

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
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 800-280-7118
E-mail: arl-pf-npfcclaimsinfo@uscg.mil
Fax: 703-872-6113

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Number: 7012 2210 0001 7214 9685

5890/DWHZ

8 July 2013

Brian Moscarello



Re: Claim Number: N10036-1939

Dear Mr. Moscarello:

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 N10036-1939 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 N10036-1939.

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

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1939
Claimant	Brian Moscarello
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$336,146.00

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 20 May 2013, Mr. Brian Moscarello ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$336,146.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant owns and operates a company called Alabama Dealer Services, located in Alexandria, Alabama.² Regarding the nature of his business, the Claimant explained that he works in automotive management support³ and that his business relies on "clients operating independent car lots and parts wholesale business."⁴ After the oil spill, the Claimant alleged that he lost clients in the "the gulf region" as a result of economic effects of the oil spill, as well as due to the fact that several of his clients were compensated by BP and "moved off shore to Panama and Costa Rica."⁵

The Claimant seeks to recover \$336,146.00 in losses allegedly incurred from the date of the oil spill until the date of this claim submission.

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

¹ Optional OSLTF Claim Form, signed on 14 May 2013.

² Alexandria, Alabama is located in Calhoun County, which is north of Birmingham.

³ Business card, attached to OSLTF Claim Form.

⁴ BP Claim Form, at 10.

⁵ Email from the Claimant to the BP Claims Program, 9 April 2013.

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:

- Optional OSLTF Claim Form, signed on 14 May 2013, with attached business card for ADS Dealer Services;
- OSLTF Claim Form Instructions;

- Email from the Claimant to bpclaimsprogram@bp.com, 9 April 2013;
- BP Claim Determination Notification, Claim Number: 1001041-01, 22 March 2013;
- BP Acknowledgement of Receipt of Claim Form for Opt Out Claimants or Excluded Claimants, Claim Number: 1001041-01, 8 November 2012;
- Copy of fax transmittal, 15 May 2013;
- Copy of fax transmittal, 16 April 2013;
- BP Claims Program – Claim Form for Individuals and Businesses;
- Bank Account Statements;
- 2010 Form 1040, showing business income of -\$19,545.00;
- 2010 Schedule A (Form 1040);
- 2010 Schedule C (Form 1040);
- 2009 Schedule C (Form 1040) showing gross sales of \$128,456.00;
- 2002 Form 1040, showing earnings of \$246,559.00;
- 2001 Form 1040, showing earnings of \$191,256.00;
- 2000 Form 1040, showing earnings of \$294,778.00;

Prior to presenting this claim the NPFC, the Claimant attempted to recover these alleged losses through the BP Claims Program, where the Claimant was assigned Claim Number: 1001041-01.⁶ The BP Claims Program denied payment on the claim in a letter dated 22 March 2013.

On 20 May 2013, the Claimant presented this claim to the NPFC, seeking \$336,146.00 in loss of profit and impairment of earning capacity damages.⁷ Evidence in this claim submission indicates that the Claimant previously attempted to recover \$334,265.00 in a claim filed through the BP Claims Program.⁸ OPA's presentment requirements only allow the NPFC to consider the same damages as previously presented to the Responsible Party.⁹ Therefore, this claim is initially denied in the amount of \$1,881.00, which is the amount now before the NPFC, which was not included in claims previously filed against the RP.

Furthermore, evidence in this claim submission indicates that the Claimant is likely excluded from the Deepwater Horizon Economic and Property Damage Class Action Settlement (E&PD Settlement) as a result of the location of his business in Alexandria, Alabama.

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 damages under OPA, a claimant must provide evidence sufficient to prove (1) that the claimant's income was reduced, and (2) that the reduction in income was caused by damage to real property or natural resources resulting from the Deepwater Horizon oil spill.

Evidence in this claim submission indicates that the Claimant's income decreased in 2010 as compared to the Claimant's earnings in 2000, 2001, 2002 and 2009. However, the Claimant has

⁶ BP Claim Determination Notification, Claim Number: 1001041-01, 22 March 2013.

⁷ Optional OSLTF Claim Form, signed on 14 May 2013

⁸ BP Claim Form for individuals and businesses, at 10.

⁹ 33 C.F.R. § 136.103(c)(2).

not provided evidence to indicate that the reduction in his income in 2010 was caused by the Deepwater Horizon oil spill.

The Claimant asserted that his clients were affected by general economic effects of the Deepwater Horizon oil spill, and thus became unable to continue to do business with the Claimant. However, the Claimant has not provided any evidence that might indicate how his work in "automotive management support" in a city located in north Alabama might have been affected by the harm to property or natural resources caused by the Deepwater Horizon oil spill. As such, the Claimant's loss of income in 2010 is not compensable under OPA's loss of profits or impairment of earning capacity damage category, which is only available to compensate income losses caused by damage to real property or natural resources resulting from the discharge or substantial threat of discharge of oil.

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 \$336,146.00, 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: *7/8/2013*

Supervisor's Action: *Denial approved*

Supervisor's Comments: