

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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US COAST GUARD
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23 July 2012

Vance, Lotane & Bookhardt, PA
ATTN: Mr. Arthur S. Barksdale IV, Esq.
1980 Michigan Avenue
Cocoa, FL 32922

Re: Claim Number: N10036-1691

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 the claim number N10036-1691 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 N10036-1691.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

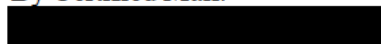
Sincerely,

Claims Adjudication Division
National Pollution Funds Center

Enclosure: (1) Claim Summary/Determination Form
(2) Evidence Presented in Support of NPFC Claim N10036-1691

cc: Mr. Sam Williams

By Certified Mail:



CLAIM SUMMARY/DETERMINATION FORM

| | |
|------------------|---------------------------------------------------|
| Claim Number | N10036-1691 |
| Claimant | Mr. Sam Williams |
| Type of Claimant | Private (US) |
| Type of Claim | Loss of Profits or Impairment of Earning Capacity |
| Amount Requested | \$84,000.00 |

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.

On 08 March 2012, the United States District Court, Eastern District of Louisiana issued a "Transition Order" (TO) limiting the GCCF's ability to accept, process, or pay claims except as provided in that order. The TO created a Transition Process (TP) to facilitate the transition of the claims process from the GCCF to a proposed Court Supervised Settlement Program (CSSP). The Court granted Preliminary Approval of the proposed settlement agreement on 2 May 2012, and the CSSP began processing claims on 4 June, 2012.

CLAIM AND CLAIMANT

On 24 April 2012, Arthur S. Barksdale IV, Esq., on behalf of Mr. Sam Williams (the Claimant), submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$84,000.00 in loss of profits or impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.

The Claimant is a realtor in the Florida Keys, who stated that "the BP Oil spill caused 6 customers to walk away from negotiations on properties."¹ Claimant asserted that beyond the six transactions that never materialized, the oil spill caused a general lack of interest among buyers and sellers.

Claimant seeks to recover income lost in the six transactions identified in this claim submission, totaling \$84,000.00.²

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 waters or adjoining shorelines or the exclusive economic zone, as described in § 2702(b) of OPA.

The OSLTF 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. 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.

¹ GCCF Full Review Final payment Claim Form, page 8.

² Claim Cover Letter, 21 February 2012.

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; and
- (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 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.

Under 33 U.S.C. § 2712(f), payment of any claim or obligation by the Fund under OPA shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

In support of this claim, the Claimant presented the evidence in enclosure (2).

Claim History

On 7 April 2011, the Claimant presented a Full Review Final (FRF) claim to the GCCF, seeking \$57,000.00 in loss of earnings damages.³ The GCCF assigned Claimant ID # 3510887 and the FRF claim was assigned claim # 9347554.⁴ The RP/GCCF denied payment on the FRF claim.⁵

On 27 October 2011, the Claimant presented a second Full Review Final (FRF2) to the RP/GCCF, this time, seeking \$84,000.00 in loss of earnings damages.⁶ The Claimant retained Claimant ID 351088 and the FRF2 was assigned claim # 9527454.⁷ The GCCF also denied payment on FRF2.⁸

³ GCCF United States Coast Guard Report, 13 May 2012.

⁴ GCCF Denial Letter, dated 07 April 2012.

⁵ GCCF Denial Letter, dated 07 April 2012.

⁶ GCCF United States Coast Guard Report, 13 May 2012.

⁷ GCCF United States Coast Guard Report, 13 May 2012.

On 22 February 2012, the Claimant presented this claim to the NPFC, seeking \$84,000.00 in loss of profits or impairment of earning capacity damages.⁹ According to OPA, a claim must be presented to the RP/GCCF, prior to presentation to the NPFC. Should the RP/GCCF deny payment on the claim or fail to issue payment within 90 days of presentment, the Claimant may present the claim to the NPFC.¹⁰ Information included in this submission indicates that the GCCF has denied payment on this claim in the amount now presented to the NPFC. Therefore, the OPA presentment requirements have been met.

Additionally, the NPFC notes that evidence presented in this claim submission indicates that the Claimant is a member of the economic damages class of the Deepwater Horizon oil spill class action settlement (the BP settlement).

