

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
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5890/DWHZ
8 November 2011

Mr. Brent J. Boudoin



Re: Claim Number: N10036-1506

Dear Mr. Boudoin:

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 N10036-1506 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 N10036-1506.

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	N10036-1447
Claimant	Mr. Brent J. Boudoin
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$25,840.00

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 17 October 2011, Mr. Brent J. Boudoin (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$25,840.00 in loss of profits and impairment of earnings capacity damages, allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant owns a rental condominium in Gulf Shores, Alabama.² The Claimant alleged that following the Deepwater Horizon oil spill, he had a significant number of rental cancellations, resulting in lost rental income in 2010.³ The subject of this claim, however, is the Claimant's loss of rental income from December 2010 through August 2011, during which, in spite of having no cancellations, the Claimant reported generally low bookings.⁴ Although the tourism in Gulf Shores was at an all-time high during the 2011 season, the Claimant alleged that the oil spill and other factors drove rental rates down to a level at which the Claimant was uncomfortable and unwilling to rent his property.⁵

Specifically, the Claimant stated, "[m]any inquiries this season were to rent my unit for a discounted price, which was the norm throughout Orange Beach/Gulf Shores this summer. That was unacceptable to me since I believed I would still have to file a BP claim for the difference."⁶

The Claimant therefore seeks compensation from the NPFC for lost rental income from December 2010 to March 2011, in the amount of \$25,840.00.⁷

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.

¹ Optional OSLTF Claim Form, dated 3 August 2011.

² Optional OSLTF Claim Form, dated 17 September 2011.

³ Condo Rental Record, 2010; GCCF Claimant Status, accessed on 8 November 2011.

⁴ Response to request for additional information, received on 6 November 2011.

⁵ Response to request for additional information, received on 6 November 2011.

⁶ Response to request for additional information, received on 6 November 2011.

⁷ Optional OSLTF Claim Form, dated 17 September 2011.

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.
- (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, dated 17 September 2011;
- Spreadsheet showing Condo Rentals, 2011;
- Alabama Department of Revenue, Sales and Use Tax Documentation, 2010, 2011;
- Response to request for additional information, received on 7 November 2011.

On 6 November 2010, the Claimant presented an Emergency Advance Payment (EAP) claim to the RP/GCCF, seeking loss of profits damages in the amount of \$24,000.00.⁸ The Claimant was assigned Claimant ID 1080281 and the EAP claim was assigned 425205. This claim was paid in the amount of \$8,400.00.⁹

On 31 March 2011, the Claimant presented a First Quarter Interim Claim (ICQ12011) to the RP/GCCF, seeking loss of profits damages in the amount of \$6,000.00. The ICQ12011 was assigned claim # 9339927. The Claimant was found to have been fully compensated for alleged losses and was sent a final payment offer by the RP/GCCF, which the Claimant has not accepted as of the date of this letter.

On 8 July 2011, the Claimant presented a Third Quarter Interim Claim (ICQ32011) to the RP/GCCF, seeking loss of profits damages in the amount of \$9,040.00. The ICQ32011 was assigned claim number 9441980 and as with the ICQ21011, no payments were made on this claim, as the Claimant was found to have been fully compensated.

⁸ GCCF U.S. Coast Guard Report, 2 November 2011.

⁹ GCCF U.S. Coast Guard Report, 2 November 2011.

Prior to his dealings with the RP/GCCF, the Claimant received compensation from BP in the amount of \$12,652.26, for total compensation of \$21,052.26 paid to the Claimant by BP and the GCCF.¹⁰

On 17 October 2011, the Claimant presented this claim to the NPFC, seeking \$25,840.00 in loss of profits and earnings capacity damages.¹¹ The Claimant has presented claims for damages to the RP/GCCF in the amount of \$39,040.00.¹² Because these damages have been first presented to the RP/GCCF, the NPFC deems presentation of this claim to have been proper,¹³ and shall adjudicate the entirety of this claim in the amount of \$25,840.00 as now before the NPFC.

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, a claimant must demonstrate (1) that he suffered an actual financial loss, and (2) that the loss was the direct result of the discharge or substantial threat of discharge of oil, caused by the Deepwater Horizon oil spill.

