

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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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 8886

5890/DWHZ
7 December 2012

Mr. Ernest Max Cornelius
[REDACTED]

Re: Claim Number: N10036-1879

Dear Mr. Cornelius,

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 N10036-1879 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 N10036-1879.

Mail reconsideration requests to:

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

Sincerely,

[REDACTED]

Claims Adjudication Division
National Pollution Funds Center
U.S. Coast Guard

Enclosure: Claim Summary/Determination

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1879
Claimant	Ernest Max Cornelius
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$4,341.12

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 27 November 2012, Mr. Ernest Max Cornelius ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$4,341.12 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

The Claimant is an owner of a timeshare condominium unit in Orange Beach, Alabama. The Claimant pays a fixed monthly fee and has usage of the condominium for a specified week each year. The Claimant seeks recovery of \$4,341.12, which is the sum of his monthly payments for the year of 2010.

According to the Claimant's submission, this sum represents the amount of loss he sustained as a result of the oil spill, which allegedly had an adverse affect on the week of his rental, 1 August 2010 through 8 August 2010.² The Claimant does not indicate whether or not he actually used or attempted to rent the condominium unit for the dates indicated. However, his claim submission indicates that the oil spill resulted in his inability to enjoy the use of the unit.

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

¹ Optional OSLTF Claim Form, signed on 31 October 2012..

² Optional OSLTF Claim Form, signed on 31 October 2012.

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

The Claimant submitted the following documentation in support of this claim:

- Optional OSLTF Claim Form, signed on 31 October 2012;
- Document showing supporting documentation requirements for certain OPA claims;
- Handwritten list of maintenance payments;
- Document confirming the Claimant's vacation reservation, 8/1/2010 to 8/8/2010;
- NPFC Claimant's Guide Cover Sheet, April 2003.

On 27 November 2012, the Claimant submitted this claim to the NPFC seeking \$4,341.12 in loss of profits or impairment of earning capacity damages. The Claimant alleged that this claim was first presented to and denied by the Responsible Party or its agent, providing BP claim number 6866124523670 and Claimant ID 101-8718.³ The NPFC does not have the information necessary to verify this assertion, but will adjudicate this claim to the extent that these damages have first been presented to and denied by the responsible party. However, any damages now presented to the NPFC, which were not first presented to and denied by the Responsible Party, are denied for improper presentment.⁴

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.

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 the NPFC to those rights.

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 his request for reconsideration of this claim.

Furthermore, this claim is also denied on its merits. In order to prove a claim for loss of profits or impairment of earning capacity damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained a loss of profits within the meaning of OPA, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

According to 33 C.F.R. § 136.233, a claimant seeking to recover loss of profits damages must prove, among other things, "that the claimant's income was reduced." Here, the Claimant seeks to recover costs expended on a vacation to Orange Beach, Alabama from 1 August 2010 through 8 August 2010. The Claimant alleged that the vacation was adversely affected by the Deepwater Horizon oil spill. However, the Claimant has not provided evidence that might show that his income or earnings were somehow affected by the oil spill.

Furthermore, OPA specifically disallows recovery based on a claimant's inability to use vacation property, stating that "[c]ompensation for loss of use of noncommercial property is not

³ Handwritten list of maintenance payments.

⁴ 33 C.F.R. § 136.103(a).

allowable.” For these reasons, the type of loss presented in this claim is not compensable under OPA and this claim is denied.

This claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that he sustained a financial loss in the amount \$4,341.12, (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, or (3) that the nature of his alleged loss is an OPA compensable damage recoverable from the OSLTF. 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: *12/7/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments: