

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

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CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 8849

5890/DWHZ
25 January 2011

James Traxinger
[REDACTED]

Re: Claim Number: N10036-1538

Dear Mr. Traxinger:

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 your claim number N10036-1538 involving the Deepwater Horizon oil spill. Please see the enclosed 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. If, however 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 N10036-1538.

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

Enclosures: (1) Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number N10036-1538
Claimant James Traxinger
Type of Claimant Private (US)
Type of Claim Real or Personal Property Damages
Amount Requested \$422,600.00

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 01 November 2011, James Traxinger (the Claimant), presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$422,600.00 for real or personal property damages that allegedly resulted from the Deepwater Horizon oil spill.

Prior to the Deepwater Horizon oil spill, the Claimant owned a development property located at 557 Fore Drive in Bradenton, Florida.¹ The lot for the property was initially bought on 5 December 2005² and construction of the residential home located on the property was completed in January of 2009.³ Despite efforts by the Claimant to sell the property beginning in December of 2008 just prior to the completion of the residential construction, the property remained unsold at the time of the Deepwater Horizon oil spill.⁴ Harris Bank, holder of the mortgage on the Claimant's property, began proceedings for foreclosure on the property on 16 September 2009.⁵ Manatee County Circuit Court ordered a final judgment of mortgage foreclosure on the property on 02 June 2010 in the amount of \$1,439,354.62.⁶ Harris Bank bought the property at the court ordered foreclosure auction⁷ and later transferred ownership to LaSalle Holdings 115 LLC, who resold the property for \$795,400.00 as agent for the bank.⁸

The Claimant asserted that the property sold for less than it should have due to decreased property value caused by the Deepwater Horizon oil spill.⁹ Based on statistics from the Florida Housing Data Clearinghouse, the Claimant extrapolated that the decline in property value should have been approximately 44% based on an approximately 11% annual decline exhibited in 2006-2009.¹⁰ Using the

¹ GCCF Interim Payment Claim Form, dated 01 May 2011.

² Warranty Deed for Parcel 535, Harbour Walk, executed on 5 December 2005.

³ Document entitled "Interim Payment Claim Description"

⁴ Document entitled "Interim Payment Claim Description"

⁵ Notice of Lis Pendens from Manatee County Circuit Court for foreclosure proceedings, dated 16 September 2009.

⁶ Uniform Final Judgment of Mortgage Foreclosure from Manatee County Circuit Court, ordered on 02 June 2010.

⁷ Certificate of Title from Manatee County Circuit Court certifying sale of property, dated 11 August 2011.

⁸ Manatee County Appraiser's Office Records of Sale for the property at 557 Fore Drive on 11 August 2010, 10 September 2010, and 15 October 2010.

⁹ Document entitled "Interim Payment Claim Description"

¹⁰ Document entitled "Interim Payment Claim Description"

average of two appraisals¹¹ on the subject property in 2006, the Claimant asserted that the sales price of the house should have been \$1,218,000.00 after a reduction of 44% is subtracted in property value.¹² The Claimant calculated his damages by subtracting the actual sales price (\$795,400.00) from the Claimant's calculated price (\$1,218,000.00) for a total of \$422,600.00 in damages allegedly resulting from the Deepwater Horizon oil spill.¹³

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 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. 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 C.F.R. § 136.215, a claimant must establish the following to real or personal property damages:

- (a) An ownership or leasehold interest in the property;
- (b) That the property was injured or destroyed;
- (c) The cost of repair or replacement; and
- (d) the value of the property both before and after injury occurred.

Additionally, for each claim for economic loss resulting from destruction of real or personal property, the claimant must establish:

- (a) That the property was not available for use and, if it had been, the value of that use;
- (b) Whether or not substitute property was available and, if used, the costs thereof; and
- (c) That the economic loss claimed was incurred as the result of the injury to or destruction of the property.

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.

Under 33 C.F.R. § 136.217, the amount of compensation allowable for damaged property is the lesser of:

- (a) Actual or estimated net cost of repairs necessary to restore the property to substantially the same condition which existed immediately before the damage;

¹¹ Uniform Residential Appraisal Report for the property located at 557 Fore Drive, Bradenton, FL 34208. Effective date of Appraisal, 09 November 2006; Uniform Residential Appraisal Report for the property located at 557 Fore Drive, Bradenton, FL 34208. Effective date of Appraisal, 22 November 2006.

¹² Document entitled "Interim Payment Claim Description"

¹³ Document entitled "Interim Payment Claim Description"

- (b) The difference between value of the property before and after the damage; or
- (c) The replacement value.

