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
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5890/DWHZ
22 January 2013

Sanctuary By The Sea, LLC
[redacted]

Re: Claim Number: N10036-1882

Dear Mr. Bethea,

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 N10036-1882 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 N10036-1882.

Mail reconsideration requests to:

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

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

Enclosure: Claim Summary/Determination

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1882
Claimant	Sanctuary By The Sea
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	$11,163,346.00

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 8 January 2013, Mr. William Bethea, on behalf of Sanctuary By The Sea, LLC, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking $11,163,346.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.[1]

Sanctuary By The Sea is a high-end condominium complex in Santa Rosa Beach, Florida. The complex was developed in 2004 and pre-sale of the 82 units and 21 pool cabanas began in 2005. Of the 82 units, 58 were sold between 2005 and completion of construction in September 2007.[2] However, the weak real estate market in the area at the time of completion resulted in only 10 of the original purchasers actually closing on their units. In spite of these initial sales problems between 2005 and 2008, the Claimant lowered unit prices and renegotiated a bank loan, resulting in renewed sales activity in 2008 and 2009. The Claimant alleged that"[p]rior to the oil spill, we were selling units at a brisk pace."[3] However, according to the Claimant, "[a]fter the oil spill occurred, we lost one sale, after which we did not get an offer on a single unit for the remainder of 2010."[4]

The Claimant alleged that "the oil spill scared prospective buyers away from the Gulf of Mexico beach real estate market" and furthermore, that "buyers are only coming back in some areas and for some types of real estate."[5] According to the Claimant, Sanctuary By The Sea has been more

[1] Optional OSLTF Claim Form, signed on 4 January 2013.
[2] Claim Narrative, 12 December 2012.
[3] Claim Narrative, pg. 2.
[4] Claim Narrative, pg. 2.
[5] Claim Narrative, pg. 2.

affected by the oil spill than other types of real estate, due to the fact that it is a relatively expensive, high-end development, which does not have the same market appeal as lower end, more affordable real estate.

The Claimant further alleged that had sales continued at pre-oil spill rates, the complex would have been completely sold as of the date of this claim submission. As a result, the Claimant has lowered prices, thereby incurring losses on unit sales, and is continuing to incur certain unanticipated carrying costs. In calculating their losses, the Claimant compared post-oil spill property values, with pre-spill values as well as sales projections at the time of the oil spill, as compared to actual sales following the oil spill. The total loss calculated by the Claimant, which includes (1) loss of property value, (2) lost sales and (3) increased carrying costs, totals $11,163,346.00. The Claimant estimates that this amount represents the amount of oil spill losses incurred to date, and anticipated to be incurred until all units are sold.

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.

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:

- Cover letter and list of enclosures, 12 December 2012;
- Optional OSLTF Claim Form, signed on 4 January 2013;
- Overview of Sanctuary By The Sea Project, 12 December 2012;
- Exhibit A: Sales Records;
- Exhibit B: Sales Change Analysis – After Oil Spill;
- Exhibit C: G&A Change Analysis – After Oil Spill;
- Exhibit D: Other Inc-Exp Change Analysis – After Oil Spill;
- Other Inc-Exp Change Analysis – After Oil Spill;
- Exhibit E: Valuation of Lost Value;
- Exhibit F: Photograph/Layout of Sanctuary By The Sea;
- Chart showing units available for sale;
- Exhibit G: Purchase and Sale Agreement, closing date, 5 March 2010, including addendum;
- Receipt for unit purchase
- Settlement Statement (HUD-1);
- Purchase and Sale Agreement, closing date, 19 February 2010, including financing contingency, addendum to extending closing date to March 19, 2010;
- Settlement Statement (HUD-1);
- Purchase and Sale Agreement, closing date, 30 April 2010, including financing contingency;
- Settlement Statement (HUD-1);
- Exhibit H: Purchase and Sale Agreement, closing date 19 May 2010, including financing addendum, and additional addendum extending closing date;
- Release and Cancellation of Contract for Sale and Purchase with handwritten notation regarding oil spill, executed 28 June 2010;
- Exhibit I: HUD-1 summaries, post oil spill;
- Exhibit J: Balance Sheet, 2007 – projected 2015;
- Exhibit K: Balance Sheet Jan – Dec 2007 – projected 2015;
- Exhibit L: Yearly Income Statements, 2007 – projected 2015;
- Exhibit M: post-oil spill income projections;
- Exhibit N: projections vs. Actual difference through 2014;
- Exhibit O: SBTS Cash Forecast, 4-30-10;
- Exhibit P: SBTS Cash Forecast 10-31-12;
- Exhibit Q: Association Dues by quarter, invoices;
- Exhibit R: Property Tax documentation;

- Exhibit S: Loan Interest Documentation;
- Exhibit T: Loan Documentation, Amended and Restated Promissory Note, 4 May 2012;
- Exhibits U - Z: Tax Documentation, 2007 – 2012

The Claimant indicated that they first submitted this claim to the RP/GCCF on 28 February 2011. The Claimant was assigned claimant ID # 1610145. The GCCF never rendered a decision on the claim, which was then passed to the CSSP. The Claimant alleged that the terms of the Deepwater Horizon Economic and Property Damage class action settlement (E&PD Settlement) did not cover the losses sustained by the Claimant, and as such, they have opted out.[6]

On 8 January 2013, the Claimant submitted this claim to the NPFC seeking $11,163,346.00 in loss of profits or impairment of earning capacity damages."[7] As of the date of this submission, this claim has remained unsettled by the RP. The NPFC, therefore, may properly adjudicate this claim to the extent that all damages now before the NPFC have been first presented to the RP or their agent.[8]

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.

