U.S. Department of Homeland Security

United States Coast Guard

Director
National Pollution Funds Center
United States Coast Guard

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7012 2210 0001 7215 0216

5890/DWHZ
15 May 2013

Lyons Specialty Company, LLC
[redacted]

Re: Claim Number: N10036-1917

Dear Mr. Jones,

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 N10036-1917 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 N10036-1917.

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
cc: [redacted]

By Certified Mail:
No. 7012 2210 0001 7215 0209

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1917
Claimant	Lyons Specialty Company, LLC
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	$892,562.23

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 25 April 2013, Mr. Christopher Jones on behalf of Lyons Specialty Company, ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking $892,562.23 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.[1]

The Claimant describes itself as "a wholesale distributor of candy, tobacco, groceries, health and beauty care items, automotive supplies, general merchandise, paper and janitorial supplies." The Claimant's customer base consists of "convenience stores, grocery stores and restaurants throughout Louisiana, particularly including south Louisiana."[2] The Claimant alleged the oil spill caused a general economic downturn and also decreased tourism throughout Louisiana, thereby causing the Claimant to lose income. In regards to specifically how the oil spill caused the business' alleged losses, the Claimant states,

> [b]ecause of the spill, tourism was severely impacted throughout Louisiana. The main impact was in Southern Louisiana. Similarly the fishing and seafood industries, particularly in south Louisiana, saw the worst impact . . . [f]ewer travels resulted in fewer and smaller orders from [the Claimant].[3]

As a result of decreases in sales allegedly caused by decreased tourist traffic and general economic conditions in south Louisiana after the oil spill, the Claimant seeks to recover "past present and future damages" in the amount of $892,562.23.[4]

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.

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[1] Claim cover letter, 19 April 2013.
[2] Claim cover letter, 19 April 2013.
[3] Claim Cover Letter at 4.
[4] Claim Cover letter at 15.

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:

- Claim Cover Letter, 19 April 2013;
- Federal Tax Returns, 2007 – 2011;
- Settlement Opt-Out Letter, 30 October 2012;
- Copy of submission to the BP Claims Program, 17 January 2013;
- Response to deficiency notice, 25 February 2013;
- BP Acknowledgement of receipt of claim form, 31 January 2013;
- Item Class Sales Analysis;
- Complaint, filed in U.S. District Court for the Eastern District of Louisiana on 18 April 2013;
- Monthly Payroll by Department, 2008, 2009, 2010, 2011, including sales records and transactions by customer;
- Accountant's report, 2006, 2007;

- Invoice, Hannis T. Bourgeois "services rendered with regards to the OPA presentment claim";
- Combined financial statements, 2007, 2008;
- Representation agreement;
- Combined financial statements, 2008, 2009;
- Accountant's Review Report, 23 December 2009;
- Louisiana Resale Certificate, 2012 – 2015;
- Accountant's Review Report, 8 December 2010;
- Accountant's Review Report, 16 December 2011;
- Resume, Hannis T. Bourgeois;
- Optional OSLTF Claim Form;
- BP Claim Form for individuals and businesses;
- BP deficiency notice, 1 February 2013;
- Articles of organization.

On 17 January 2013, the Claimant presented a claim to the BP Claims Program, seeking to recover losses sustained as a result of the Deepwater Horizon oil spill.[5] Copies of the claim forms submitted to BP indicate that the Claimant is attempting to recover in excess of three million dollars in damages from BP arising from the same cause of action that is the subject of this claim. As of the date of this determination, BP has not made a determination on this claim.

On 25 April 2013, the Claimant submitted this claim to the NPFC seeking $892,562.23 in loss of profits or impairment of earning capacity damages.[6] Because the damages presented in this claim have been previously presented to BP and because the claim has not been settled following 90 days of presentment, OPA presentment requirements have been met.[7]

Furthermore, evidence in this claim submission indicates that the Claimant is not a member of the Deepwater Horizon oil spill economic and property damages class action settlement (the E&PD Settlement).[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.

For the reasons explained below, this claim is not compensable under OPA.

1. <u>The claim is currently the subject of an action in court by the Claimant to recover the same damages as now before the NPFC</u>.

In accordance with OPA's implementing regulations, the NPFC may not make payment on a claim "during the pendency of an action by the person in court to recover costs which are the subject of the claim."[9] The Claimant has included a copy of a Complaint filed in the District Court for the Eastern District of Louisiana, in which the Claimant is attempting to recover the same damages as now before the NPFC. As such, the NPFC would be precluded from making a payment on this claim.

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[5] BP Acknowledgement of receipt of claim form, 31 January 2013.
[6] Claim cover letter.
[7] 33 C.F.R. § 136.103(c)(2).
[8] Copy of "opt-out letter" included in claim submission.
[9] 33 C.F.R. § 136.103(d).

