

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: 7012 2210 0001 7214 9678

5890/DWHZ
3 July 2013

Gregory Smith
[REDACTED]

Re: Claim Number: N10036-1936

Dear Mr. Smith,

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 N10036-1936 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 N10036-1936.

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: Claim Summary/Determination
cc: [REDACTED]

[REDACTED]
No. 7012 2210 0001 7214 9661

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1936
Claimant	Gregory Smith
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$82,000.00

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 16 May 2013, Mr. J. Knox Boteler III, legal representative of Mr. Gregory Smith, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$82,000.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant was attempting to sell a property in Mobile, Alabama. On 19 April 2010, the buyer and seller signed an agreement indicating that the property sale would be finalized at a price of \$951,000.00 on a date between 15 May 2010 and 30 June 2010 if certain contingencies were met. However, the sale was not finalized and the property is still on the market as of the date this claim was submitted to the NPFC. The Claimant alleged that "as a result of the spill, the buyer was released from the contract."² The Claimant has relisted the home at \$869,000, but has been unable to sell it.³

The Claimant seeks to recover \$82,000.00 allegedly lost due to the cancelled sales contract. This amount is the difference between the initial un-executed sales contract and asking price of the home at the time this claim was submitted to the Responsible Party.

APPLICABLE LAW

¹ Optional OSLTF Claim Form, signed on 6 May 2013.

² Optional OSLTF Claim Form, signed on 6 May 2013.

³ It appears as though the Claimant listed the home at 869,000.00 from approximately March of 2010 until May of 2013, when the price was reduced to \$789,899.00. See, home value/sales data, available at, http://www.zillow.com/homedetails/5870-Riverchase-Dr-N-Mobile-AL-36619/51045759_zpid/, accessed on 2 July 2013.

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:

- Claim cover letter/representation letter, 8 May 2013;

- Denial letter, BP Claims Program, 17 April 2013;
- Optional OSLTF Claim Form, signed on 6 May 2013;
- List of supporting documents;
- BP Claims Program – Claim Form for Individuals and Businesses;
- BP Claims Program Attorney Consent Form;
- Certified mail receipt/letter indicating intent to be excluded from the E&PD Settlement Class, 31 October 2012;
- Warranty Deed, 16 August 2001;
- Photographs of subject property;
- Map showing location of the property;
- Purchase agreement, signed 19 April 2010;
- Purchase Agreement addendum #1, signed on 19 April 2010;
- Seller’s disclosure statement, 22 March 2010;
- Reserved Items by Seller on 5870 Riverchase Drive North, 19 April 2010;
- Record of Payment for “Riverchase,” 4/18/2010;
- Purchase Agreement Addendum #2, Right of First Refusal.

On 15 January 2013, the Claimant presented these alleged losses to the Responsible Party through the BP Claims Program.⁴ The BP Claims Program denied payment on the claim in a letter dated 17 April 2013.

On 16 May 2013, the Claimant presented this claim to the NPFC, seeking \$82,000.00 in loss of profit and impairment of earning capacity damages.⁵ Because it appears as though this claim was first presented to and denied by the Responsible Party, OPA presentment requirements have been satisfied.⁶

Furthermore, evidence in this claim submission indicates that the Claimant has opted out of the Deepwater Horizon Economic and Property Damage Class Action Settlement (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.

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

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

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.”⁷ The Claimant has indicated that a Complaint has been filed in the District Court for the Eastern District of Louisiana, in which the Claimant is attempting to recover the

⁴ BP Claim Form, Individuals and Businesses.

⁵ Optional OSLTF Claim Form, signed on 6 May 2013

⁶ 33 C.F.R. § 136.103(c)(2).

⁷ 33 C.F.R. § 136.103(d).

same damages as now before the NPFC.⁸ As such, the NPFC would be precluded from making a payment on this claim.

2. The Claimant has not experienced a loss or reduction in income.

In order to prove a claim for loss of profits or impairment of earning capacity damages, a claimant must provide evidence sufficient to prove that (1) the Claimant sustained an uncompensated loss or reduction in income and (2) that the financial loss was caused by damage to real property or natural resources resulting from the discharge of oil caused by the Deepwater Horizon oil spill.

The Claimant has alleged that he was unable to close on a property sale because of the effects of the Deepwater Horizon oil spill. The property, which is not located on the water, was not actually damaged by the oil spill.

The Claimant indicated that a potential buyer signed a sales agreement on 19 April 2010, but that the sale did not proceed to closing “as a result of the spill.”⁹ The Claimant has not resold the home, but asserts that it is listed for sale at approximately \$82,000.00 less than the price agreed upon by the potential buyer who the Claimant released from the contract.

In order to prove that a claimant has experienced loss of profit or impairment of earning capacity damages, a claimant must prove, at least, “that the claimant’s income was reduced,”¹⁰ as well as “the actual net reduction or loss of earnings or profits suffered.”¹¹ In this case, because the Claimant maintains ownership of the home has not actually sold it at a loss, the Claimant has not sustained a certain amount of lost income, and cannot be compensated under OPA’s loss of profits or impairment of earning capacity damage category.

3. The Claimant has not proven that the alleged financial loss was caused by the Deepwater Horizon oil spill.

Furthermore, the Claimant has not provided evidence sufficient to prove that the contract failed to move forward as a result of damage to real property or natural resources caused by the discharge of oil resulting from the Deepwater Horizon oil spill. A copy of the sales contract provided by the Claimant indicates that closing was contingent upon the buyer “receiv[ing] an acceptable [offer] on [the buyer’s property, which was also for sale].”¹² As of 19 April 2010, the buyer presumably had not received an acceptable offer and the contract had not been finalized.

According to the contract between the Claimant and the potential buyer, the Claimant’s property was to remain on the market and the buyer would maintain a right of first refusal until 30 June 2010.¹³ The Claimant has not provided any evidence to indicate that this contingency regarding the sale of the buyer’s property was indeed met, nor has the Claimant otherwise proven that the contract between the parties was ever finalized. The Claimant has also not provided any evidence to indicate why the sale never proceeded to closing, other than a statement indicating that “as a result of the spill, the buyer was released from the contract.”¹⁴

⁸ Optional OSLTF Claim Form, signed on 6 May 2013.

⁹ Optional OSLTF Claim Form, signed on 6 May 2013.

¹⁰ 33 C.F.R. § 136.233(b).

¹¹ 33 C.F.R. § 136.235.

¹² Purchase Agreement, Addendum #1, signed 19 April 2010.

¹³ Purchase Agreement, Addendum #1.

¹⁴ Optional OSLTF Claim Form, signed on 6 May 2013.

Furthermore, the NPFC notes that publicly available information indicates that the property was listed for sale at \$869,999.00 at various points throughout 2010, 2011 and 2012 before the list price was reduced to \$789,899.00 in May of 2013.¹⁵ Because the Claimant has not been able to sell the property during the last three years, at a lower price than the price being negotiated in April of 2010, it is not evident that the oil spill, and not other factors which have caused the home to remain on the market, caused the particular sale identified by the Claimant to fail to close.

In sum, the Claimant has not experienced an actual loss on the sale of the home, which has not yet been sold, and has not proven that contract was cancelled as a result of damage to property or natural resources caused by the Deepwater Horizon oil spill.

Based on the foregoing, 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 \$82,000.00, 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: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *7/3/2013*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁵ See, Zillow listing, available at, http://www.zillow.com/homedetails/5870-Riverchase-Dr-N-Mobile-AL-36619/51045759_zpid/, accessed on 2 July 2013.