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.

As an initial matter, it appears that the Claimant is a member of the economic damages class of the BP settlement. This claim is therefore considered to have been settled, and the Claimant is ineligible to recover funds from the OSLTF. According to OPA, the payment of any claim by the NPFC is subject to the NPFC's ability to obtain, by subrogation, the rights to recover all costs and damages from the responsible party. If a claim has been settled, the Claimant no longer has rights to the claim and therefore cannot subrogate rights to the NPFC.

While this claim may not have been quantified or paid, it is considered to have been settled by virtue of the Court's preliminary approval of the settlement agreement. If the Claimant disagrees that he is a member of the economic damages class of the BP Settlement, he should then submit evidence to indicate that he has either opted out or is excluded from the BP Settlement in his request for reconsideration of this claim.

Furthermore, this claim is denied under OPA's loss of profits damage category, as the Claimant has failed to prove that he has sustained a financial loss as a result of the Deepwater Horizon oil spill.

1. Failure to prove a financial loss.

In order to prove that a claimant has sustained an actual financial loss within the meaning of OPA, a claimant must prove that his "income was reduced"¹¹ following the oil spill. In establishing a baseline by which to measure the Claimant's loss, OPA requires that the NPFC consider "the claimant's profits or earnings in comparable periods."¹² A Claimant may also present evidence of actually cancelled contracts. However, in order to prove that any cancelled contracts resulted in actual losses; a Claimant must prove that the cancelled or lost contracts were not replaced with other work and that any lost sales were not made up at a later time.

⁸ GCCF United States Coast Guard Report, 13 May 2012.

⁹ Claim Cover Letter, 21 February 2012.

¹⁰ 33 C.F.R. § 136.133(c)(2).

¹¹ 33 C.F.R. § 136.233(b).

¹² 33 C.F.R. § 136.233(c).

Here, the Claimant alleged that real estate sales decreased in the period following the Deepwater Horizon oil spill, and that six potential sales did not proceed as a result of the spill. However, the Claimant's earnings following the spill are significantly higher than his earnings during the same period of the previous year. The Claimant's profit and loss statements indicate earnings of \$30,324.07 for the period of May to November of 2009, as compared to earnings of \$60,003.85 for May to November of 2010.¹³

Furthermore, with regards to the transactions in progress at the time of the oil spill, the NPFC notes that no sales contracts had been finalized.¹⁴ The Claimant's failure to earn income from potential sales is not an actual loss under OPA's loss of profits damage category.¹⁵

2. Failure to prove a loss as a result of the Deepwater Horizon oil spill.

The Claimant alleged that certain sales were lost as a result of the oil spill and that business generally slowed due to oil spill related concerns. However, information regarding the Florida Keys real estate markets indicate that 2010 sales increased 14% relative to 2009.¹⁶ This overall increase in real estate sales in the Florida Keys is mirrored by the substantial increase in the Claimant's sales in 2010, as discussed above.

Based on the fact that Florida Keys real estate sales improved in 2010 over 2009, it does not appear that the discharge of oil caused by the Deepwater Horizon oil spill actually caused industry losses in 2010.

Regarding the six sales allegedly lost as a result of the spill, again, the NPFC notes that no contracts had actually been finalized. All contracts were either unsigned, or were pending bank approval. Accordingly, any loss the Claimant might have sustained is speculative due to the preliminary nature of the documentation provided. Furthermore, it is unclear whether potential sales were actually lost, or were merely delayed following the spill. There is insufficient documentation in this claim submission to indicate whether or not delayed sales actually materialized at a later time.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$84,000.00, 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. Furthermore, this claim is considered to have been settled by virtue of Claimant belonging to the economic damages class associated with the CSSP.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *7/23/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹³ 2009, 2010 Monthly Profit and Loss Statements.

¹⁴ One short sale purchase contract had been signed, but was pending bank approval.

¹⁵ 33 C.F.R. § 136.235, limiting potentially available compensation to "the actual net reduction or loss of earnings or profits suffered."

¹⁶ Tropical Breezes Real Estate Newsletter, Vol. 10, No. 1, Winter 2011.

