U.S. Department of
Homeland Security

**United States
Coast Guard**

Director
National Pollution Funds Center
United States Coast Guard

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5890/DWHZ
22 September 2012

Mr. Kenneth Haughton
[redacted]

Re: Claim Number: N10036-1844

Dear Mr. Haughton:

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 N10036-1844 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 N10036-1844.

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: (1)Claim Summary/Determination
(2) Evidence Presented in Support of NPFC Claim # N10036-1844

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1844
Claimant	Mr. Kenneth Haughton
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	$350,000.00

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 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 02 May 2012, and the CSSP began processing claims on 04 June 2012.

CLAIM AND CLAIMANT

On 18 June 2012, Mr. Kenneth Haughton (the Claimant) submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking $350,000.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.[1]

At the time of the oil spill, the Claimant was working as a Field Sales Representative in the Gulf States Sales region, specializing in the sale of hospitality card entry locks. The Claimant's customers included hotels throughout Louisiana, Mississippi, Alabama, Arkansas, Tennessee and Northwest Florida.[2] The Claimant was employed in this position from May 2008 until 30 September 2010. The Claimant alleged that his position was eliminated due to the effects of the Deepwater Horizon oil spill on the tourism industry in the Gulf Coast. Specifically, a letter from his former employer states that the Claimant's position,

> was eliminated as a result of the impact of the BP oil spill on [his] assigned sales territory including the Gulf States of LA, MS, AL and FL west of Tallahassee.[3]

The Claimant has remained unemployed since the loss of his position, and seeks $350,000.00 for 30 months of unemployment including benefits lost from the time of his termination through the end of 2013.

APPLICABLE LAW

[1] Hardship Letter, dated 28 June 2012.
[2] Haughton – Territory By State, Market & Hotel Size.
[3] Letter from the Claimant's former employer, dated 30 January 2012.

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 water, adjoining shorelines, or the exclusive economic zone of the United States, 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.

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 NPFC

To support this claim, the Claimant submitted the following documentation:
See Enclosure (2) Evidence Presented in Support of NPFC Claim # N10036-1844.

On 18 June 2012, the Claimant presented this claim to the NPFC, seeking $350,000.00 in loss of profits or impairment of earning capacity damages.[4] Prior to submitting this claim to the NPFC, the Claimant presented several claims to the GCCF and later, to the CSSP under Claimant ID 3142755. The claim numbers and payment amounts are summarized in the following chart.[5]

Claim type	Date Filed	Period	Claim #	Requested	Paid
Lost Earnings	10/11/2010	EAP	197615	$25,000.00	$25,000.00
Lost Earnings	10/11/2010	Final	9048985	-	-
Lost Earnings	1/07/2011	ICQ12011	9180799	$50,000.00	$10,760.08
Lost Earnings	4/07/2011	ICQ22011	9348265	$41,092.98	$26,588.84
Lost Earnings	9/02/2011	ICQ32011	9452855	$110,000.00	-
Lost Earnings	11/11/2011	ICQ42011	9534860	$100,000.00	-
Lost Earnings	3/30/2012	ICQ62011	9585418	$189,000.00	$3,185.67
Economic Loss	6/04/2012	DWH	1954	-	-
Total Paid					**$65,534.59**

All claims before the NPFC must have been first presented to the Responsible Party or its representative. Should the RP fail to issue payment on a claim, or should the claim be pending for a period longer than 90 days, the claimant may then present the same claim, for the same damages, to the NPFC.[6] Evidence available to the NPFC indicates that the Claimant has properly presented claims to the GCCF and CSSP, over and above his claimed damage amount of $350,000.00. With the exception of the EAP claim, these claims have been denied at least in part, or remain undetermined. Therefore, OPA presentment requirements have been met and the NPFC may properly adjudicate this claim for loss of profits and impairment of earning capacity damages in the amount of $350,000.00.

