

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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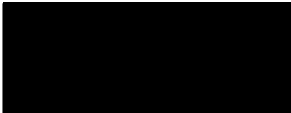
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5890/DWHZ

20 August 2013

Aylstock, Witkin, Kreis & Overholtz



Gulf Acquisitions, Inc.



Re: Claim Number: N10036-1961

Dear Mr. Barger:

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 N10036-1961 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 N10036-1961.

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	N10036-1961
Claimant	Gulf Acquisitions, Inc.
Type of Claimant	Corporate (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$200,000.00

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 24 June 2013, Mr. James Barger, of Aylstock, Witkin, Kreis & Overholtz, and on behalf of Gulf Acquisitions, Inc., (collectively, "the Claimant"), submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$200,000.00 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, it appears the Claimant was in the real estate business, either buying or selling homes and/or parcels of land. It states that the claim is for a "failed contract for [the] sale of [a property] lot" and that the property value declined. The Claimant seeks to recover \$200,000.00, although the NPFC is not able to determine how this total was derived.²

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:

¹ Claim cover letter, 11 June 2013.

² See Optional OSLTF Claim Form, dated 10 June 2013, as well as NPFC Additional Documentation Request, dated 12 July 2013

- (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 10 June 2013;
- 2008 Form 1120S with schedules and attachments, showing business income of \$387,064.00;
- 2008 Form 4562 Depreciation and Amortization
- 2009 Form 1120S with schedules and attachments, showing business income of \$56,129.00;
- 2009 Form 4562 Depreciation and Amortization
- 2010 Form 1120S with schedules and attachments, showing business income of \$1,259,041.00;
- 2010 Form 4797 Sales of Business Property
- Form 966, Corporate Dissolution or Liquidation, (Rev. December 2010), dissolution adopted 30 November 2010;
- Claim Cover Letter, signed by James Barger, 11 June 2013.

The Claimant alleges that this claim was first presented to the Responsible Party and that the RP denied payment on this claim.³

On 24 June 2013, the Claimant presented this claim to the NPFC, seeking \$200,000.00 in loss of profits or impairment of earning capacity damages. The NPFC will adjudicate the claim to the extent that presentment requirements have been satisfied. If any damages subject of this claim were not first presented to and denied by the RP, these damages are denied for improper presentment.⁴

Additionally, the NPFC notes that evidence presented in this claim submission indicates that the Claimant is a member of the Deepwater Horizon oil spill economic and property damages class action settlement (the E&PD Settlement).

NPFC ANALYSIS

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.

As an initial matter, it appears that the Claimant is a member of the E&PD Settlement. This claim is therefore considered to have been settled, and the Claimant is ineligible to recover funds from the OSLTF. According to OPA, the payment of any claim by the NPFC is subject to the NPFC's ability to obtain, by subrogation, the rights to recover all costs and damages from the responsible party. If a claim has been settled, the claimant no longer has rights to the claim and therefore cannot subrogate the NPFC to those rights.

While this claim may not have been quantified or paid, it is considered to have been settled by virtue of the Court's preliminary approval of the settlement agreement. If the Claimant disagrees that it is a member of the economic damages class of the E&PD Settlement, it should submit evidence to indicate that it has either opted out or is excluded from the E&PD Settlement in its request for reconsideration of this claim.

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."⁵ The Claimant has stated in its claim submission that it filed a complaint 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.⁶ As such, the NPFC would be precluded from making a payment on this claim.

³ Optional OSLTF Claim Form, signed on 10 June 2013.

⁴ 33 C.F.R. § 136.103(c)(2).

⁵ 33 C.F.R. § 136.103(d).

⁶ See U.S. District Court Eastern District Court Case Number 2:10-cv-04536-CJB-SS, filed 12/15/2010.

Furthermore, this claim is also denied on its merits. In order to prove a claim for loss of profits or impairment of earning capacity damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained a loss of profits within the meaning of OPA, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

2. The Claimant has not provided requested documentation to show its actual losses.

This claim is based on the Claimant's interpretation that, as a result of the oil spill, its ability to either acquire and/or sell property was impaired. Though it did provide 1120S forms for 2008-2010 to show its income over the years preceding and including the oil spill, it neither offered an explanation of how its business operated, nor how it arrived at its \$200,000.00 claim total. As it stands, according to the 1120S forms provided, the Claimant experienced significant losses in 2008 and 2009 and not just in the affected year, 2010. Additionally, the Claimant did not provide any future or past contracts/sales records to show both comparables and actual contracts lost. Without these, it cannot be determined that its 2010 income losses were a result of the oil spill.

This claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that it sustained a financial loss in the amount \$200,000.00, (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, or (3) that the nature of his alleged loss is an OPA compensable damage recoverable from the OSLTF. Additionally, this claim is considered to have been settled by virtue of the Claimant belonging to the E&PD Settlement, and is therefore not eligible for OSLTF compensation.


Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *8/20/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments: