

U.S. Department of
Homeland Security

United States
Coast Guard



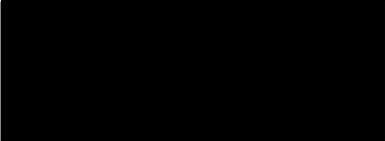
Director
National Pollution Funds Center
United States Coast Guard

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-npfclaimsinfo@uscg.mil
Fax: 703-872-6113

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1150 0000 4636 3912

5890/DWHZ
1 August 2012

Mr. Scott Trebelhorn



Re: Claim Number: N10036-1847

Dear Mr. Trebelhorn:

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 N10036-1847 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 N10036-1847

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 Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1847
Claimant	Trebelhorn & Associates
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$2,003,000.00

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

CLAIM AND CLAIMANT

On 21 June 2012, Mr. Scott Trebelhorn, on behalf of Trebelhorn & Associates (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$2,003,000.00 in loss of profits or impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

The Claimant is a BP fuel distributor, operating in southern Minnesota. The Claimant alleged that two high volume BP sites with which the Claimant conducted business, were forced to close as a result of the oil spill and the accompanying "stigma associated with the BP brand."² Both stores were for sale and undergoing the process of transferring ownership at the time of the oil spill. Following the closure of these stores, the Claimant became unable to meet BP's minimum five million gallon annual purchase requirement, causing BP to terminate their contract with the Claimant.³

As a result of the closure of the two sites mentioned above, as well as the loss of the Claimant's contract with BP, the Claimant estimates to have sustained a loss of profits totaling approximately \$2,003,000.00.⁴ This figure includes unpaid fuel costs owed to the Claimant by the two closed BP sites, reimbursement of "incentive funds", and ten years of future profits which the Claimant alleged will be lost a result of the loss of the Claimant's contract with BP.⁵

¹ Optional OSLTF Claim Form signed on 13 June 2012.

² Claim cover letter at page 2.

³ Claim cover letter at page 3.

⁴ Optional OSLTF Claim Form signed on 13 June 2012.

⁵ Claim cover letter at page 3.

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.

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

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

- Optional OSLTF Form, signed 13 June 2012;
- Emails between the Claimant and the NPFC, 15 & 21 June 2012;
- Letter from the Claimant describing losses and past dealings with the GCCF, 13 June 2012 (6pgs);
- GCCF Claim Information Details;
- Geographical Summary of Trebelhorn & Associates.

On 10 January 2011, the Claimant presented a claim for economic losses to the GCCF.⁶ The Claimant was assigned Claimant ID 100016194.⁷ The Claimant stated that this claim was left unresolved with the GCCF at the time of transition to the CSSP.⁸ Based on the Claimant's location and the nature of his business, the Claimant is likely excluded from the CSSP, meaning that this claim has not been settled by payment. The NPFC therefore may adjudicate this claim to the extent that the damages now presented to the NPFC do not exceed the amount previously presented to the GCCF.⁹

On 21 June 2012, the Claimant presented this claim to the NPFC, seeking \$2,003,000.00 in loss of profits or impairment of earning capacity damages.¹⁰ As noted above, the NPFC deems OPA presentment requirements to have been met, and may therefore properly adjudicate this claim.

NPFC Determination

Under 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136, a claimant must prove that any income loss 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, 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 alleged to have sustained losses stemming from two sources: (1) losses based on the closure of BP stores located in Belle Plaine, and Norwood, Minnesota and (2) losses based on the subsequent termination of the Claimant's contract with BP.

1. Losses due to store closures.

Regarding the store closures, the Claimant alleged that the store in Belle Plaine was "scheduled for a transfer of ownership on May 1, 2010" but that financing for the sale "disintegrated after the Gulf incident."¹¹ The Claimant alleged that after the loss of the first buyer, no other buyers were interested due to "the stigma associated with the BP brand."¹² Finally, the Claimant stated that the owner of this particular store "had commitments in another part of the country that were more pressing than his BP station in Belle Plaine, so he abandoned that venture."¹³

⁶ Claim cover letter at page 1.

