

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  
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Fax: 703-872-6113

CERTIFIED MAIL-RETURN RECEIPT REQUESTED  
Number: 7011 1570 0001 4802 9983

5890/DWHZ  
14 May 2012

Arthur S. Barksdale IV, Esq.  
Vance, Lotane & Bookhardt, P.A.  
1980 Michigan Avenue  
Cocoa, Florida 32922

Re: Claim Number: N10036-1684

Dear Mr. Barksdale:

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 N10036-1684 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 N10036-1684.

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

Copy: Terry Howard



USPS Certified Receipt: 7011 1570 0001 4802 9686

Enclosures: Claim Summary/Determination Form

## CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1684
Claimant	Terry Howard
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$552,565.70

### ***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 21 March 2012, Arthur S. Barksdale IV, on behalf of Terry Howard (collectively, the Claimant), presented an optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$552,565.70 in loss of profits and impairment of earnings capacity damages that allegedly resulted from the Deepwater Horizon oil spill.

The Claimant is a commercial security system salesman in Pensacola, Florida.<sup>1</sup> At the time of the Deepwater Horizon oil spill, the Claimant worked for A-Z Security & Sounds, as well as ADT Security Services; the Claimant has also represented APT and Sonitrol since the oil spill occurred.<sup>2</sup> The Claimant indicated that his clients are tourist based businesses, such as restaurants and hotels in the Gulf Coast area.<sup>3</sup> The Claimant asserted that, due to a decrease in tourism caused by the Deepwater Horizon oil spill, his prospective clients lost earnings and could not afford to invest in security systems.<sup>4</sup>

### ***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

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<sup>1</sup> GCCF Full Review Final Payment Claim Form, 08 September 2011.

<sup>2</sup> GCCF Full Review Final Payment Claim Form, 08 September 2011.

<sup>3</sup> GCCF Full Review Final Payment Claim Form, 08 September 2011.

<sup>4</sup> GCCF Full Review Final Payment Claim Form, 08 September 2011.

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. § 136.233, 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 the claim, the Claimant presented the following documentation to the NPFC:

- Cover letter from Vance, Lotane & Bookhardt, dated 03 February 2012;
- NPFC Authorization Agreement, dated 01 February 2012;
- Denial Letter on Interim Payment/Final Payment Claim, dated 30 December 2011;
- GCCF Full Review Final Payment Claim Form, 08 September 2011;
- Lost Earnings/Income Worksheet, dated 19 November 2011;
- Letter from the Claimant to "Whom It May Concern," undated;

- Letter from Advanced Protective Technologies to “Whom It May Concern,” dated 11 November 2010;
- 2010 Form 1040A Joint U.S. Individual Income Tax Return;
- 2009 Form 1040 Joint U.S. Individual Income Tax Return;
- 2008 Form 1040 U.S Individual Income Tax Return ;
- Photocopy of the Claimant’s Florida Driver’s License;
- Paystub from A to Z Security and Sound, Inc. for the period 12 September 2011 through 18 September 2011;
- Paystub from GSC Systems, Inc. for the period 17 October 2011 through 23 October 2011; and
- GCCF Client Authorization, dated 08 September 2011.

Prior to presenting this claim to the NPFC, the Claimant filed three claims for loss of earnings with the GCCF – all under Claimant ID # 3338310.<sup>5</sup> Claim # 396778 is an Emergency Advance Payment (EAP) claim filed on 22 November 2010 for \$32,000.00, Claim # 9294491 is a Full Review Final (FRF1) claim filed on 30 May 2011 for \$45,000.00, and Claim # 9541400 is a Full Review Final (FRF2) claim filed on 29 November 2011 for \$552,565.74.<sup>6</sup> These claims were all denied by the GCCF.<sup>7</sup>

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant’s GCCF claims is the same as the subject matter of the claim before the NPFC, i.e., that due to the Deepwater Horizon oil spill, the Claimant lost earnings as a commercial security system salesman. The NPFC deems that the Claimant’s GCCF claims were properly presented to the responsible party and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1684 considers and addresses the earnings claimed in the claim presented to the responsible, specifically; GCCF Claim #'s 396778 (EAP), 9294491 (FRF1), and 9541400 (FRF2).

### **NPFC Determination**

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 (1) some of the Claimant’s alleged damages are for future losses and not compensable under OPA, and (2) the Claimant failed to prove his alleged loss was due to the Deepwater Horizon oil spill.

### **Non-Compensable Damages**

The Claimant indicated that his claimed damages to the NPFC included damages for a period of up to 60 months from the date of the Deepwater Horizon oil spill.<sup>8</sup> However, under 33 CFR § 136.235, “the amount of compensation is limited to the actual net reduction or loss of earnings *suffered.*”<sup>9</sup> Therefore, the Claimant cannot be compensated for any prospective damages that

<sup>5</sup> Report from the GCCF, dated 17 April 2012.

<sup>6</sup> Report from the GCCF, dated 17 April 2012.

<sup>7</sup> Report from the GCCF, dated 17 April 2012.

<sup>8</sup> Lost Earnings/Income Worksheet.

<sup>9</sup> Emphasis added.

might accrue in the future. Consequently, to the extent the losses claimed by the Claimant are for future losses, those damages are non-compensable under OPA and therefore denied.

### **Failure to Prove Damages or Causation**

The remainder of this claim is denied because the Claimant failed to prove he experienced a financial loss due to the Deepwater Horizon oil spill. The Claimant asserted that he lost commercial security system sales because of a decrease in tourism caused by the Deepwater Horizon oil spill. The Claimant's submission to the NPFC consisted of assorted tax documentation and one pay stub. On 20 March 2012, the NPFC requested that the Claimant provide additional information to further document his alleged loss and provide a connection between his alleged loss and the Deepwater Horizon oil spill. The NPFC requested that the Claimant provide, among other things, sales records from 2008 through 2011, documentation of sales that were cancelled due to the Deepwater Horizon oil spill, and full and complete paystub and tax information.<sup>10</sup> To date, the NPFC has not received any response or additional information from the Claimant. Accordingly, the Claimant failed to meet his burden to prove that he experienced a loss of earnings due to the Deepwater Horizon oil spill.

This claim is denied because (1) some of the damages claimed are for future damages and not OPA compensable, (2) the Claimant failed to meet his burden to demonstrate that there was a loss in the amount claimed, and (3) the Claimant failed to meet his burden to demonstrate 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.

Claims Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *5/14/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

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<sup>10</sup> Letter from the NPFC to the Claimant, dated 20 March 2012.