Compensation for economic loss resulting from the destruction of real or personal property may be allowed in an amount equal to the reasonable costs actually incurred for use of substitute commercial property or, if substitute commercial property was not reasonably available, in an amount equal to the net economic loss which resulted from not having use of the property. When substitute commercial property was reasonably available, but not used, allowable compensation for loss of use is limited to the cost of the substitute commercial property, or the property lost, whichever is less. Compensation for loss of use of noncommercial property is not allowable.

Pursuant to the claims regulations, 33 C.F.R. § 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 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.

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

The Claimant's Submission to the OSLTF

In support of his claim, the Claimant presented the following documentation to the NPFC:

- Optional OSLTF Claim form, dated 26 October 2011;
- List of Exhibits;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, dated 07 May 2011;

- USPS Certified Mail Receipt, dated 29 April 2011;
- Sales receipt for USPS Certified Mail;
- GCCF Interim Payment Claim Form, dated 01 May 2011;
- Document entitled “Interim Payment Claim Description”;
- Two Google Maps geography images of 557 Fore Drive;
- Warranty Deed for Parcel 535, Harbour Walk, executed on 5 December 2005;
- Uniform Residential Appraisal Report for the property located at 557 Fore Drive, Bradenton, FL 34208. Effective date of Appraisal, 09 November 2006;
- Uniform Residential Appraisal Report for the property located at 557 Fore Drive, Bradenton, FL 34208. Effective date of Appraisal, 22 November 2006;
- Notice of Commencement for the construction of a house at 557 Fore Drive, Bradenton, FL 34208. Signed by notary public on 20 January 2007;
- Notice of Commencement for the construction of a house at 557 Fore Drive, Bradenton, FL 34208. Signed by notary public on 12 May 2008;
- Letter from Bamboo Building & Development to the Claimant regarding transfer of utilities, undated;
- Schedule of Cost of Sales for the property and house construction at 557 Fore Drive;
- Schedule of Direct Construction Costs at 557 Fore Drive;
- Schedule of Capitalized Indirect Construction Costs at 557 Fore Drive;
- Notice of Lis Pendens from Manatee County Circuit Court for foreclosure proceedings, dated 16 September 2009;
- Uniform Final Judgment of Mortgage Foreclosure from Manatee County Circuit Court, ordered on 02 June 2010;
- Order Authorizing Clerk of Court to Hold Foreclosure Sale from Manatee County Circuit Court, ordered on 07 July 2010;
- Certificate of Title from Manatee County Circuit Court certifying sale of property, dated 11 August 2011;
- Manatee County Appraiser’s Office Property Listing Report for 557 Fore Drive;
- Manatee County Appraiser’s Office Records of Sale for the property at 557 Fore Drive on 11 August 2010, 10 September 2010, and 15 October 2010;
- Manatee County Single Family Residential Market Analysis; and
- Schedule entitled “Median Single Family Home Price, 2001-2009” for State of Florida and Manatee County, Florida accessed at Florida Housing Data Clearinghouse.

Prior to presenting this Claim to the NPFC, the Claimant filed an Interim II (ICQ22011) claim with the GCCF for real or personal property damages on 03 May 2010.¹⁴ The Claimant was assigned Claimant ID # 3493392 and Claim # 9374714. This claim was denied by the GCCF on 07 May 2011.¹⁵

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant’s GCCF claim is the same as the subject matter of his claim before the NPFC, i.e., that due to the Deepwater Horizon oil spill, the Claimant’s property received a reduced sales price. The NPFC deems that the Claimant’s GCCF claim was properly presented to the RP and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC claim N10036-1538 considers and addresses the Claimant’s claimed damages to the extent these damages were presented to the Responsible Party, specifically; GCCF Claim # 9374714 (ICQ12011).

¹⁴ Report from the GCCF, dated 23 January 2012.

¹⁵ GCCF Denial Letter on Interim Payment/Final Payment Claim, dated 07 May 2011.

NPFC Determination

This claim is denied. 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. The NPFC considered all documentation presented by the Claimant.

1. Real or Personal Property Damages

This claim is denied because the Claimant failed to prove that he experienced real or personal property damages 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.

Under 33 CFR § 136.1, the OSLTF is available to pay costs for certain uncompensated damages, including damage to real or personal property “resulting from the discharge, or substantial threat of discharge of oil.” Here, the Claimant asserted that the Deepwater Horizon reduced the value of his property, which caused the property to be sold at a lesser price after it was foreclosed upon by the bank.¹⁶ The Claimant does not assert that the property was in any way physically damaged or destroyed by oil from the Deepwater Horizon oil spill or any removal activities. Furthermore, this property is located off a waterway in Manatee County, Florida, which is a significant distance from the area of Florida that was documented to be oiled by the Deepwater Horizon oil spill.¹⁷ Accordingly, this claim is denied because the Claimant failed to meet his burden to prove that his property was damaged as a result of a discharge or substantial threat of a discharge of oil.

