

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd., Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 1-800-280-7118
E-mail: arl-pf-npfcclaimsinfo@uscg.mil
Fax: 202-493-6937

CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7010 1060 0001 7082 9130

5890/DWHZ
23 February 2012

Wise Properties LLC
Attn: [REDACTED]
25451 State Hwy 181
Daphne, AL 36526

Re: Claim Number: N10036-1595

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 your claim number N10036-1595 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 N10036-1595.

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

Encl: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1595
Claimant	: Wise Properties LLC
Type of Claimant	: Corporate
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$192,064.00

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 05 December 2011, Mr. Henry A. Wise IV (the Claimant), owner of Wise Properties LLC (Wise Properties) presented a lost profits & earnings claim in the amount of \$192,064.00 to the National Pollution Funds Center (NPFC) for reimbursement. The Claimant asserts that his rental property business, Wise, suffered due to a declining number of leases as a result of the Deepwater Horizon oil-spill.¹ According to the Claimant, “[a] number of Wise Property LLC lessors were contractors, construction workers and craftsmen, business owners that were dependent upon new construction, remodeling, construction materials/services, etc.” Further, Claimant asserts that because this type of work was no longer available following the oil spill, the individuals and businesses to which he leased could no longer honor their leases.²

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).

¹ OSLTF Claim Form Additional Information letter, submitted with the claim by the claimant on 05 DEC 2011.

² OSLTF Claim Form Additional Information letter, submitted with the claim by the claimant on 05 DEC 2011

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 (with additional information attachments), received 05 December 2011;
- Wise Properties Sales by Customer Summary Sheet;
- Copies of canceled leases;
- Wise Properties Profit & Loss Report for 2011;
- Wise Properties Profit & Loss Report for 2010;
- Wise Properties Profit & Loss Report for 2009;
- Wise Properties Profit & Loss Report for 2008;
- Wise Properties Tax Statement for 2010;
- Wise Properties Tax Statement for 2009;
- Wise Properties Tax Statement for 2008

Prior to presenting this claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) claim with the GCCF for loss of profits and impairment of earnings capacity on 10 October 2010 in the amount of \$187,235.17. The Claimant was assigned GCCF Claimant ID # 3180110 and GCCF Claim # 235415. The Claimant was denied on 30 November 2010. Additionally, the Claimant filed a Full Review Final (FRF) claim on 14 October 2010 for \$187,235.17 in loss of profits and impairment of earnings capacity, receiving GCCF Claim # 9045233. The GCCF denied this FRF claim on 22 April 2011. Lastly, the Claimant filed an Interim 4 (ICQ42011) claim on 22 October 2011 for loss of profits and impairment of earnings capacity in the amount of \$192,064.00. The Claimant was assigned GCCF Claim # 9520237. This claim is currently under Re-Review by the GCCF.

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant's GCCF claim regarding loss of earnings 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 business suffered due to a declining number of leases as a result of the oil spill. The NPFC deems that the Claimant's GCCF claim was both properly presented to the RP and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC claim N10036-1595 considers and addresses the earnings claimed to the extent that the damages were presented to the responsible party.

NPFC Determination

Under 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136, a claimant must prove that his loss of income was due to injury or destruction or loss of real or personal property or 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. The NPFC considered all documentation presented by the Claimant.

This claim is denied because the evidence presented by the Claimant does not establish that his alleged loss is due to the Deepwater Horizon oil spill. While Claimant submitted financial documentation relating to Wise Properties, evidence of an alleged loss, by itself, does not establish a causal connection between that loss and the oil spill. For example, the Claimant's profit and loss statements indicate that the business was operating at a loss for each of the six months prior to the oil spill.³ Further, Wise Property tax returns show overall business losses in 2008, 2009, and 2010.⁴ Accordingly, the Claimant has not shown how the oil spill, and not other ongoing economic factors, affected his business.

Here, the Claimant has alleged that the reduction of lease renewals, the increase of lease defaults and both the surrendering of seven properties and foreclosing of two properties to banks are due to the Deepwater Horizon oil spill. However, the Claimant's assertions that any individual lessee was impacted by the Deepwater Horizon oil spill, by themselves, also do not establish causation.⁵ For example, the information provided does not establish that the Claimant's business, or the businesses of his lessees who terminated, was impacted by the oil spill as opposed to a myriad of other economic factors including the overall state of the nation's economy and a stalled real estate market. The Claimant has not provided letters or affidavits from these former tenants describing how their businesses or jobs were affected by the

³ Wise Properties, LLC Profit & Loss statements from 2009 and 2010.

⁴ Wise Properties, LLC IRS Form 1065 for 2008, 2009, and 2010, prepared by Robert Hall and Associates.

⁵ Wise Properties, LLC Documentation supporting page 2 of 2, Item No. 10 with leases attached.

Deepwater Horizon oil spill. Should the Claimant decide to request reconsideration, these letters would be expected to show, again, how their businesses were impacted by the Deepwater Horizon oil spill as opposed to other economic factors. Cancelled leases, by themselves, do not establish causation.

Further, with regard to the leases, the NPFC notes that a comparison between some of the leases and the tenant's rent rolls indicate that some tenants may not have been not paying the contracted rent amounts agreed upon in the leases.⁶ For example, the Barnhill lease dated 19 January 2005 states that the tenant will pay \$2,100.00 per month for the first thirty months and then \$2,240.00 for the second thirty months over the course of a five year lease.⁷ The tenant's rent roll for Barnhill indicates that this tenant was averaging \$1,900.00 per month for the sixteen months prior to the oil spill in contravention to the agreed upon lease effective at that time.⁸

Additionally, the rent roles appear to contain other tenants who neglected to fulfill their obligations under the contractual terms of their lease agreements prior to the oil spill.⁹ In order to provide a complete picture of his business, if the Claimant decides to request reconsideration of this denial, he should submit copies of every lease noted on his rent roll to allow the NPFC to fully evaluate the condition of Wise Properties both before and after the Deepwater Horizon oil spill.

Furthermore, if the Claimant decides to request reconsideration of this determination, the Claimant will be expected to show that he has not mitigated his alleged losses through the retention of security deposits or some legal action against his former tenants.

This claim is denied because, based on the documentation presented, the Claimant has failed to demonstrate that the alleged loss is due to injury, destruction or loss of property or natural resources as a result of a discharge or substantial threat of discharge of oil or that he has a loss in the amount alleged.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's review: *2/23/12*

Supervisor Action: *Denial approved*

Supervisor's Comments:

⁶ Wise Properties, LLC, Sales by Customer Summaries for 2009 and 2010.

⁷ Lease dated 19 January 2005 by and between Wise Properties, LLC and Barnhill Metals.

⁸ Wise Properties, LLC, Sales by Customer Summaries for 2009-2010.

⁹ Wise Properties, LLC, Sales by Customer Summaries for 2009.