

CLAIM SUMMARY / DETERMINATION FORM

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| Claim Number | : N10036-1582 |
| Claimant | : CpC Design-Build |
| Type of Claimant | : Corporate (US) |
| Type of Claim | : Loss of Profits and Earning Capacity |
| Amount Requested | : \$122,383.44 |

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 28 November 2011, Curtis P. Colson d/b/a CpC Design-Build, (referred to as “the Claimant”) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$122,383.44 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.¹² This loss is associated with the loss of a single design and build project allegedly cancelled because of impacts from the Deepwater Horizon oil spill.

The Claimant is an architect and state-licensed contractor in Waveland, Mississippi.³ The Claimant specializes in beachfront properties, docks/piers and property developments.⁴

Based upon the information received from the Claimant and independent verification by the NPFC, the Claimant first presented his claim to BP on 7 June 2010,⁵ for an unknown amount. Subsequently, the Claimant submitted two claims to the GCCF and was issued GCCF Claimant Identification # 1016482.⁶ The Claimant was issued GCCF Claim # 9174225 for his Interim Payment Claim (ICQ12011) and GCCF Claim # 1016482 for his GCCF Final Claim (FRF).

The NPFC verified that the FRF claim was presented on 21 October 2010 seeking damages of \$61,600.00 and that his ICQ12011 claim was presented on 6 January 2011 seeking damages of \$209,690.00.⁷ The FRF claim was denied, while the Claimant received compensation in the amount of \$11,260.56 on his ICQ12011 claim.⁸

¹ Optional OSLTF Claim Form signed 21 November 2011 and received 28 November 2011.

² On 2 March 2012, the Claimant revised the claim amount from \$146,388.00 to \$122,383.44.

³ Claimant’s letter to NPFC dated 11 November 2011 and State of Mississippi Board of Contractors, Certificate of Responsibility, signed and dated 22 May 2009.

⁴ Claimant’s letter to NPFC dated 11 November 2011.

⁵ GCCF – US Coast Guard Report as of 23 January 2012.

⁶ GCCF letter to Claimant dated 23 August 2010.

⁷ GCCF – US Coast Guard Report as of 23 January 2012.

⁸ GCCF Re-Review Determination Letter dated 22 November 2011 and GCCF – US Coast Guard Report as of 23 January 2012.

The NPFC denied the claim originally on March 19, 2012, on the basis that the Claimant failed to prove that his loss was due to the Deepwater Horizon oil spill. In a loss of profits or impairment of earnings capacity claim, a Claimant must prove that the alleged loss is due to the oil spill. Here, the Claimant has failed to prove the actual causation for his alleged loss.

The NPFC contacted the Claimant's clients, Mr. and Mrs. Adams, who cancelled the construction project.⁹ The clients indicated that start of the construction was delayed from August/September 2009 until May 2010 due to the illness of a parent in Waveland, MS. Mrs. Adams stated that she saw oil and sludge on the shore about a mile from their property, but oil and its strong smell went into the Bay [Bay St. Louis], including past their property, at least half way up the Bay. She further stated that she couldn't go there [the property] anymore and could not confirm if oil hit their shore.¹⁰

Mrs. Adams also stated that she has severe asthma and could not go forward with construction at a time when the fumes were so bad and when there was no end in sight to the ongoing release of oil. She was adamant that cancelling the contract meant defaulting on their prepaid insurance, losing the grandfather provision for zoning and probably requiring that they relocate the proposed house on the site and further raise the elevation on which it is located.¹¹

The Claimant submitted a letter from his clients dated 14 May 2010 stating that their decision to not build on the property was "mostly due to the fact that property values are projected to decline dramatically due to the Deepwater Horizon oil spill disaster; however the air and water quality do not meet OUR standards at that property due to the spill either." They further state that the proposed contract of construction of the house of \$440,000 would be "a great risk to us now" and that they had been advised that the actual property itself has decreased in value by approximately \$300,000 using beachfront values prior to the disaster. "Therefore, our liability of building on a decreased property value is not in our best interest."¹²

The NPFC attempted to confirm the existence of surface oil or oiled shoreline near the client's property along N. Beach Boulevard in May 2010, but was unable to do so.¹³ Information for May 2010 showed moderate tar balls only along a section of shore more than two miles from the client's property.¹⁴ Despite the Claimant's assertions, the Claimant had not demonstrated that his clients' cancellation of the home construction project was due to the impacts of the oil spill and not a business decision or other factors.