2. Loss of Profits and Impairment of Earning Capacity

Although the Claimant presented a claim for real or personal property damages to both the Responsible Party (GCCF) and the NPFC, the Claimant is actually claiming a loss from diminution of property value, which under OPA is classified as a claim for loss of profits and impairment of earnings capacity. However, even if the Claimant had proper presentment and the NPFC analyzed this claim as a loss of profits and impairment of earning capacity, it would still be denied for failure to prove that the Claimant experienced a financial loss due to the Deepwater Horizon oil spill.

For claimants seeking damages based on diminution in property value resulting from the Deepwater Horizon oil spill, a claimant must provide evidence sufficient to prove, at a minimum: (1) the pre-spill value of the property, (2) the post-spill value of the property, (3) that a sale was lost or cancelled or that the property was foreclosed upon and (4) that the lost or cancelled sale or the foreclosure was caused by the Deepwater Horizon oil spill.

Regarding the valuation of the Claimant’s property, the Claimant did not provide the NPFC with adequate documentation to prove either the pre-spill or post-spill value of the property. The only appraisals provided for the value of the Claimant’s property were performed in 2006, which is too far removed to adequately address the value of the property in 2010 around the time of the Deepwater Horizon oil spill. Additionally, the statistics¹⁸ used by the Claimant to extrapolate his loss concern the “Median Single Family Home Price” in Manatee County. These statistics are not sufficiently specific to calculate the precise value of the Claimant’s individual property and prove any loss in value for the Claimant’s property.

¹⁶ Document entitled “Interim Payment Claim Description”

¹⁷ <http://gomex.erma.noaa.gov/erma.html>

¹⁸ Schedule entitled “Median Single Family Home Price, 2001-2009” for State of Florida and Manatee County, Florida accessed at Florida Housing Data Clearinghouse.

In addition to the Claimant's failure of all the above stated criteria, there are numerous other issues with the Claimant's alleged loss. The Claimant no longer owned the property at the time that the property was sold. Harris Bank began foreclosure proceedings in May of 2009, long before the Deepwater Horizon oil spill occurred, which were then completed in June of 2010. Accordingly, any sale of the property after the foreclosure would result in a loss for the Bank who became the interest holder in the property after the foreclosure.¹⁹ Even if the NPFC accepted the Claimant's property valuations as accurate, the difference in value would not have made up for the loss on the mortgage experienced by Harris Bank. The foreclosure judgment against the Claimant was for 1,439,354.62.²⁰ The Claimant alleged that the house should have sold for \$1,218,000.00 absent the Deepwater Horizon oil spill.²¹ Therefore, accepting the Claimant's allegations as true, the Claimant would have still owed Harris Bank an additional \$221,354.62 if the property had sold at his projected value and, consequently, would not have received any proceeds from the sale of the property.²²

Furthermore, the NPFC accessed the statistics provided by the Claimant to substantiate the valuation of his property. Since the Claimant's submission to the NPFC, those statistics have been updated to include median prices from 2010 as well.²³ Prior to 2010, both Manatee County and the State of Florida had experienced similar downward trends in median sale prices from 2006-2009. However, the updated statistics accessed by the NPFC indicate that while the median sale prices continued to decline in the state of Florida in 2010, the median sale price for houses in Manatee County actually experienced an increase in 2010. Consequently, the statistics fail to show that the Deepwater Horizon had any effect on property values in Manatee County and the Claimant failed to provide any other evidence to prove that his specific property decreased in value due to the Deepwater Horizon oil spill.

Lastly, the Claimant failed to consider the effect that foreclosure proceedings would have on the sale price of the house, considering that distressed properties often sell at a price point much lower than their market value. Consequently, the Claimant failed to prove that the Deepwater Horizon oil spill was the cause of the alleged decreased sale price of his property.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that there was an alleged loss in the amount claimed, 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: *1/25/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁹ Uniform Final Judgment of Mortgage Foreclosure from Manatee County Circuit Court, ordered on 02 June 2010.

²⁰ Uniform Final Judgment of Mortgage Foreclosure from Manatee County Circuit Court, ordered on 02 June 2010.

²¹ Document entitled "Interim Payment Claim Description"

²² In a conversation with agent of Harris Bank on 01 December 2010, the agent confirmed his belief that any theoretical loss of value in the house would be the bank's interest. Additionally, the agent confirmed that Harris Bank had not undertaken a deficiency suit against the Claimant for the remaining value of the mortgage not covered by the sale of the house.

²³ <http://flhousingdata.shimberg.ufl.edu/>