This claim is based on the Claimant's loss of rental income from December 2010 until August 2011. However, research conducted by the NPFC indicates that the 2011 tourist season in Orange Beach had been a record setting season, with the Alabama Gulf Coast Convention & Visitors Bureau, reporting the highest condominium occupancy rates for any year from 2007 - 2011.¹⁴

The Claimant has acknowledged that the season was successful in terms of the numbers of tourists traveling to Gulf Shores and Orange Beach,¹⁵ but has alleged that the oil spill affected the rental market by driving down rental prices, causing the Claimant to be unable to rent his unit at his desired price point.¹⁶ The Claimant stated that Gulf Shores and Orange Beach condominium owners' "desire to return to renting is what drove prices down for the 2011 season," resulting in the Claimant's loss of rental income.¹⁷ However, upon researching rental rates of comparable units in the same condominium complex, it appears that the Claimant's rental rates are consistent with and competitive within the Gulf Shores and Orange Beach market.¹⁸ Furthermore, tourism statistics indicate that in 2011, the average daily rental rate for condominiums in Gulf Shores and Orange Beach was higher than it had been in any year from 2007 - 2011.¹⁹

The Claimant has not provided evidence or documentation to demonstrate that rental rates in fact dropped in 2011, or to show that the alleged drop was caused by the effects of the Deepwater Horizon oil spill. Therefore, the Claimant's assertion that rental rates had been driven down to a point where the Claimant was unable to compete in the rental market has not been substantiated.

In a letter dated 20 October 2011, the NPFC requested certain additional information to support this claim, including evidence regarding the types of advertising methods used by the Claimant.²⁰ The

¹⁰ GCCF U.S. Coast Guard Report, 2 November 2011.

¹¹ Optional OSLTF Claim Form, dated 17 September 2011.

¹² \$24,000.00 in EAP, \$6,000.00 in ICQ12011, \$9,040.00 in ICQ32011.

¹³ 33 C.F.R. § 136.103(a).

¹⁴ See, Tourism Report, www.agccvb.org/stats/, Accessed on 7 November 2011.

¹⁵ PHONECON: Claimant and NPFC Staff, 7 November 2011.

¹⁶ Response to request for additional information, received on 6 November 2011.

¹⁷ Response to request for additional information, received 6 November 2011.

¹⁸ See, e.g., www.vrbo.com; (www.vrbo.com/search?q=Romar), Accessed on 8 November 2011.

¹⁹ Gulf Shores & Orange Beach Tourism, CONDOMINIUM OCCUPANCY SUMMARY, Gulf Shores & Orange Beach, Alabama, available at www.agccvb.org/stats, Accessed on 8 November 2011.

²⁰ NPFC Request for Additional

Claimant responded by stating that he relied on word-of-mouth advertising initiated by previous renters.²¹ Although the Claimant stated that he did market his property online in 2008 and 2009, he stopped in 2010 due to the oil spill, and has not yet relisted his rental condominium.²²

Furthermore, it should be noted that the Claimant alleged to have “made significant upgrades to [the Claimant’s] unit during Fall 2010 and Spring 2011 . . . including new LG Kitchen Appliances, washer and dryer . . . slate floors, granite tops and waterfall faucets.”²³ The Claimant has alleged that he lost rental income from December 2010 until August 2011. However, it is not clear that the Claimant’s unit was actually available for rent during the period in which the Claimant was renovating his condominium unit, in the spring of 2011.

Based on the foregoing, it appears that the Claimant’s alleged loss of rental income was caused by the Claimant’s restrictive rental practices and by the possible unavailability of the Claimant’s rental unit during periods of renovations, rather than due to effects of the Deepwater Horizon oil spill. This determination is based on publicly available tourism statistics, as well as on documentation contained in the Claimant’s submission to the NPFC.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$25,840.00, 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: *11/8/11*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

²¹ PHONECON: Claimant and NPFC Staff, 7 November 2011.

²² PHONECON: Claimant and NPFC Staff, 7 November 2011.

²³ Response to request for additional information, received 6 November 2011.