

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
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Arlington, VA 20598-7100
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 5343

5890
14 November 2011

Mr. Jerry L. Englund


Re: Claim Number: N10036-1363

Dear Mr. Englund:

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 N10036-1363 involving Deepwater Horizon. You presented this claim on behalf of Mr. Donald Holmes. Please see the attached Claim Summary/Determination Form for further explanation.

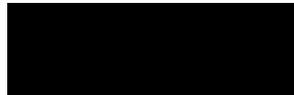
You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you 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 N10036-1363.

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: (1) Claim Summary/Determination Form
(2) List of Documentation Provided by Claimant, N10036-1363

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1363
Claimant	: Jerry L. Englund
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$7,800.00

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 was 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 claims for certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT

On 31 August 2011, Mr. Jerry L. Englund ("Claimant") presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$7,800.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.¹ Claimant is owner and manager and real estate agent for a realty company in Mobile, Alabama.² Claimant indicates that prices in an existing contract for lots between his company and a home builder were renegotiated because property values decreased due to the oil spill.³

On 3 January 2011, and prior to presentation of this claim to the NPFC, the Claimant presented an Interim Payment Claim for \$26,584.00 in lost wages/earnings to the GCCF.⁴ Claimant number 3479554 was assigned to that claim and it was denied on 10 August 2011.⁵

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 waters or adjoining shorelines or the exclusive economic zone, as described in Section 2702(b) of OPA.

The OSLTF which is administered by the NPFC, is available, pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, to pay claims for uncompensated damages. 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.

¹ Optional OSLTF Claim Form received 31 August 2011.

² GCCF Interim Payment Claim Form dated 12/29/2010 and recorded at GCCF on 3 January 2011.

³ Optional OSLTF Claim Form received 31 August 2011.

⁴ GCCF Interim Payment Claim Form dated 12/29/2010 and recorded at GCCF on 3 January 2011.

⁵ GCCF Denial Letter dated 10 August 2011.

- (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.
- (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.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

On 3 January 2011, the Claimant presented an Interim Payment Claim for \$26,584.00 in lost wages/earnings to the GCCF.⁶ Claimant number 3479554 was assigned to that claim and it was denied on 10 August 2011.⁷ The NPFC, independently confirmed presentation to the RP/GCCF and that the claim had been denied.⁸

On 31 August 2011, the Claimant presented this claim to the OSLTF for \$7,800.00 for loss of profits and earning capacity as a result of the Deepwater Horizon oil spill.⁹ To support the claim, the Claimant submitted a large amount of documentation, which is listed in Enclosure (2).

Among other things, the Claimant presented documentation of a contract between his development company, Torrington Place, LLC, and a home builder, D.R. Horton, Inc.¹⁰ This contract provided that Torrington Place, LLC, would sell and D.R. Horton, Inc. would purchase 48 lots for \$35,000.00 per lot. Further, the contract provided that, no later than 180 days after Initial Closing Date for 20 lots, the purchaser would purchase an additional 15 lots and, 90 days thereafter, purchaser would purchase the remaining lots.

⁶ GCCF Interim Payment Claim Form dated 12/29/2010 and recorded at GCCF on 3 January 2011.

⁷ GCCF Denial Letter dated 10 August 2011.

⁸ GCCF – U.S. Coast Guard Report as of 21 September 2011 indicates Interim 1 claim presentation on 3 January 2011 in the amount of \$26,584.00 that has been denied.

⁹ Optional OSLTF Claim Form received 31 August 2011.

¹⁰ Contract of Sale between Torrington Place, LLC, and D.R. Horton, Inc. – Birmingham, executed 8 September 2006, also receiving D.R. Horton, Inc. Corporate Approval on 11 October 2006.

The Claimant presented documentation of an amendment to the contract of Sale that provided the per lot purchase price was amended to \$30,000.00 per lot, that ten lots would be purchased on or before 8 July 2010 and that the remaining lots would be purchased on or before 8 January 2011.¹¹

The Claimant presented documentation of closings on 29 lots prior to the 8 June 2010 amendment to the Contract of Sale, with real estate commissions totaling \$60,900.00.¹² The Claimant has not requested compensation related to those closings.