The remainder of this determination addresses the substantive reasons for denial.

2. The Claimant has failed to prove that they sustained a loss of profits or impairment of earning capacity within the meaning of OPA.

A loss of profits under OPA is evidenced by comparing "the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered."[10] The Claimant has not provided evidence sufficient to prove that the business' income during the claimed loss period was in any way reduced as compared to unaffected periods.

The Claimant asserts that the business lost income as a result of the oil spill due to (1) an actual decrease in profits, and (2) a reduction in the business' rate of growth. Regarding their alleged decrease in profits, the Claimant explains, "[cigarettes and tobacco products] historically increase in price over time due to a variety of reasons . . . Thus, despite the downturn in sales of the items themselves; this increased cost of goods artificially, and necessarily, increased the gross revenue figures. But, Lyons' profits decreased over the same time period."[11]

In addition to claiming that profits decreased, the Claimant alleged that growth experienced by the business prior to the oil spill, slowed due to the spill. The Claimant states that the "growth trajectory realized by Lyons over the last several years continued in North Louisiana, but this growth trajectory did not continue in Lyons' Southern Louisiana customers."[12]

However, financial documentation presented in support of this claim fails to indicate that the Claimant lost profits or experienced a reduction in their rate of growth in 2010. Rather, the Claimant's federal tax returns indicate that the Claimant recorded higher gross profits in 2010 than in any other year from 2007 through 2011. Furthermore, gross profit as a percentage of revenue was higher in 2010 than in either 2009 or 2011 and only slightly lower than in 2007 or 2008.[13] Furthermore, from 2007 through 2011, this percentage remained steady between 7.17% and 8.24%. It does not seem then, that the Claimant incurred a loss of profits in the period following the oil spill.

Additionally, it does not appear that the Claimant's growth trajectory slowed in 2010. Tax returns do not indicate that the business' profits were growing prior to the oil spill. For example, in 2008, 2009 and 2010, the Claimant reported gross profits after cost of goods sold at $8,014,819.00, $7,546,488.0, $8,054,983.00.[14] This data fails to support the Claimant's contention that they were experiencing a certain amount of growth prior to the oil spill, which slowed in the period following the oil spill. Rather, it seems that the Claimant's revenue has increased on a yearly basis while gross profits have fluctuated from year to year, but were at their highest in 2010 for any year from 2007 – 2011.

3. The Claimant has failed to prove that their alleged loss was caused by the Deepwater Horizon oil spill.

In addition to identifying an actual loss or reduction in earnings, a claimant must prove that the loss was caused by the discharge of oil from the Deepwater Horizon oil spill. The Claimant primarily sells "cigarette and tobacco products" to "convenience stores, grocery stores and restaurants, most of which are adjacent to high traffic roadways and are reliant on traveling customers for business."[15] The Claimant makes two assertions regarding how the oil spill caused the business to sustain losses. First the Claimant states that because tourism throughout Louisiana was impacted by the oil spill, highway traffic decreased and the Claimant lost sales it would have made if visitors had continued to travel through Louisiana. Secondly, the Claimant alleged that the oil spill "had a rippling effect on the entire economy of the state"

[10] 33 C.F.R. § 136.233(c).
[11] Claim cover letter at 4-5.
[12] Claim cover letter at 4.
[13] Revenue and gross profits figures taken from 2007 – 2011 Forms 1120S.
[14] 2008 – 2011, Forms 1120s.
[15] Claimant's submission to BP.

which "harms most businesses in Louisiana and this is particularly true for a business like Lyons that caters to convenience stores located along highways in South Louisiana."[16]

However, the Claimant has not provided any evidence in support of either contention. Furthermore, documentation of the Claimant's revenue fails to indicate that the business relies on tourism related traffic. If the business did rely on tourism, then it would seem that during certain high tourism seasons, the Claimant's revenue would increase. However, the Claimant's monthly revenue remains fairly steady as evidenced by state sales and use tax returns. The Claimant has also not provided any evidence to show which customers reduced their orders from the Claimant, nor have they proven that those orders were reduced due to the Deepwater Horizon oil spill. Therefore, the Claimant has failed to provide evidence sufficient to prove that the discharge of oil from the Deepwater Horizon oil spill somehow caused the Claimant to sustain a loss or reduction in profits or earning capacity.

Based on the foregoing, this claim is denied because (1) the Claimant is pursuing the same damages in the U.S. District Court for the Eastern District of Louisiana, (2) the Claimant has failed to provide evidence sufficient to prove that they sustained a financial loss in the amount of $892,562.23, and (3) the Claimant has failed to prove 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: *5/15/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

[16] Claim cover letter at 9.