U.S. Department of Homeland Security

United States Coast Guard

Director
National Pollution Funds Center
United States Coast Guard

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

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 2446 4975

5890/DWHZ
26 March 2012

Country Club, Inc.
ATTN: [redacted]
634 Louisa Street
New Orleans, LA 70117

Re: Claim Number: N10036-1690

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 the claim number N10036-1690 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 N10036-1690.

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	N10036-1690
Claimant	Country Club, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	$33,506.00

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 16 January 2012, Ms. Sarah Ney, on behalf of Country Club, Inc., (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking $33,506.00 in loss of profits damages resulting from the Deepwater Horizon oil spill.[1]

The Claimant is club and restaurant in New Orleans, Louisiana, offering private membership as well as public access to a restaurant, pool, cabana bar, and other amenities.[2] The Claimant notes that its profits increased in the period following the oil spill, due in large part to extensive renovations to the property.[3] In spite of this growth, the Claimant stated that the oil spill impacted the business by "discourag[ing] our guests from wanting to partake in our restaurant as they were expected to"[4] following the renovations. The Claimant also alleged that general economic effects of the oil spill on the New Orleans economy resulted in slower than anticipated business growth, stating that,

> [m]any of the Club's guests are employed in the hospitality industry, and others are either employed in offshore work or businesses that cater to the offshore industry. Tourism also slumped citywide, and the Clubs' projections were not met, despite the fact that the gross profits were still increasing.[5]

The Claimant estimated to have sustained losses in food sales revenue from May to December 2010 in the amount of $33,506.00, based on the business' failure to reach anticipated levels of growth.[6]

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

[1] Optional OSLTF Claim Form, signed on 16 January 2012.
[2] *See*, www.thecountryclubneworleans.com
[3] Letter from the Claimant to the GCCF, 3 November 2011.
[4] Letter from the Claimant to the GCCF, 19 April 2011.
[5] Letter from the Claimant to the GCCF, 3 November 2011.
[6] Optional OSLTF Claim Form, signed on 16 January 2012.

waters or adjoining shorelines or the exclusive economic zone, as described in § 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.

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 undertake, 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, signed on 16 January 2012;
- Claim Cover Letter, 27 January 2012;
- GCCF Determination Letter on Final Payment Claim, 23 May 2011;
- GCCF Expiration of Re-Review Option for Determination Letter on Interim Payment/Final Payment Claim, 6 July 2011;
- Letter from the Claimant to the GCCF, requesting loss of revenue in the amount of $33,506.00, 19 April 2011;

- Letter from the Claimant to the GCCF, regarding tax return deadline extension, various issues with claim, 3 November 2011;
- Authorization for Claimant's agent, James Janis;
- Loss calculation sheet, re food sales;
- Balance Sheet as of December 31, 2010;
- Letter from the Claimant to the GCCF, noting request for tax filing extension, 19 April 2011;
- Profit and Loss Monthly Comparisons, 2010, 2011;
- Monthly Profit and Loss Statements, 2010, 2011, 2009;
- 2010 Form 1120;
- Louisiana Statements and Supplemental Information, The Country Club, Inc.;
- Fax Cover Sheet, 20 April 2011;
- Louisiana Business Registration Documentation;
- Photographs of renovations to The Country Club;

Prior to presentment of this claim to the NPFC, the Claimant presented a Full Review Final (FRF) claim to the RP/GCCF, seeking loss of profits and wages damages in the amount of $33,506.00.[7] The Claimant was assigned Claimant ID # 3513835 and the FRF claim was assigned claim #9360679.[8] The RP/GCCF denied payment on this claim in a letter dated 23 May 2011.[9]

On 13 February 2012, the Claimant submitted this claim to the NPFC, seeking $33,506.00 in loss of profits and impairment of earning capacity damages.[10] Documentation submitted by the Claimant indicates that the claim now before the NPFC addresses the same damages, in the same claimed amount as previously presented to the RP/GCCF. Therefore, presentment requirements under OPA have been met[11] and the NPFC may properly adjudicate this claim for loss of profits and impairment of earning capacity damages in the amount of $33,506.00.

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.