Enclosure (2)
Evidence Presented in Support of
NPFC Claim # N10036-1691

- Claim Cover Letter, 21 February 2012;
- NPFC Authorization Agreement, 7 February 2012;
- Email from the Claimant's legal representative, acknowledging request for representation authorization, 22 February 2012;
- Custom Transaction Detail report, August – December 2010;
- GCCF Denial of Re-Review Request for Determination Letter on Interim Payment/Final Payment Claim, 23 January 2012;
- GCCF Determination Letter on Interim Payment/Final Payment Claim, 26 December 2011;
- Income and Expense Detailed Report, 1/1/2010 to 6/30/2010;
- Letter from the Claimant to BP, 28 October 2010;
- Net Income Report, 1/1/2010 to 7/31/2010;
- GCCF Full Review Final Claim Form, Claimant ID 3510887;
- Monthly Profit and Loss Statements, 2008;
- Tropical Breezes Real Estate Newsletter, Vol. 7, No. 4, Fall 2008;
- 2008 Form 1040, showing wages of \$35,943.00;
- 2008 Schedule C (Form 1040), showing gross sales of \$5,958.00;
- 2009 Form 1040, showing wages of \$17,283.00;
- 2009 Schedule C (Form 1040), showing gross sales of \$39,484.00;
- 2009 Schedule SE (Form 1040);
- 2009 Form 5329;
- 2009 Form 8606;
- 2009 Form 4562;
- 2009 Schedule M (Form 1040A or 1040);
- Tropical Breezes Real Estate Newsletter, Vol. 7, No. 1, Winter 2008;
- Monthly Profit and Loss Statements, 2009;
- Income and Expense Detailed Report, 1/1/2009 to 12/31/2009;
- Tropical Breezes Real Estate Newsletter, Vol. 8, No. 4, Fall 2009;
- Net Income Report from 1/1/2009 to 12/31/2009;
- Tropical Breezes Real Estate Newsletter, Vol. 8, No. 2, Spring 2009;
- Monthly Profit and Loss Statements, 2010;
- Income and Expense Detailed Report, from 7/1/2010 to 12/31/2010;
- Tropical Breezes Real Estate Newsletter, Vol. 9, No. 4, Fall 2010;
- 2010 Form 1120S, showing gross sales of \$117,861.00;
- 2010 Schedule K-1 (form 1120S);
- 2010 Form 1040, showing wages of \$20,000.00 and total income of \$34,471.00;
- 2010 Schedule C (Form 1040), showing gross sales of \$61,389.00;
- 2010 Schedule E (Form 1040);
- 2010 Form 4797;
- 2010 Schedule M (Form 1040A or 1040);
- Net Income Report from 1/1/2010 to 12/31/2010;
- Tropical Breezes Real Estate Newsletter, Vol. 9 No. 2, Spring 2010;
- Tropical Breezes Real Estate Newsletter, Vol. 9, No. 3, Summer 2010;
- Tropical Breezes Real Estate Newsletter, Vol. 9, No. 1, Winter 2010;

- Emails between Claimant and potential customer, beginning 2 October 2009 and ending on 21 June 2010;
- Emails between Claimant and second potential customer, beginning 13 April 2010 and ending on 19 April 2010;
- Income and Expense Detailed Report from 7/1/2010 to 7/31/2010;
- Emails between Claimant and a third potential customer, beginning on 22 May 2010 and ending on 14 June 2010;
- "As Is" contract for sale and purchase, signed by buyer on 19 June 2010;
- Property Listing;
- Letter indicating preliminary approval of mortgage financing for potential customer, 1 October 2009;
- Letter to Claimant, informing of customer's decision not to purchase property, 22 June 2010;
- Emails between Claimant and fourth potential customer, 9 October 2009;
- "As Is" contract for sale and purchase, showing would-be closing date of 2/25/2010, and signed on 1/10/10;
- "As Is" contract for sale and purchase, signed by buyer on 19 April 2010;
- Copy of check, signed on 19 April 2010;
- Email from fifth potential customer, on 13 April 2010, ending on 29 June 2010;
- Emails from sixth potential customer, on 27 December 2009, ending on 10 November 2010;
- "As Is" contract for sale and purchase, signed on 6 March 2010;
- Short Sale Rider to Far/Bar "As Is" Contract For Sale and Purchase;
- Property Listing, Marathon, FL.