The Claimant presented documentation of closings on 11 lots after the 8 June 2010 amendment to the Contract of Sale, including real estate commissions paid totaling \$18,800.00.¹³ The Claimant requests lost commission amounts, based on the difference in sale prices, calculating his lost commission amounts for those 11 lots as \$3,300.00.¹⁴

The Claimant also requested lost commissions as real estate agent on 15 lots which had not closed as of the date of claim presentment, totaling \$4,500.00.¹⁵ The total value of losses claimed is \$7,800.00.¹⁶

The Claimant also presented the GCCF's 10 August 2010 Denial Letter for Claimant ID 3479554, including financial calculations for monthly business revenues in 2008, 2009 and 2010.

NPFC Determination

Under 33 U.S.C. § 2702 (b)(2)(E) and 33 C.F.R. Part 136, a claimant must prove that his loss of income was due to injury or destruction or loss of real or personal property or 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 to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

The NPFC considered all documentation presented by the Claimant.

After an initial review, the NPFC sent the Claimant a letter requesting additional information to further evaluate the claim. The letter requested, among other things, financial documentation to support lost profits and earnings, as well as an explanation of how the Deepwater Horizon oil spill caused the business losses. The Claimant was given 14 days to respond to the letter, dated 4 October 2011. To date, the Claimant has not responded.

Regarding the valuation of the lost profits, the NPFC's specific request included a copy of the second amendment to the Contract for Sale, available appraisals [r]elated to the subject lots, and to identify what portion of the amount claimed might be attributable to the general housing market and not the oil spill. The NPFC also asked for a confirmation of the number of 'unsold' lots that are included in the claim because the spreadsheet provided indicates there are 15 unsold lots, but the contract included 48 lots, 40 of which have closed already.¹⁷

¹¹ Amendment to Contract of Sale between Torrington Place, LLC, and D.R. Horton, Inc. – Birmingham, executed 11 June 2010.

¹² HUD-1 statements were provided for closings between 21 August 2008 and 6 August 2009, totaling 29 lots.

¹³ HUD-1 statements were provided for closings between 8 July 2010 and 19 May 2011, totaling 11 lots.

¹⁴ Undated spreadsheet summarizing commissions for Pre-Spill Lots Sold, Post-Spill Lots sold, and calculations of loss in commissions.

¹⁵ Undated spreadsheet summarizing commissions for Pre-Spill Lots Sold, Post-Spill Lots sold, and calculations of loss in commissions.

¹⁶ Undated spreadsheet summarizing commissions for Pre-Spill Lots Sold, Post-Spill Lots sold, and calculations of loss in commissions.

¹⁷ HUD-1 statements were provided for closings between 21 August 2008 and 19 May 2011, totaling 40 lots.

Regarding the cause of the claimed losses, the NPFC's specific requests were to provide documentation that would indicate the claimed losses on commissions were directly related to the Deepwater Horizon oil spill (i.e. a map or chart showing the location of Torrington Place and the distance to the closest body of water, information on the elevation of Torrington [P]lace above datum, a description of the alleged losses that are solely related to the oil spill and what portion is due to the decline in market conditions).

This claim is denied for the following reasons: (1) Claimant has failed to meet the evidentiary burden to provide all evidence, information and documentation deemed necessary by the Director, NPFC, to support the claim; (2) Claimant has failed to demonstrate an alleged loss in the amount of \$7,800.00 through financial documentation; and (3) Claimant has failed to demonstrate that the alleged loss is due to injury or destruction or loss of real or personal property or a natural resource as a result of a discharge or a substantial threat of a discharge of oil.



Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *11/14/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

1. Optional OSLTF Claim Form received 31 August 2011.
2. Undated spreadsheet summary of lots sold pre-spill and post-spill, with sale prices, commissions and lost commissions.
3. Plat of Torrington Place approved 7/31/2008.
4. GCCF Denial Letter dated 11 August 2011 on Interim Payment/Final Payment Claim.
5. GCCF Interim Payment Claim Form dated 12/29/2010.
6. Amendment to Contract of Sale (Torrington), executed 6/11/2010.
7. Undated HUD-1 Settlement Statement for five (5) lots at Torrington Place (lots 9, 12, 28, 29 and 30).
8. Surety Land Title, Inc. check dated 7/22/2010 in the amount of \$9,000.00, payable to Englund Realty.
9. Undated HUD-1 Settlement Statement for one (1) lot at Torrington Place (lot 39).
10. Surety Land Title, Inc, check dated 3/17/2011 in the amount of \$1,800.00, payable to Jerry L. Englund.
11. HUD-1 Settlement Statement for three (3) lots at Torrington Place (lots 35, 48 and 53) dated 3/16/2011
12. Surety Land Title, Inc. check dated 4/7/2011 in the amount of \$5,400.00, payable to Englund Realty, LLC.
13. HUD-1 Settlement Statement for two (2) lots at Torrington Place (lots 34 and 38) dated 5/19/2011
14. Surety Land Title, Inc. check dated 5/19/2011 in the amount of \$3,600.00, payable to Englund Realty, LLC.
15. Contract of Sale dated 10/11/2006 with Exhibit A, undated Plat of Torrington Place, and Exhibit B, Seller's Letter for Compliance with FASB Interpretation No. 46 dated 9/8/2006.
16. HUD-1 Settlement Statement for ten (10) lots at Torrington Place (lots 2, 3, 5, 6, 7, 8, 15, 16, 17, & 31) dated 8/21/2008.
17. Community Bank receipt of transfer dated 8/21/2008 in the amount of \$21,000.00, payable to Englund Realty, LLC.
18. HUD-1 Settlement Statement for one (1) lot at Torrington Place (lot 45) dated 10/8/2008.
19. Surety Land Title, Inc. check dated 10/2/2008 in the amount of \$ 2,100.00, payable to Englund Realty, LLC.
20. HUD-1 Settlement Statement for three (3) lots at Torrington Place (lots 23, 24 and 25) dated 2/5/2009.
21. Surety Land Title, Inc. check dated 2/5/2009 in the amount of \$ 6,300.00, payable to Englund Realty, LLC.
22. HUD-1 Settlement Statement for two (2) lots at Torrington Place (lots 14 and 26) dated 2/19/2009.
23. Surety Land Title, Inc. check dated 2/19/2009 in the amount of \$ 4,200.00, payable to Englund Realty, LLC.
24. HUD-1 Settlement Statement for one (1) lot at Torrington Place (lot 18) dated 2/26/2009.
25. Surety Land Title, Inc. check dated 2/26/2009 in the amount of \$ 2,100.00, payable to Englund Realty, LLC.
26. HUD-1 Settlement Statement for six (6) lots at Torrington Place (lots 1, 11, 21, 41, 46, & 47) dated 6/11/2009.
27. Surety Land Title, Inc. check dated 6/11/2009 in the amount of \$12,600.00.00, payable to Englund Realty, LLC.

28. HUD-1 Settlement Statement for two (2) lots at Torrington Place (lots 43 & 44) dated 7/9/2009.
29. Surety Land Title, Inc. check dated 7/9/2009 in the amount of \$ 4,200.00, payable to Englund Realty.
30. HUD-1 Settlement Statement for one (1) lot at Torrington Place (lot 42) dated 7/30/2009.
31. Surety Land Title, Inc. check dated 7/30/2009 in the amount of \$2,100.00, payable to Englund Realty.
32. HUD-1 Settlement Statement for one (1) lot at Torrington Place (lot 31) dated 8/6/2009.
33. Surety Land Title, Inc. check dated 8/6/2009 in the amount of \$2,100.00, payable to Englund Realty, LLC.