source of the discharge and BP as the responsible party (RP) for the discharge. BP accepted the designation, advertised its OPA claims process, and compensated claimants. On 23 August 2010, the Gulf Coast Claims Facility (GCCF) began accepting and adjudicating claims on behalf of BP.

CLAIM AND CLAIMANT

On 10 September 2010, Claimant [REDACTED] submitted an Oil Spill Liability Trust Fund (OSLTF or the Fund) claim form to the NPFC claiming lost profits and earnings the amount of \$314,000.00. The reported basis for his claim is that [REDACTED] purchased "or were purchasing" seven investment properties in southern Florida and that they are unable to sell them as a result of the Deepwater Horizon oil spill. In his documentation, [REDACTED] only provides information relating to the claimed financial losses for three properties. [REDACTED] primary occupation is that of Construction Supervisor.¹ [REDACTED] primary occupation is that of a realtor.²

According to [REDACTED] OSLTF claim form, he filed his claim with BP between 27 May and 06 June 2010, Claim #6866-124-168856. [REDACTED] wrote a letter to the RP (BP) on 14 June 2010, stating that [REDACTED] "own or are purchasing seven properties in South Florida."³ Three of the properties are located in the lower Florida Keys in Monroe County. Further, [REDACTED] letter indicates that the vacant parcels were already purchased or were being purchased with the intent to sell them at a profit.⁴ According to [REDACTED], the properties were constantly advertised and priced competitively but they have been unable to sell them.⁵ Based upon his submission to BP, [REDACTED] claimed \$214,000.00 due to the total loss of sales, which amount would increase to \$319,000.00 if the mortgages were in default.⁶ The letter

¹ See, 2009 IRS Form 2106 EZ.

² See, 2008 IRS Form 2106.

³ See, letter from [REDACTED] to BP Claims dated June 14, 2010.

⁴ See, letter from [REDACTED] to BP Claims dated June 14, 2010.

⁵ See, letter from [REDACTED] to BP Claims dated June 14, 2010 and electronic property advertisements included as part of [REDACTED] documentation.

⁶ See, Financial Summary of Actual Loss, pg 107 "Last Page" for BP Claim # 6866124168856.

that [REDACTED] wrote to BP is dated 14 June 2010. BP took no action on his claim. He filed with GCCF on 23 August 2010, Claim #1076574 for \$45,000.00. [REDACTED] claim with the GCCF is has been denied.

[REDACTED] also stated in his letter to BP that two of the properties were purchased using owner financing in the form of a short term "balloon mortgage," with the expectation that the properties would be resold before the balloon mortgages came due.⁷ [REDACTED] states that there have been no buyers interested in the properties due to the Deepwater Horizon oil spill.⁸

In addition to his 14 June 2010 letter to BP explaining his loss, [REDACTED] also submitted a "Financial Summary of Actual Loss" as part of his original claim.⁹ This financial summary claimed a total loss due to lost sales of \$214,000.00 and a "potential loss of sales and resulting mortgage default of \$319,000.00."¹⁰ Further, this document reported a "ROI Rate" (i.e. a return on investment rate) of 100% per year.¹¹

In a phone conversation on 06 October 2010 with the NPFC, [REDACTED] described the impact of the oil spill as similar to interfering with a person's ability to play the lottery. He described owning a piece of property as akin to playing the lottery, inasmuch as the owner never knows when that property will sell. In [REDACTED] view, as described in that conversation, the Deepwater Horizon oil spill prevented him from playing that lottery for the period of time that buyers are avoiding Florida properties due to the threat of oiled beaches.¹²

On 02 November 2010, [REDACTED] clarified his position in a letter to the NPFC. In his letter, [REDACTED] states that the

"Nature of the referenced claim is not for diminished value although this surely is a 'by product' of a government agency such as NOAA indicating that oil had a 60-80% chance of reaching your shores. . . [but] a loss of interest (*emphasis in the original*) from prospective buyers as a result of the oil spill coming to the Florida Keys."

Further, [REDACTED] makes the following statements:

"Would I have sold 1, 2, or all of the subject properties in the segment of time from the oil spill occurred (*sic*) to present? Based on the previous interest before the spill, it is probable. What I do know is the oil spill took away the opportunity to sell the properties at profit for a period of time. That is fact."

