

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: 800-280-7118
E-mail:
arl-pf-npfcclaimsinfo@uscg.mil
Fax: 202-493-6937

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1150 0000 4666 9960

5890/DWHZ
29 August 2011

Mr. Thomas M. Gortemoller


Re: Claim Number: N10036-1323

Dear Mr. Gortemoller:

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 N10036-1323 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 N10036-1323.

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	N10036-1323
Claimant	Mr. Thomas M. Gortemoller
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$34,429.00

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

On 22 August 2011, Mr. Thomas M. Gortemoller (Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$34,429.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.¹

Claimant owns a rental unit in a condominium complex in Panama City Beach, Florida.² Claimant alleged that his tenants of over two years moved out on 1 June 2010, as a result of the Deepwater Horizon oil spill.³

Claimant seeks \$34,429.00 in lost rental income due to the loss of his tenants and his inability to re-let the property after his tenants' departure on 1 June 2010.⁴

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.
- (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.

¹ Optional OSLTF Claim Form dated 22 August 2011.

² Id.

³ Id.

⁴ Id.

- (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 undertake, 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, Claimant submitted the following documentation:

- Optional OSLTF Claim Form, 22 August 2011;
- Letter from Claimant's tenant, noting reason moving, 20 May 2011;
- Letter from Claimant regarding efforts to find a new tenant, undated;
- Document titled, "Business Information regarding Bay Point condo Unit #304;
- Lease listing, 4600 Kingfish Lane #304, undated;
- Copy of lease agreement, dated 17 April 2008;
- Disclosure of Information on Lead-Based Paint and/or lead-Based Hazards;
- Copy of GCCF Claim Form, requesting compensation in the amount of \$34,429.00 in lost earnings or profits, dated 9 February 2011;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 13 August 2011;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 12 May 2011;
- GCCF Letter regarding receipt of Full Review Final Payment Claim, 14 February 2011;
- Fax Cover Sheet, 22 August 2011.

On 9 February 2011, the Claimant presented a Full Review Final (FRF) payment claim to the RP/GCCF for loss of profits and earning capacity damages in the amount of \$34,429.00.⁵

⁵ Copy of GCCF Claim Form, provided by Claimant.

Claimant was assigned ID 1190808 and FRF was assigned claim # 9284947. This claim was denied on 12 May 2011, and denied on Re-Review on 13 August 2011.⁶

On 22 August 2011, the Claimant presented this claim for \$34,429.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill. Because this is the same claim presented to the RP/GCCF in FRF # 9284947, this NPFC determination addresses the entirety of the Claimant's loss of profits claim, in the amount of \$34,429.00.

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 the claim.

In order to prove a claim for loss of profits and earnings capacity, the Claimant must demonstrate (1) that he sustained an actual financial loss, and (2) that the loss was a result of the discharge or substantial threat of discharge of oil.

Claimant indicated that his tenants, who were on a month-to-month lease, moved out of his condominium unit in Panama City Beach on 1 June 2010, "because of possible toxins and smell of oil."⁷ However, the tenants' departure does not constitute a loss to the Claimant because the month-to-month lease agreement did not guarantee the Claimant rental income for any time longer than a one-month rental period. The tenants were free to end the lease agreement at any time, having given appropriate notice.⁸ Because the Claimant did not have a lease in place which would have guaranteed rental income for the period in which he is claiming losses, the Claimant has not sufficiently demonstrated that he sustained an actual loss in the amount of \$34,429.00.

Additionally, the Claimant has failed to provide evidence to show that his inability to secure a new tenant was a result of 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 \$34,429.00 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: *8/29/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

⁶ Copy of GCCF Denial Letters, provided by Claimant.

⁷ Letter from tenant, 21 May 2011; Lease agreement, signed 17 April 2008; Optional OSLTF Claim Form, dated 22 August 2011.

⁸ Lease agreement, signed 17 April 2008.