In order to prove a claim for loss of profits or impairment of earning capacity damages, a Claimant must provide evidence sufficient to prove (1) that the Claimant's income was reduced and (2) that the income reduction was "a consequence of injury to, destruction of, or loss of the property or natural resource"[9] caused by the oil spill.

Here, the Claimant alleges that the oil spill drove down property values and caused prospective unit buyers to lose interest in purchasing condominium units. Furthermore, because of the Claimant's alleged inability to sell the units after the oil spill, the Claimant incurred certain maintenance, tax and other carrying costs, which they alleged they would not have had to pay, had the units sold as anticipated.

However, the Claimant has failed to provide evidence to prove that any sales which may have been delayed in the period following the oil spill were in fact lost or cancelled because of the oil spill. Furthermore, the Claimant has not provided evidence to prove that the oil spill actually caused the sales rate to slow or caused property values to decrease.

Research conducted by the NPFC indicates that property values for the subject properties and for Santa Rosa, Florida in general, did not experience a noticeable decrease in the period following the oil spill.[10] Rather, housing prices continued a steady downward trend, which began several years before the oil spill. The Claimant has not provided evidence to prove that the oil spill, and not the factors affecting property values from 2005 until present, actually caused the properties to decrease in value, thereby causing the Claimant to sustain losses on the sales.

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[6] Claim Overview, pg. 12.
[7] Optional OSLTF Claim Form, signed on 4 January 2013.
[8] 33 C.F.R. § 136.103(c)(2).
[9] 33 C.F.R. § 136.233(b).
[10] *See e.g.*, 1363 Hwy 30-a # 3112, Santa Rosa Beach, FL 32459, Zillow.com, Accessed on 17 January 2013.

In addition to claiming that the oil spill caused decreases in property value, the Claimant alleged that the oil spill caused prospective buyers to lose interest in the properties. In support of this assertion, the Claimant provides records of unit sales prior to and following the oil spill, as well as evidence of a sales contract allegedly cancelled as a result of the oil spill.

The NPFC contacted the buyers who were alleged to have cancelled their contract due to oil-spill related concerns. The buyers stated that although they did not purchase the unit under the originally agreed upon terms, they did purchase a different, significantly more expensive unit at the same complex the following year. The buyers stated that the unit they had initially contracted to purchase had been sold and was no longer available.[11] This particular cancellation therefore, only resulted in a delayed sale rather than a lost sale and was not the result of the oil spill.

In addition to the loss of this specific contract, the Claimant alleged that sales abruptly halted after the oil spill. However, it appears that in the first quarter of 2010, prior to the oil spill, the Claimant's sales had slowed significantly as compared to the first quarter of 2009. From January 1 through April 30, 2010, the Claimant entered into contracts for the sale of 15 units, generating revenue of $10,941,000.00.[12] In the first quarter of 2010 however, the Claimant only entered into sales contracts for 3 units, which closed for a total of $2,425,000.00.[13] An examination of the remaining units indicates that sales began to slow in the end of 2009, seemingly due to the fact that the less expensive units were no longer on the market, and those that remained on the market were higher-end units, listed with substantially higher prices. For example, the Claimant's list of unsold units as of April 30, 2010, shows that the unsold units are currently listed at prices ranging between $799,000.00 and $4,730,000.00.[14] Between January 1, 2009 and May 1, 2010, the Claimant sold units with prices ranging at significantly lower prices between $567,000.00 and $1,135,000.00.[15] As of the October 31, 2012, of the eighteen units remaining on the market, only two are listed at less than 1 million dollars. It seems then, that the Claimant's difficulty in selling the remaining properties is due to a lack of consumer interest in the most expensive/high-end property at the complex, which had not generated much interest since construction began in 2005.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that they sustained a financial loss in the amount $11,163,346.00, or (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.

Claim Supervisor: [redacted] ***Adjudication Division***

Date of Supervisor's Review: ***1/22/13***

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

Supervisor's Comments:

[11] PHONECON: NPFC Staff and unit purchaser, 16 January 2013.
[12] Claimant Exhibit A: SBTS Sales – Inception through 4/30/12.
[13] Claimant Exhibit A: SBTS Sales – Inception through 4/30/12.
[14] Claimant Exhibit B: Sales Change Analysis – After Oil Spill.
[15] Claimant Exhibit A: SBTS Sales – Inception through 4/30/12.