⁷ GCCF claim information, provided by the Claimant.

⁸ Optional OLSTF Claim Form, signed on 13 June 2012.

⁹ 33 C.F.R. § 136.103(a).

¹⁰ Optional OSLTF Claim Form, signed on 13 June 2012.

¹¹ Claim cover letter at page 2.

¹² Claim cover letter at page 2.

¹³ Claim cover letter at page 2.

Regarding the second sale, the Claimant noted that the store was undergoing a transfer of ownership, which required that the remaining owner “procure financing to become the sole owner/operator.”¹⁴ Again, the Claimant alleged that the sale did not progress past the financing stage due to negative perceptions of BP following the oil spill.

It seems then, that closures of these stores were due to factors other than the oil spill, such as the inability of the buyers to secure financing, or decisions of the buyers not to proceed with the sales, in part due to negative publicity surrounding BP. However, even if the Claimant were able to provide evidence sufficient to prove that the buyers were unable to secure financing for the store as a result of negative publicity associated with BP after the oil spill, this loss would not be a loss that would be compensable under OPA’s loss of profits damage category, which is available to compensate a Claimant for lost income “resulting from the discharge, or substantial threat of discharge, of oil from a vessel or facility, into the navigable waters, adjoining shorelines, or exclusive economic zone.”¹⁵

Any losses caused by a “stigma” associated with BP, which may have caused buyers to back out of sales agreements, anticipating low sales of BP branded gasoline, are also not OPA-compensable losses because of their speculative nature. Before the NPFC could even consider such damages, the Claimant would have to prove the claim within the claim. In other words, the Claimant would have to prove by a preponderance of the evidence that the gas stations to whom the Claimant was selling gasoline (1) experienced a financial loss in a certain amount, (2) that the loss was due to the Deepwater Horizon oil spill, as opposed to a myriad of other economic factors, and (3) that the impact of the Deepwater Horizon losses of the gas stations resulted in a Deepwater Horizon loss to the Claimant’s business. Here, the speculative nature of “stigma” damages makes them exceptionally difficult to prove and, even if, the Claimant could show some negative impact on his client’s business due to the public’s alleged negative perception of BP gasoline, he would still be required to quantify that impact on those businesses and then show how those impacts affected his own business.

For example, the Claimant would have to provide detailed financial records for each gas station to prove that station’s economic loss and then show that the losses resulted from the Deepwater Horizon oil spill. Further, regarding the sale of the gas stations themselves, in order to prove that the Claimant sustained an actual financial loss, the Claimant would have to prove that the sales for each store had actually been finalized and that the Claimant would have then continued to supply fuel to the stores following the changes in ownership.

2. Losses due to termination of BP contract.

Secondly, the Claimant has alleged that the loss of business from the two closed BP stores has caused the Claimant to be unable to meet purchase requirements pursuant to his contract with BP. As a result, BP terminated the agreement, causing the Claimant to lose other smaller BP customers as well as causing the Claimant to be unable to secure new business with BP. The Claimant goes on to explain how BP policies regarding branding and purchase requirements in certain territories have made it very difficult for him to replace the business he lost. However, the Claimant explains that the policies adopted by BP to “eliminate small Jobbers like [the Claimant] took place before the spill.”¹⁶ The Claimant asserts, however, that “it was the Gulf

¹⁴ Claim cover letter at page 2.

¹⁵ 33 C.F.R. § 136.1(a)(1).

¹⁶ Claim cover letter at page 3.

spill that resulted in circumstances causing [the Claimant's] two largest supplied stores to close” and then prevented the Claimant from finding new business.¹⁷

Any losses which may be due to business practices and policy adopted by BP, are not losses caused by the oil spill, and are not compensable under OPA's loss of profits damage category.

This claim is therefore denied because (1) the Claimant has failed to meet his burden to demonstrate 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, (2) he has failed to demonstrate a loss in the amount claimed, and (3) the losses claimed for ten years into the future are not actual losses and therefore not OPA compensable.


Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *8/1/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁷ Claim cover letter at page 3.