Additionally, the NPFC notes that evidence presented in this claim submission indicates that the Claimant is a member of the Deepwater Horizon oil spill economic and property damages class action settlement (the E&PD 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 all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

[4] Hardship Letter, dated 28 June 2012.
[5] Deepwater Horizon- United States Coast Guard Report, as of 8/16/2012.
[6] 33 C.F.R. § 136.103(c)(2).

As an initial matter, it appears that the Claimant is a member of the E&PD 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 those 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 E&PD Settlement, he should submit evidence to indicate that he has either opted out or is excluded from the E&PD Settlement in a request for reconsideration of this claim.

Furthermore, this claim for loss of profits and impairment of earning capacity damages is also denied on its merits, as the Claimant has failed to prove that his alleged loss was caused by the Deepwater Horizon oil spill. 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 financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

In support of this claim, the Claimant provides a breakdown of his earnings throughout his employment, from May 2008 through September 2010. However, these records fail to demonstrate that the Claimant sustained an appreciable drop in income in the period following the oil spill. Rather, it appears that the Claimant's sales had been declining for several months prior to the oil spill and that the Claimant's pay rate remained consistent in the period following the spill as compared to the four months immediately prior. For example from January through April 2010, the Claimant's income decreased by an average of 32.03% each month, as compared to those months of 2009. For the remainder of his employment, from May through September 2010, the Claimant's income decreased as compared to 2009, by an average of 35.8% per month.[7] This slight increase in the rate of the Claimant's loss after April 2010, does not prove that the Claimant's income was actually affected by the oil spill. Rather, it appears that the Claimant's income changed substantially upon his relocation to Gulf Shores in January 2010, and remained steady from that time through the end of his employment. Documentation of the Claimant's pay, therefore, fails to support his assertion that the oil spill affected the Claimant's sales in any way.

Furthermore, the Claimant makes clear that his sales region encompassed several southern states, including all of Tennessee and Arkansas, in addition to areas of Louisiana, Mississippi and Alabama. A letter from a human resources manager of the Claimant's former employer states that the oil spill and accompanying decline in business volume "caused the hospitality industry to defer plans for new construction and retrofits," resulting in the elimination of the Claimant's position.[8] However, the Claimant has failed to provide any evidence that might show that certain projects or contracts were cancelled as a result of the oil spill. Furthermore, it is unclear why an alleged decrease in business in the area of Gulf Shores and Orange Beach, Alabama would have caused the Claimant's sales to drop to the extent that the company was forced to eliminate his position as a regional salesperson. In a document provided by the Claimant, indicating "current supply, construction pipeline & forecast for new hotel openings" in the Claimant's region, the majority of the hotel openings identified during the fourth quarter of 2009, were not located near the Gulf Coast. The Claimant's identified markets included Birmingham,

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[7] Calculations made using net pay, ADP pay history, 2008, 2009, 2010.
[8] Letter from the Claimant's employer, 30 January 2012.

Alabama, Chattanooga, Nashville, and Knoxville, Tennessee, and Little Rock, Arkansas. In fact, the Claimant's business forecast for new hotel openings indicates that the largest projected share as business as of the fourth quarter of 2009, would be located in Tennessee.[9] Although coastal cities like Mobile, Alabama, and New Orleans, Louisiana, were also identified as the Claimant's markets, the Claimant has not provided evidence to prove that business in those markets in fact decreased as a result of the oil spill.

Additionally, the Claimant's actual separation agreement with his former employer fails to reference the oil spill in any way. Rather, the agreement states that "due to restructuring [the Claimant's] employment with Onity (the Company) will end on 09/28/2010."[10]

Based on the (1) consistency of the Claimant's earnings throughout 2010, (2) failure to document any business lost as a result of the oil spill, and (3) failure to prove that the Claimant's earnings were indeed dependent on such a small area of the southeast region, the Claimant has failed to prove that that his position was eliminated because of the discharge of oil resulting from the Deepwater Horizon oil spill.

