U.S. Department of Homeland Security

United States Coast Guard

Director
United States Coast Guard
National Pollution Funds Center

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5890
3/15/2011

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: [redacted]

[redacted]
Miami, FL 33157

RE: Claim Number: N10036-0009

Dear [redacted]:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on the claim number N10036-0009 involving Deepwater Horizon. Please see the attached Claim Summary / Determination Form for an explanation regarding this denial.

Disposition of this reconsideration constitutes final agency action.

If you have any questions or would like to discuss the matter, you may contact me at the above address and phone number.

Sincerely,

[redacted]
[redacted] Claims Adjudication Division
U.S. Coast Guard

ENCL: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Date	: 3/15/2011
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	: $314,000.00

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 claims for certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT:

Claimant, [redacted], presented a claim in the amount of $314,000.00 to the National Pollution Funds Center (NPFC) on 10 September 2010, claiming a loss of profits and impairment of earning capacity resulting from the Deepwater Horizon incident.

The NPFC's original denial determination was completed and issued to the Claimant on December 6, 2010. The NPFC denied the claim because the Claimant failed to meet his burden to demonstrate he had a loss of profits and earnings due to the injury to, destruction of or loss of property or natural resources as a result of a discharge or substantial threat of a discharge of oil. On January 19, 2011, [redacted] requested reconsideration of the NPFC's December 06, 2010 denial based on the following information:

1. With respect to 33 CFR §136.233(a), Claimant provided (3) individual Certified Property Appraisals as evidence for the properties that are subject of this claim. Claimant contends that the appraisals accurately appraise the taxable value of the (3) subject properties before the incident, the value after the incident, and the loss of value as a result without any other economic factors contributing to that assessment;
2. With respect to 33 CFR §136.233(b), Claimant states he has proven factually that his real property was injured and damaged as a result of the oil-spill through certified appraisal, depreciating property value disclosures that are now required by law whereas they were not before the spill, and loss of interested buyers that would no longer pursue the subject properties owned by the Claimant. Claimant further states that the damage caused directly by the oil-spill and substantial threat of oil was overwhelming proof to cause market stigma, reduce the value of the properties, and eliminate an essential factor that is required to making profit on the sale of any property, interested buyers;
3. With respect to 33 CFR §136.233(c), Claimant states he submitted the original purchase contract between [redacted] and himself for the amount of $100.00, the executed IRS Form 1099 for the amount of $90,000.00 of taxable profit from real estate investing and sale of the most recent and relevant investment by the Claimant, along with four (4) pay stubs from his employer that indicated the year to date income from [redacted]

Construction to establish the rate of pay by proration of $6,033.39 biweekly for Claimant's income from January 1, 2010 to August 13, 2010. Claimant earned $48,267.00, a reduction of $90,000.00 during the oil-spill. Also, the direct loss of value as a result of the injury to the subject properties (i.e., Claimant's assets as proven by certified appraisal in the same period is $41,813.00) and Claimant has paid $1,350.00 for the certified appraisals to prove his case which contends furthers his loss;

4. With respect to 33 CFR §136.233(d), Claimant maintains that he continues to have regular employment with the same construction company for the past 20 years. Claimant states that his income has not been supplemented by any other speculative real estate investment sales or any other sources of income in order to offset the loss of profit he alleges to have experienced as a result of the Deepwater Horizon incident. Claimant further alleges that there are other sources of income available although he continues to lose money due to the lost opportunities for him to invest without the working capital therefore there is no opportunity for him to offset his losses until he receives compensation.
5. In summary, the Claimant requests compensation for the alleged loss of marketability, diminished property value, and loss of interested buyers that occurred during the defined period, specifically from April 20,2010 through July 15, 2010 or caused the loss thereafter in the total amount of $442,292.00 for those fair and accurate incurred loss of profits and additional costs that resulted from his certified appraisals in the amount of $1,350.00, property taxes, mortgage interest and maintenance costs in the amount of $12,942.00 for 12 months, property diminution in the amount of $41,813.00, loss of income and profit from the previously evidenced historical 100% rate of return on investments based on the loss of $214,000.00 lost profit realized and projected rate of return to the total amount of $428,000.00 just prior to the Deepwater Horizon incident based on the evidence and proofs submitted and where no other contrary evidence has been submitted or exists.

It is important to note that the information provided above (items 1-5) are the Claimant's assertions on reconsideration but are not proven by the documentation submitted by the Claimant. Additionally, the Claimant has misconstrued the claims regulation associated with lost profits and earnings located at 33 CFR §136.233(a-d). See NPFC Analysis and Determination on Reconsideration discussion below.