Additionally, the NPFC contacted the local permitting office for further information on this construction project. Personnel at that office indicated that the building permit expired on 28 March 2010¹⁵, nearly one month prior to the oil spill, and that it was not renewed. The local permitting office noted that renewing the permit would have been very easy and cheap for the Claimant and his clients and that the project would have been "grandfathered" from new zoning,

⁹ Phone conversations btwn Dianne Adams & NPFC on 4 January 2011 and on 22 February 2012.

¹⁰ Phone conversation btwn Dianne Adams & NPFC on 4 January 2011.

¹¹ Phone conversation btwn Dianne Adams & NPFC on 4 January 2011.

¹² Letter from Douglas and Dianne Adams dated 14 May 2010.

¹³ NPFC reviewed NOAA ESRI (GIS) mapping for 15 May and 30 May 2010, as well as NOAA Environmental Response Management Application (ERMA) information showing cumulative observations through 28 May 2010.

¹⁴ NOAA's (ERMA) information for 28 May 2010 shows no shoreline oiling for Bay St. Louis, MS, and only a section of moderate tar balls south of Main Street.

¹⁵ Phone conversation between Maryann Barbetta & NPFC on 5 March 2012 and Bay St. Louis Building w/Flood Permit, Permit No. 09-18522 for Flood Zone A-10.

based on the prior permit.¹⁶ The Claimant has provided no information explaining why the permit was not renewed and the building design was not fully approved and offered to local officials before the oil spill occurred. If the Claimant and his clients had planned to move forward in the spring, then the NPFC expects that a new design would have been produced sometime before April if they had intended to move forward with the house. Thus, based on the administrative record, it is not clear that the Claimant's clients made the decision to not build the house prior to, or after, the oil spill.

Additionally, even if the Claimant's clients cancelled because of the Deepwater Horizon oil spill, it was the Claimant's decision not to hold his clients to the terms of the agreed upon contract.¹⁷

REQUEST FOR RECONSIDERATION:

On April 30, 2012, the Claimant sent a request for reconsideration to the NPFC stating he would like the NPFC to reconsider his claim. The NPFC received the reconsideration and associated documents on May 8, 2012 via USPS Priority Mail.

The Claimant provided a seven-page letter that requested his claim be reconsidered. The Claimant also provided a two-page letter dated April 27, 2012 from the Claimant's clients, Mr. and Mrs. Adams, to BP, a two-paragraph letter to the Claimant from Mr. and Mrs. Adams dated May 14, 2010, and a one-page letter from David Rush dated April 16, 2012 as a subcontractor to the Claimant on the Adams project. The Claimant also provided Drawing - Permitted plans 1 (approved by Bay St. Louis building dept); Drawing - Adams plans approved by a Professional Engineer dated 9/29/09; Drawing - 3 beach side elevation shows modification of elevation height; Copy of State Residential license stamped insured and a copy of the Claimant's City of Bay St. Louis contractor license; and Copy of general liability insurance for the period of 10/14/09 through 10/14/10.

In his seven-page letter the Claimant identified points of concern he had that are associated with the NPFC's original denial determination:

1. Claimant clarified for the record that Mr. Adams' mother lived in Waveland, MS and not the state of Indiana as stated by the NPFC in its initial denial. The NPFC acknowledges its error and has made the appropriate correction;
2. Claimant stated that the delay of the Adams construction project was first realized in November 2009 due to Mr. Adams' mother's illness (prior to the oil spill);
3. Claimant stated that Mrs. Adams' reporting of oil sighting and odor might be better understood given the constant reporting of oil damage in the Gulf and the Claimant further states that the Deepwater Horizon oil spill changed Ms. Adams' life;
4. Claimant stated that the NPFC misunderstood information regarding the Adams' flood insurance. The Claimant asserts that the NPFC's reference in its denial determination that Mrs. Adams told them, the NPFC, on January 4, 2012 that canceling the contract with the Claimant meant them defaulting on prepaid insurance is not correct and is an obvious misunderstanding by the NPFC because how can someone default on a prepaid policy;

¹⁶ Phone conversation btwn Josh Hayes & NPFC on 7 March 2012.

¹⁷ Agreement btwn Owner and Contractor, signed by Douglas Adams, Dianne Adams and Curtis P. Colson on 5 October 2009.