"What is the value of that fact? The actual profit is the loss from the sales of the subject properties in the amount of \$214,000.00 at present. That is a fact."

⁷ See, letter from [REDACTED] to BP Claims dated June 14, 2010

⁸ See, letter from [REDACTED] to BP Claims dated June 14, 2010.

⁹ See, Financial Summary of Actual Loss , pg 107 "Last Page" for BP Claim # 6866124168856

¹⁰ See, Financial Summary of Actual Loss , pg 107 "Last Page" for BP Claim # 6866124168856

¹¹ See, Financial Summary of Actual Loss , pg 107 "Last Page" for BP Claim # 6866124168856

¹² Phone conversation between [REDACTED] of the NPFC and [REDACTED] of 06 October 2010 as recorded in an email to file N10036-0009.

In his OSLTF claim form, [REDACTED] makes clear that the properties were "purchased/under contract" before the spill. Further, [REDACTED] indicates that he is still making the mortgage payments on the property and that the balloon mortgage maturity dates will soon be reached.

APPLICABLE LAW

The Oil Pollution Act of 1990 (OPA) provides that each responsible party for a vessel or facility from which oil is discharged into or upon the navigable waters or adjoining shorelines or exclusive economic zone is liable for removal costs and damages. 33 U.S.C. § 2702(a). Damages include the loss of profits or impairment of earning capacity due to the injury, destruction or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant. 33 U.S.C. § 2702(b)(2)(E).

The OSLTF, which is administered by the NPFC, is available to pay claims for uncompensated damages pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136. With certain exceptions a claim must first be presented to the responsible party. 33 U.S.C. § 2713(a). If the claim is either denied or not settled by any person by payment within 90 days after the date on which it was presented, the claimant may elect to commence an action in court or present the claim to the OSLTF. 33 U.S.C. § 2713(c).

Pursuant to the claims regulations, 33 CFR § 136.233, a claimant must establish the following to prove loss of profits or impairment of earning capacity:

- (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.
- (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 CFR 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 CFR 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

A. Documentation Provided to the NPFC

_____ submitted the following list of documentation:

- Letter from _____ to BP dated June 14, 2010
- Photocopies of drivers license, social security card and passport
- Monroe County Florida newspapers articles
- Real estate transaction documents:
 - o 7 January 2010 Form 1099-S Gross Proceed Statement from _____ to _____
 - o 8 January 2010 Mortgage Deed Transfer (Charlotte County, FL Lot 5, Block 4688, Port Charlotte Subdivision, Section 79) by _____ to _____
 - o 14 May 2010 General Warranty Deed Transfer (Charlotte County, FL Lot 5, Block 4688, Port Charlotte Subdivision, Section 79, Parcel ID Number 402231102004) from _____ & _____ to _____
 - o 21 May 2010 Counter Offer/Rejection Signature Page for unknown transaction
- Real Estate Appraiser searches
 - o Monroe County Property Appraiser _____ CFA Search Results for the period of 15 March 2010 to 15 April 2010 of lower Florida Keys indicating 29 total qualified transactions before the Spill.
 - o Monroe County Property Appraiser _____ CFA Search Results for the period of 15 April 2010 to 15 May 2010 of lower Florida Keys indicating 27 total qualified transactions before the Spill.
 - o Monroe County Property Appraiser _____ CFA Search Results for the period of 15 May 2010 to 15 June 2010.
 - o Monroe County Property Appraiser _____ CFA 9 June 2010 Property Record View for Cutthroat Harbor Estate BK 12 LT 4 Hakluyt Ln Cudjoe Key Parcel ID: 00185540.
 - o Monroe County Property Appraiser _____ CFA 9 June 2010 Property Record Views and Parcel Value History (1982 to 2009).
 - o Monroe County Property Appraiser _____ CFA 9 June 2010 Property Record Views for Little Torch Key; Alternate Key: 1287831 Parcel ID: 00220600 and Alternate Key: 1287903 Parcel ID: 00220670 with parcel value & sales histories (1992-2009)
- 23 March 2010 Promissory Note to _____ as Trustee of the _____ Revocable Trust of 25 March 2009 for \$23,750.00.
- 23 May 2010 Feasibility Study from _____ to _____ AmeriRealty Corp for Offer for Little Torch Parcel Re# 0219770-000000.
- 12 June 2010 Craigslist.org posting for \$75,000 Buildable Canal Lot with Open Views (Little Torch Key)
- 16 June 2010 Promissory Note to _____ from _____ for \$80,000.00.
- Advertisements for sale of the properties
 - o Craigs List Execute Contract Discussions on 11 Jan 2010.
 - o Craigs List for Canal Lot in Cudjoe Key of 6/9/2010

- Monroe County tax records
- Federal income tax returns for 2008 and 2009 (Note 1: On 2009 Schedule A [REDACTED] Revocable Trust Interest Paid is shown)
- Financial Summary of Actual Loss by [REDACTED] for 3 parcels
- Letter from [REDACTED] to USCG OPA Fund dated November 2, 2010
- News articles relating to the impact of the Deepwater Horizon oil spill to Gulf Coast Real Estate markets. Articles include reports of analysis conducted by [REDACTED] entitled "New [REDACTED] Data Shows the Potential Impact of the BP Deepwater Horizon Oil Spill on Coastal Real Estate."

B. Claimant's Analysis of his Claim

1. [REDACTED] OSLTF claim form states a claim for Loss of Profits and Impairment of Earning Capacity in the amount of \$314,000.00. [REDACTED] claim to the GCCF was denied.
2. [REDACTED] states that his inability to sell his South Florida properties is the result of the Deepwater Horizon oil spill and he seeks to be compensated for the downturn in interest among potential buyers that. He asserts that such interest did exist before the Deepwater Horizon oil spill. While he believes that his property has also experienced a diminution in value resulting from the Deepwater Horizon oil spill, he does not assert this diminution as a basis for his claim but rather calculates the sum certain to be the loss of the sales and the costs he will incur or has incurred as a result of defaulting on the balloon mortgages. He views the decreased value as a byproduct of government agency action reporting on potential impacts of the spill.

C. NPFC Analysis of the Claim

1. Claimant asserts that he suffered a loss of profits or impairment of earning capacity in the amount of \$314,000 for several parcels of land that he purchased/was purchasing at the time of the Deepwater Horizon oil spill. He purchased these properties as investment properties and he argues that he cannot now sell these properties because there is a lack of public interest in purchasing them. As a result of this lack of interest he has been unable to sell the properties.
2. It is somewhat unclear as to whether his basis for the loss of profits is the diminution in value of the properties or the inability to sell them and the subsequent costs associated if he defaults on the balloon payments. [REDACTED] cannot be compensated by the Fund under either theory. The Fund is available to pay claims for uncompensated removal costs or uncompensated damages. In this case [REDACTED] has not established that he suffered a loss of profits due to the diminution of value of the properties.
3. Even if his property value has diminished, he has not yet sold his property for less than he paid for it. As a result, any loss that he might experience remains prospective.
4. [REDACTED] asserts that he cannot sell the properties because there is a lack of public interest in purchasing properties in South Florida because of the oil spill. However, [REDACTED] has not provided convincing evidence that the housing

market in South Florida was impacted solely by the oil spill. Instead, a number of economic factors may be involved making it impossible to separate out and determine that his claimed losses are the result of the Deepwater Horizon oil spill. Further, the NPFC review of specific data and studies related to the Deepwater Horizon incident do not reveal any clear declines in real estate sales volume that can be specifically linked to the spill.¹³

D. Determination

Under 33 CFR 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 CFR § 136.233, a claimant must establish loss of profits or impairment of earning capacity. As described above, [REDACTED] has failed to meet his burden and his claim is denied.

DETERMINATION [REDACTED] claim for \$314,000 to the OSLTF is denied.

AMOUNT \$0.00

Claim Supervisor: [REDACTED]

Date:

12/7/10

Supervisor's Comments:

Denial allowed

¹³ Memorandum dated 09 November 2010 from [REDACTED] and [REDACTED] IEC to [REDACTED]
[REDACTED] USCGR, NPFC, Subj: Preliminary Property Value Assessment Results