Accordingly, this claim for $350,000.00 is denied in its entirety because the Claimant has failed to demonstrate (1) that he sustained a financial loss in the amount claimed, 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 discharge of oil. Additionally, this claim is considered to have been settled by virtue of the Claimant belonging to the E&PD Settlement, and is therefore not eligible for OSLTF compensation.

Claim Supervisor: ***NPFC Claims Adjudication Division***

Date of Supervisor's Review: ***8/14/12***

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

Supervisor's Comments:

[9] Haughton- Territory by state, market & hotel size, at Q4 2009.
[10] Separation Agreement, pg 1 of 11, dated 27 September 2010.

Enclosure (2)
Evidence Presented in Support of
NPFC Claim # N10036-1844

- Optional OSLTF Claim Form, signed on 13 May 2012;
- 2010 Form W-2, showing wages of $56,654.21;
- 2009 Form W-2, showing wages of $107,370.87;
- 2008 Form W-2, showing wages of $60,789.07;
- Vehicle Standard Cost Schedule, effective 3/30/2010;
- UTC Savings Plan;
- Monthly Breakdown of Runzheimer benefits, calculating "real loss of $16,916.00," handwritten;
- Emails between the GCCF and the Claimant, 11 messages, 26 October 2011;
- Sloan, Allan, *United Technologies' $1 billion employee college plan*, CNNmoney, 2 May 2012;
- Salesperson Commission Report, 1 April 2010;
- Email from the Claimant to the GCCF, containing attachments, 15 June 2012;
- Salesperson Commission Report, 1 April 2010, 16 pages;
- Employer letter regarding the termination of the Claimant's position, 30 January 2012;
- Earning Statement, 9/29/2010;
- Pay History, 2008, 2009, 2010;
- Email from Grant Williams, subj: Official Scorecard- January, 17 February 2009;
- Letter from Legal Services, Alabama, 30 May 2012;
- Letter from the Claimant to the GUCCF, 30 March 2012;
- Letter from United Technologies to the Claimant, dated "April 2010";
- Sales Quote, dated 1 June 2009;
- Sales Quote, dated 28 July 2009;
- Email from the Claimant to the NPFC, 15 June 2012;
- Sales Quote, 18 August 2008;
- Evidence of prior payments to the Claimant by the GCCF;
- Evidence of unemployment compensation, 2011;
- Health Care Spending Account detail, 2010;
- 2010 Form 1040, showing adjusted gross income of $102,706.00;
- May 19, 2008, Employment Offer letter;
- Email from Daniel Foxworth, Subject: Monthly Game Ball Winners and Q3 MVPs;
- Chart of 2008 and 2009 Pay History;
- Job Posting, Regional Hospitality Security Sales Manager (Gulf Region);
- Email from Daniel Foxworth to the Claimant, 19 October 2010;
- Record of pay rate, 2008, 2010;
- 2010 Form 1099-R;
- Record of COBRA payments;
- Sales Quote, 12/11/09;
- Bill showing payment due as a result of the Claimant's broken lease, 3 August 2011;
- Jumper, Kathy, *Beach hotels get state loans to save energy*;
- Separation agreement, showing termination date of 20 September 2010;
- Letter from the Claimant's former employer regarding his termination, 27 September 2010;
- Document A, "4 Year Analysis of Ken Haughton's Past, Present and Future Earnings";
- Letter from the Claimant to the GCCF, undated;

- Haughton – Territory by State, Market & Hotel Size;
- Sales Quote, 12/11/09;
- Email from Daniel Foxworth, subject, FYI, dated 3 November 2009;
- Letter from Congressman Aderholt, 16 Marcy 2012;
- Letter from Congressman Aderholt, 20 July 2011;
- Letter from Congressman Aderholt, 7 November 2011;
- Letter from the Claimant to the GCCF, 7 January 2011.