5. Claimant stated that the building permit for the Adams project expired during the time Mr. Adams' mother's health had taken a turn for the worse (March 2010) and was therefore overlooked by everyone. The Claimant further stated that a small fee to the permit office to renew the permit would not have been a problem had the Adams not eventually cancelled the contract with the Claimant.
6. Claimant stated that comments made by his clients regarding property depreciation and related concerns would never have been a consideration had the oil spill not occurred. The Claimant further stated that the Adams were pleased with his project pricing proposal in September 2009 prior to the oil spill;
7. Claimant clarifies project drawings and permitting issues. The NPFC acknowledges receipt of all drawings, permits and dates for each based on the drawings provided and explanation of facts;
8. The Claimant discusses his contract with the Adams' for construction of their beachfront home. The Claimant states that he did not have a clause in his contract by which he could hold Mr. and Mrs. Adams liable for damages if they delayed or canceled the contract prior to construction. While the contract proposal was for \$440,000.00, construction never began and the Claimant affirms that the Adams did pay him for all contract services up to the point when they canceled the contract.

NPFC Determination on Reconsideration

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 and that the loss was due to the destruction or injury to real or personal property or natural resources. The NPFC considered all the documentation submitted by the Claimant. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 CFR 136.115(d).

The NPFC performed a *de novo* review of the entire claim submission upon reconsideration.

The NPFC performed a complete review of the documentation presented by the Claimant. Claimant bases his alleged loss of profits of \$144,388.00¹⁸ on a cancelled contract with his clients, Mr. and Mrs. Adams. However, based on the evidence in the administrative record it is not clear that there was a contract in place at the time of the oil spill. While the Claimant submitted an executed Agreement between the Owners and the Contractor dated October 5, 2009, a May 14, 2010 letter to the Claimant from the Clients states that the contract for construction of the house was a "proposed contract of construction." Further, the provisions in the agreement do not provide for an exact start time but only state that construction will be completed within six months. There are scant or no details about payment schedules or other requirements in the Agreement that are typically provided in an enforceable construction contract; therefore, it is not clear that there was a contract that was cancelled.

Even if the Agreement between the Owners and the Contractor was enforceable and more than proposed Claimant has not established that the Clients cancelled the contract due to the oil spill.

¹⁸ The alleged contract price was \$440,000 and Claimant bases his alleged \$146,388.00 loss on a GCCF LOI calculation.

The Clients' April 27, 2012 letter to BP discusses in detail the impacts from the oil spill to the Clients' property; however, an earlier letter to the Claimant from the Clients dated May 14, 2010, states that the Clients decided to not build on the property "mostly due to the fact that property values are projected to decline dramatically due to the Deepwater oil spill disaster..." and that building on the speculative \$300,000 decrease in the property value "is not in our best interest." Thus, the decision to not build was not due solely to the oil spill but was based on economic considerations and speculation, less than one month after the oil spill occurred, that property values would drastically reduce due to the oil spill.

The eight-point discussion in the letter requesting reconsideration does not provide additional facts or a legal basis to persuade the NPFC that Claimant has established that the Deepwater Horizon oil spill caused his alleged loss of profits.

Despite the newly dated affidavit provided by the Claimant on reconsideration, the Claimant has not established the Deepwater Horizon oil spill as the cause of his alleged loss. Documentation produced demonstrates that Mr. & Mrs. Adams were not on a particular schedule for the construction project that they cancelled, Mr. & Mrs. Adams' written letter of May 2010 and April 2012 affidavit indicate the Deepwater Horizon oil spill influenced their decision on not to build a beach front home although unsupported statements about property values combined with concerns of health risks are the actual causes of the Adams' decision not to build.¹⁹

Based on the foregoing information, this claim is denied upon reconsideration.

Claim Supervisor: *Thomas Morrison*

Date of Supervisor's review: *6/18/12*

Supervisor Action: *Denial on reconsideration approved*

Supervisor's Comments:

¹⁹ See, letter dated May 14, 2010 from Mr. & Mrs. Adams.

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

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Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 800-280-7118
E-mail:
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5890
6/18/2012

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 8060

CpC Design-Build
ATTN: [REDACTED]
314 HWY 90 Suite 103
Waveland, MS 39576

RE: Claim Number: N10036-1582

Dear [REDACTED]:

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 claim number N10036-1582 involving the Deepwater Horizon oil spill. Please see the enclosed Claim Summary/Determination Form for further explanation.

Disposition of this reconsideration constitutes final agency action.

Sincerely,

Thomas S. Morrison
Chief, Claims Adjudication Division
U.S. Coast Guard

Encl: Claim Summary / Determination Form