NPFC Analysis and Determination on Reconsideration

To receive compensation from the OSLTF for lost profits and earnings, the Claimant MUST establish that his loss of profits and earnings was due to the injury, destruction or loss of real property, personal property or natural resource in order to have an OPA compensable damage. In this particular claim, [redacted] states two bases for his request for reconsideration and they are: (1) loss of marketability and sale of his three investment properties and (2) diminution of property values.

With respect to the Claimant's first basis on reconsideration, the Claimant states he has a loss of marketability of his three investment properties based on what he refers to as "the full selling price" of the subject properties.

Based on the documentation presented by the Claimant in his original claim submission, the Claimant stated that he listed the selling price for each of the subject investment properties as (1) parcel one located in [redacted] Key, FL at $149,000.00; (2) parcel two located in [redacted] Key, FL at $95,000.00, and (3) parcel three located in [redacted] Key, FL at $75,000.00 bringing his original selling price for all three properties to $319,000.00 based on a copy of his individual Craigslist property advertisements. The Claimant has not provided documentation for the sale price of each property via a signed purchase and sale agreement for which he alleges he had prospective buyers. Therefore it is impossible for the NPFC to verify definitively that the Claimant would have received his asserted $214,000.00 for the sale of the subject properties.[1] Moreover, the Claimant has not actually sold the properties; therefore, his alleged loss remains prospective.

With respect to the second basis on reconsideration, the Claimant states he has property value diminution. In support of the Claimant's request for reconsideration, the Claimant hired an Appraiser to perform certified appraisals on the three investment properties which are the subject of this claim. The December 2010 certified appraisals provided by the Claimant include a pre-spill value, a post-spill value, and a property diminution value as determined by the appraiser. The Claimant stated that the resulting property diminution value does not include any other economic factors. However, upon review of the appraiser's considerations, under the 'Introduction" section of each property appraisal, it is clear that the value concluded in the appraisal reports considered information that was used for the analysis from most recent sales occurring pre and post oil-spill which do contain other economic factors, since the sale(s) were based on market demand with environmental considerations built in.

Although Claimant asserts that the appraisals accurately measure the taxable value of the (3) subject properties due to the oil spill, this is not the "injury, destruction or loss of real property, personal property or natural resource" contemplated by the statute and regulations. In this case his property was not injured, destroyed or lost due to the oil spill nor was his property injured, destroyed or lost due to damage to the natural resource.

When considering property value diminution, the concept could constitute an economic loss only if the Claimant had realized an actual financial loss by selling the subject properties and that loss was due to the injury, destruction or loss of the real property or the natural resource. Additionally, when considering property value diminution, the value should equal only the reduction in market value as a direct result of the damage to the natural resource. Consideration should also be given to any increase in property prices since the end of the oil-spill. These would reduce the Claimant's asserted loss once the loss is actually realized.

It is important to note that the appraised value of the subject properties post incident is only an indication of their potential value. Furthermore, as noted above, the Claimant cannot claim a loss for the full price of the properties that he currently still owns. If in fact he sells the properties the Claimant still has the burden to demonstrate that any loss he were to realize is due to the damage to the natural resource.

With respect to the Claimant's arguments associated with property taxes, mortgage interest and maintenance fees requested over a twelve month period, the NPFC finds that the Claimant would have been responsible for servicing the mortgage and paying property-related expenses regardless of the oil-spill until the properties were sold; therefore, these costs are not OPA compensable. Moreover, some of the costs that the Claimant alleges are for a future time period

[1] While the Claimant submitted letters from two prospective buyers withdrawing their interest or commitment to the properties, these letters were generated in October 2010 and November 2010, respectively. Both of these dates are long after the time period where there was a threat of the discharge of oil reaching the Florida Keys. The offshore well was capped on July 15, 2010; therefore, Claimant has not established that the injury to the natural resource caused his alleged loss of profits.

which makes them speculative in nature and not an actual damage at the time the claim was presented.

With respect to the Claimant's argument that he incurred appraisal costs in order to document a decline in property values, the NPFC does not disagree that the Claimant incurred such costs. However, (1) the NPFC does not compensate for 'claim preparation costs' [2]which is what the appraisal fee is considered since the Claimant has yet to demonstrate a loss of profits and earnings and because (2) the Claimant has not realized any financial losses by way of the sale of the subject properties.

The NPFC again denies the claim because the Claimant has not established that his alleged losses are due to the injury, destruction or loss of property or natural resources.

[redacted]

Claim Supervisor: [redacted]

Date of Supervisor's review: *3/15/11*

Supervisor Action: ***Denial on reconsideration approved***

Supervisor's Comments:

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[2] *See*, 33 CFR §136.105(e)(8)