Here, in order to prove a claim for loss of profits damages, a claimant must provide documentation sufficient to prove (1) that the Claimant sustained an actual loss of profits, as evidenced in part by "the amount of the claimant's earnings in comparable periods and during the period when the claimed loss or impairment was suffered"[12], as well as (2) that the loss of profits was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

---

[7] GCCF Claimant Status, accessed on 14 March 2012; *See also*, Letter from the Claimant to the GCCF, 19 April 2011.
[8] GCCF Claimant Status, accessed on 14 March 2012.
[9] GCCF Determination Letter on Final Payment Claim, 23 May 2011.
[10] Optional OSLTF Claim Form, signed on 12 January 2012.
[11] 33 C.F.R. § 136.103(a).
[12] 33 C.F.R. § 136.233(c).

Although the Claimant's sales revenue and profits actually increased in 2010 as compared to previous years, the Claimant asserts that the growth was slower than expected due to effects of the Deepwater Horizon oil spill.[13]

1. Failure to prove a loss of profits.

The Claimant stated that from May to December 2010, "the Club's projections were not met, despite the fact that the gross profits were still increasing."[14] As the Claimant states, profits increased in the period following the Deepwater Horizon oil spill. The evidence provided is not sufficient to prove that income was specifically lost as a result of the oil spill. Without information to identify income that was specifically lost, such as a cancelled event contract or loss of members, the failure of the Claimant's business to grow at a faster rate than it actually grew is merely speculative and is not compensable. Additionally, it should be noted that OPA is available to pay for losses of profits caused by an oil spill event, and not losses in revenue, as presented by the Claimant.[15]

The Claimant also proposes that 2011 be used as indicator of 2010 losses. The Claimant states that,

> in order to properly support our claim of loss of projected profits from May to December 2010 for a business that otherwise shows an increase in sales, we were forced to wait until we could generate Profit and Loss Statements for the same months of 2011 to compare to the same moths for 2010.[16]

However, the Claimant's 2011 monthly sales records fail to prove that the Claimant sustained a loss in 2010. If 2011 is an indicator of the Claimant's 2010 losses, then the months of 2010 prior to the spill should reflect the Claimant's earnings in the same months of 2011. However, food sales for January to March 2010 are significantly lower than sales from January to March in 2011, indicating that sales in 2010 were not on track to reach the levels reached in 2011. For example, in February, March and April 2011, food sales had increased by approximately 41%, 60%, and 30% as compared to those months of 2010.[17] However, in May, June and July of 2010, sales records much more closely matched 2011 records, increasing by only 17%, 19% and 16%. Therefore, the Claimant's records of food sales as reported in profit and loss statements are not sufficient to prove that food sales in 2011 are in fact a sufficient and reliable indicator of what 2010 food sales would have been had the oil spill not occurred.

2. Failure to prove that any alleged loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

As an element of this claim, the Claimant asserts that tourism decreased in New Orleans in the period following the Deepwater Horizon oil spill.[18] However, this assertion is not supported by statistics, including a report released on 14 April 2011 by the New Orleans Convention and Tourism Bureau, which states that tourism in New Orleans, increased 10.7% in 2010 over 2009,

[13] Letter from the Claimant to the GCCF, 3 November 2011.
[14] Letter from the Claimant to the GCCF, 3 November 2011.
[15] 33 C.F.R. § 136.235, "The amount of compensation allowable is limited to the actual net reduction of earnings or profits suffered."
[16] Letter from the Claimant to the GCCF, 3 November 2011.
[17] Food sales revenue reported in the Claimant's profit and loss statements.
[18] Letter from the Claimant to the GCCF, 3 November 2011.

marking the first time that the number of visitors rose higher than 8 million since Hurricane Katrina.[19]

The Claimant also alleged that because patrons work offshore or in the hospitality industry, the business lost income as a result of the oil spill.[20] Furthermore, the Claimant noted that patrons were wary of eating in the restaurant due to effects of the spill.[21] However, the Claimant has offered no documentation or information to show that sales of seafood items decreased at any period following the oil spill, or to show that patronage from a particular clientele decreased following the oil spill.

Because the Claimant experienced a growth in profits in 2010 following the Deepwater Horizon oil spill, and because the Claimant has not adequately demonstrated that the difference in sales from 2010 to 2011 represents a loss to the Claimant in 2010, the Claimant has failed to demonstrate a financial loss. Furthermore, the Claimant has not demonstrated any causal link between their alleged loss and the Deepwater Horizon oil spill.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that they sustained a loss of profits in the amount of $33,506.00, 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: ***3/26/12***

Supervisor's Action: ***Denial approved***

Supervisor's Comments:

[19] 2010 New Orleans Area Visitor Profile, 14 April 2011.
[20] Letter from the Claimant to the GCCF, 3 November 2011.
[21] Letter from the Claimant to the GCCF, 19 April 2011.