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 0434

5890/DWHZ
4 June 2013

Aylstock, Witkin, Kreis & Overholtz
[redacted]

Re: Claim Number: N10036-1944

Dear Mr. Witkin,

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 N10036-1944 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 N10036-1944.

Mail reconsideration requests to:

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

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

Enclosure: Claim Summary/Determination
cc: [redacted]

By Certified Mail:
No. 7012 2210 0001 7215 0445

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1944
Claimant	Wade Frank Barnes
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	$4,400,000.00

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 10 May 2013, Mr. David Witkin, legal representative of Frank Barnes, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for $4,400,000.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.[1]

In August of 2008, the Claimant executed an agreement for the sale of approximately 1,981 acres of property in Escambia County, Alabama. The property was

> to be used for mining operations and timber harvesting, the removal of clay, sand and gravel, and timber products to support the construction industry in and around the Gulf Coast, primarily in Orange Beach, Alabama.[2]

In March of 2010 and April of 2011, the Claimant reduced the amount due on the purchaser's mortgage payments. In spite of these reductions in the original sales price, by April of 2012, the purchaser could no longer make payments on the note. The Claimant accepted a Deed in lieu of Foreclosure, with approximately $4,400,000.00 remaining unpaid on the original purchase price.

The Claimant asserts that the "purchaser lost business due to the decline in construction along the Gulf Coast" caused by the Deepwater Horizon oil spill. As such, it is the Claimant's contention that "but for the Spill, Claimant would have realized income in the amount of

[1] Optional OSLTF Claim Form, signed on 26 April 2013.
[2] Claim index, 28 May 2013.

$8,490,000.00."[3] The Claimant seeks to recover $4,400,000.00 which is the approximate amount of the sales price which remained unpaid at the time the Claimant repossessed the property.

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.

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[3] Claim index, 28 May 2013. This amount does not take into account payments previously made on the note. The Claimant's OSLTF Claim Form indicates that the Claimant is seeking to recover $4,400,000.00.

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, received on 28 May 2013;
- Claim Cover Letter, signed by James D Barger, 28 May 2013;
- Claim outline, 28 May 2013;
- Mortgage Cancellation, 9 April 2012;
- Second Modification of Promissory Note, becoming effective 22 June 2011;
- Articles of Organization, RLF Baldwin Properties III, LLC;
- Purchase Money Mortgage Agreement, signed on 21 August 2008;
- Partial Release of Mortgage, 26 May 2010;
- First Amendment to Mortgage, dated 25 March 2010;
- Payment schedule;
- Deed in lieu of foreclosure, 11 April 2012;
- Exhibit A, Township 1 North, Range 8 East, boundary description;
- Exhibit B, deeds and easements;
- Certificate of RLF Baldwin Properties III, LLC, signed on 11 April 2012;
- Purchase and Sale Agreement, 15 July 2008;
- Resolution of the

The Claimant alleged to have presented this claim to the BP Claims Program on 18 January 2013. The Claimant's submission indicates that the claim was denied.[4]

On 28 May 2013, the Claimant presented this claim to the NPFC, seeking to recover $4,400,000.00 in loss of profits or impairment of earning capacity damages. The NPFC does not have information necessary to confirm the amounts and subject matter of claims previously presented to the Responsible Party. However, the NPFC will adjudicate this claim to the extent that OPA presentment requirements have been satisfied.[5] Any damages now before the NPFC which were not previously presented to and denied by the Responsible Party are denied for improper presentment.[6]

Furthermore, evidence in this claim submission indicates that the Claimant is pursuing this claim through litigation in the U.S. District Court for the Eastern District of Louisiana.[7]

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)

[4] Optional OSLTF Claim Form, signed on received on 28 May 2013.
[5] 33 C.F.R. § 136.103(a).
[6] 33 C.F.R. § 136.103(c)(2).
[7] Optional OSLTF Claim Form, received on 28 May 2013.

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."[8] The Claimant has included a statement indicating that these damages are currently being pursued through litigation in the U.S. District Court for the Eastern District of Louisiana.[9] As such, the NPFC would be precluded from making a payment on this claim.

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.

The Claimant has not specifically indicated how they calculated their losses to arrive at the sum certain of $4,400,000.00. It appears as though the Claimant is seeking to recover the unpaid amount on the original purchase price. In order for a cancelled sales contract to equate to a loss of profits or impairment of earning capacity under OPA, the Claimant must prove that the contract was cancelled and the property was later sold for a lesser amount than stipulated in the original contract. If the Claimant maintains ownership of the property at the time of filing the claim and has not resold it at a loss, the Claimant has not experienced an actual loss for the purposes of OPA.

Because it appears as though the Claimant maintains ownership of the property, the Claimant has not proven that he sustained an actual loss in the amount of $4,400,000.00.

3. The Claimant has failed to prove that alleged losses were due to the Deepwater Horizon oil spill.

In order to prove a claim for loss of profits damages, a claimant must provide evidence sufficient to prove, among other things, that "the claimant's income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources"[10] resulting from an oil spill.

The Claimant asserts that the purchaser of the Claimant's property defaulted on mortgage payments due to economic hardships caused by effects of the Deepwater Horizon oil spill. The original purchase contract had been signed in 2008, and two partial releases of the mortgage had been signed by the parties; first on 26 March 2010 and then on 18 August 2011. The first reduction in the sales price, in March of 2010 indicates that the purchaser's financial hardships began prior to the oil spill. Furthermore, OPA specifically limits compensation for losses incurred "due the injury, destruction or loss of real property or natural resources" resulting from an oil spill.[11] The Claimant's alleged loss stems from a purchaser's financial hardships due to a

[8] 33 C.F.R. § 136.103(d).
[9] Case Number: 2:10-cv-08888-CJB-SS.
[10] 33 C.F.R. § 136.1.
[11] 33 U.S.C. § 2702(b)(2)(e).

"decline in construction along the Gulf Coast"[12] and not from harm to property or resources caused by the oil spill.

Based on the foregoing, this claim is denied because (1) these damages are currently the subject of litigation, (2) the Claimant has failed to provide evidence sufficient to prove that they sustained a financial loss in the amount $4,400,000.00, 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]

Date of Supervisor's Review: ***5/04/13***

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

Supervisor's Comments:

[12] Optional OSLTF Claim Form, received on 28 May 2013.