

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: 7011 1570 0001 4803 8404

5890/DWHZ
14 August 2012

Florida BP Claims Inc
[REDACTED]

Re: Claim Number: N10036-1831

Dear Ms. Byers:

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 N10036-1831 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 N10036-1831.

Mail reconsideration requests to:

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

Sincerely,
[REDACTED] on Division
National Pollution Funds Center
U.S. Coast Guard

Enclosure: Claim Summary/Determination Form

cc: Stanley & Cynthia Kinnaman
2271 Christy Lane
Oldsmar, FL 34677

By Certified Mail:
No.: 7011 1570 0001 4803 8398

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1831
Claimant	Stanley & Cynthia Kinnaman
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$162,000.00

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 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 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 2 May 2012, and the CSSP began processing claims on 4 June, 2012.

CLAIM AND CLAIMANT

On 29 May 2012, Ms. Petra Byers, on behalf of Stanley and Cynthia Kinnaman (collectively, "the Claimant") presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$162,000.00 in loss of profits damages resulting from the Deepwater Horizon oil spill.¹

The Claimant is a real estate agent in Pinellas County, Florida, seeking to recover income allegedly lost in 2010 and 2011. The Claimant alleged that the Deepwater Horizon oil spill negatively affected the real estate market, causing the Claimant to make fewer sales than they otherwise would have.² Specifically, the Claimant stated that the "general fear of what [the oil spill] might do to our coast brought Florida real estate purchase to a halt."³

The Claimant calculated their alleged loss by comparing sales in 2009 to sales in 2010 and 2011. As compared to 2009, the Claimant alleged to have sustained oil-spill related losses of \$87,000.00 in 2010 and \$75,000.00 in 2011, for a total loss of \$162,000.00.

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 § 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

¹ Optional OSLTF Claim Form, received on 29 May 2012.

² Hardship Letter dated 15 May 2012.

³ Hardship Letter dated 12 February 2012.

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.
- (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.

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 OSLTF

To support this claim, the Claimant submitted the following documentation:

- Optional OSLTF Form, undated;
- Hardship Letter from the Claimant, signed 15 May 2012;
- Second Hardship Letter from the Claimant, signed 12 February 2012;
- GCCF Denial letter on Interim Payment/Final Payment Claim, dated 10 April 2012;
- Profit and Loss Statements for 2008 through 2011;
- 1099 Detail for 2008;
- 1099 Detail for 2009;

- 1099 Detail for 2010;
- 1099 Detail for 2011;
- Commission Check to Cynthia Kinnaman for \$82,607.82, dated 1 January 2008;
- Commission Check to Cynthia Kinnaman for \$43,933, dated 1 January 2009;
- Commission Check to Cynthia Kinnaman for \$9,022.60, dated 1 January 2011;
- 2008 1099 Miscellaneous Income;
- 2009 1099 Miscellaneous Income;
- 2010 1099 Miscellaneous Income;
- 2011 1099 Miscellaneous income;
- Photocopy of the Claimant's Drivers License;
- Photocopy of the Claimant's Florida Business License;
- Letter of Support from Kathy Erickson, dated 12 February 2012;
- Location Map of Business;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, dated 10 April 2012;
- GCCF Letter Regarding Proposed Settlement of BP Deepwater Horizon Litigation, dated 16 March 2012;
- 2008 Individual Income Tax Return;
- 2009 Individual Income Tax Return;
- 2010 Individual Income Tax Return;
- Letter from Claimant to the NPFC, signed 1 July 2012.

Prior to 10 April 2012, the Claimant presented a Full Review Final (FRF) claim to the RP/GCCF, seeking loss of profits and wages damages in an unknown amount.⁴ The Claimant was assigned Claimant ID 3578348 and the FRF claim was assigned claim # 9567202.⁵ The RP/GCCF denied payment on this claim.

On 29 May 2012, the Claimant submitted this claim to the NPFC, seeking \$162,000.00 in loss of profits and impairment of earning capacity damages.⁶ The NPFC may adjudicate this claim to the extent that these damages have first been presented to the RP/GCCF.⁷ Any damages now before the NPFC, which were not first presented to the RP/GCCF are denied for improper presentment.

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 (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 to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support this claim.

As an initial matter, it appears that the Claimant is a member of the Deepwater Horizon oil spill economic and property damages class action settlement (E&PD Settlement). This claim is

⁴ GCCF Denial Letter on Interim Payment/Final Payment Claim, dated 10 April 2012.

⁵ GCCF Denial Letter on Interim Payment/Final Payment Claim, dated 10 April 2012.

⁶ Optional OSLTF Claim Form, undated.

⁷ 33 C.F.R. § 136.103(a).

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 rights to the NPFC.

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 they are a member of the economic damages class of the E&PD Settlement, they should submit evidence to indicate that they have either opted out or are excluded from the E&PD Settlement in their request for reconsideration of this claim.

In order to prove a claim for loss of profits damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an actual financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill. Here, the Claimant failed to provide sufficient documentation to prove that any losses sustained in 2010 or 2011 were the result of the oil spill.

In a letter dated 19 June 2012, the NPFC requested that the Claimant provide certain additional information necessary to establish a causal link between the Claimants' alleged losses and the oil spill. Importantly, the Claimant was asked to provide "records of any contracts/sales cancelled as a result of the oil spill."⁸ However, the Claimant failed to respond to this request, or to otherwise provide evidence that might indicate that the decrease in the Claimant's sales was caused by the Deepwater Horizon oil spill and not by other factors affecting the housing market in Pinellas County in 2010 and 2011.

Research conducted by the NPFC indicates that property sales in the County were much improved in early 2010 as compared to 2009, largely as a result of a homebuyers' tax credit which expired on April 30, 2010. Reports compiled by the Pinellas Realtors Organization indicate that beginning in May of 2010, home sales slowed significantly for a variety of reasons, including, high unemployment rates, "the credit freeze," and low inventory following the April 30, 2010 expiration of the tax credit.⁹ Referencing low sales in September 2010, a report by the Organization indicates that "the market is still taking a breather after all the sales related to the tax credit."¹⁰

Furthermore, a spreadsheet showing the Claimant's monthly sales and income indicates that prior to the oil spill in 2010; the Claimant's earnings were significantly lower than earnings for the same period of 2009. In 2009 and 2010, the Claimant's January through May earnings totaled \$74,731.00 and \$27,631.00 respectively.¹¹ This drop in the Claimant's income in 2010 coincided with a spike in home sales experienced on a county-wide level.¹² It is unclear what factors were causing the Claimant's loss of income in 2010 prior to the oil spill, and whether or not those factors continued to affect the Claimant's income following the oil spill.

Based on the foregoing, this claim is denied because the Claimant failed to meet their burden to demonstrate (1) that he sustained a loss in the amount of \$162,000.00, and (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 a discharge of oil. Additionally, this claim is considered to

⁸ NPFC Request for Additional information, 19 June 2012.

⁹ Pinellas Realtor Organization, Pinellas County Real Estate Market Statistics for June 2010.

¹⁰ Pinellas Realtor Organization, Pinellas County Real Estate Market Statistics for September 2010.

¹¹ Spreadsheet showing Gross Income/Sales, 2008 – 2011.

¹² See, Report, Pinellas County Real Estate Statistics for March 2012, at 5, 7.

have been settled by virtue of Claimant belonging to the economic damages class associated with the CSSP and is not eligible for compensation from the Fund.



Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *8/14/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments: