

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

CERTIFIED MAIL – RETURN RECEIPT REQUESTED  
Number: 7011 1570 0001 4803 8527

5890/DWHZ  
13 August 2012

Lance Franscell  


Re: Claim Number: N10036-1854

Dear Mr. Franscell:

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 N10036-1854 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 N10036-1854.

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	N10036-1854
Claimant	Lance Franscell
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$33,358.00

### ***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 3 June 2012, Lance Franscell (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$33,358.00 in loss of profits damages resulting from the Deepwater Horizon oil spill.<sup>1</sup>

At the time of the oil spill, the Claimant was working as a market sales manager in Florida for AmeriGas Propane.<sup>2</sup> The Claimant alleged that the oil spill impacted tourism and the associated businesses in Florida, which in turn resulted in a decrease in propane demand and an impact on sales.<sup>3</sup> The Claimant states he was unable to reach his Incentive Plan goals and thus suffered a loss of income as a result of the oil spill.

In order to calculate his losses, the Claimant took his earning potential and subtracted his actual earnings, reaching a requested sum certain of \$33,358.<sup>4</sup>

### ***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

<sup>1</sup> Optional OSLTF Claim Form, signed 10 June 2012.

<sup>2</sup> Hardship Letter from Claimant, signed 23 April 2012.

<sup>3</sup> Hardship Letter from Claimant, signed 23 April 2012.

<sup>4</sup> Hardship Letter from Claimant, signed 23 April 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 undertake, 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***

### **Presentment**

On 21 February 2012, the Claimant presented an Interim Payment (IP) claim to the RP/GCCF, seeking loss of profits and wages damages in the amount of \$33,358.00<sup>5</sup> The Claimant was assigned Claimant ID 3581902 and the claim was assigned claim # 9580472.<sup>6</sup> The RP/GCCF denied payment on this claim.

<sup>5</sup> Copy of GCCF Interim Payment Claim, signed 21 February 2012.

<sup>6</sup> GCCF Denial Letter on Interim Payment/Final Payment Claim, dated 18 April 2012.

On 3 July 2012, the Claimant submitted this claim to the NPFC, seeking \$33,538.00 in loss of profits and impairment of earning capacity damages.<sup>7</sup> The NPFC may adjudicate this claim to the extent that these damages have first been presented to the RP/GCCF.<sup>8</sup> Because the Claimant has presented these damages first to the RP/GCCF in an amount equal to the amount now presented to the NPFC, this determination may properly address the entirety of the claim now before the NPFC, in the amount of \$33,538.00.

Additionally, the NPFC notes that evidence presented in this claim submission indicates that the Claimant is a member of the economic damages class of the Deepwater Horizon oil spill economic and property damage class action settlement (the 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 therefore considered to have been settled, and the Claimant is therefore 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 he is a member of the economic damages class of the E&PD Settlement, he should submit evidence to indicate that he has either opted out or is excluded from the E&PD Settlement in his request for reconsideration of this claim.

Furthermore, this claim is denied under OPA's loss of profits damage category, as the Claimant has failed to prove that he has sustained a financial loss as a result of the Deepwater Horizon oil spill. 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.

In a letter dated 5 July 2012, the NPFC requested that the Claimant provide additional documentation to meet the requirements of the law listed above, including (1) financial documentation from the Claimant's place of employment, and (2) records of contracts and/or clients lost as a result of the oil spill.

The NPFC requested that the Claimant respond to the additional information request within 14 days of the date of the letter. As of the date of this determination, the Claimant has failed to respond. The NPFC requires sufficient financial documentation to draw a causal link between any losses and the Deepwater Horizon spill. While the Claimant has provided the 2010 Incentive

---

<sup>7</sup> Optional OSLTF Claim Form, signed 10 June 2012.

<sup>8</sup> 33 C.F.R. § 136.103(a).

Plan, this does not provide a picture of the actual business and financial situation encountered by the Claimant and his place of employment. Additionally, the incentive plan provided by the Claimant is speculative in nature, requiring AmeriGas earnings to “equal or to exceed the FY 2010 Earnings Per Unit (“EPU”) minimum threshold of \$2.47 EPU.”<sup>9</sup> Thus, Claimant’s incentive pay was not guaranteed. Information included in the Claimant’s original submission is insufficient to prove that the Claimant’s place of employment sustained losses attributable to the spill and no evidence has been provided to prove that it was the oil spill, as opposed to a myriad of other economic factors affecting the Claimant’s employer, which prevented AmeriGas from equaling or exceeding the FY2010 EPU.

Furthermore, according to the provided tax returns, the Claimant’s 2010 *total* income is greater than the total income for 2009.<sup>10</sup> The NPFC may only compensate *actual* losses, and judging by the provided documentation, the Claimant did not suffer an actual loss in 2010. Means of mitigating losses and increasing income separate from the Claimant’s employment are taken under consideration by the NPFC as part of the Claimant’s entire financial situation.

Should the Claimant wish to submit for reconsideration, he must provide financial documentation and other evidence sufficient to prove that his alleged losses are due to the oil spill. Additionally, since his claim relies heavily on a theory of decreased tourism, he would have to show how decreased tourism impacted his business in the districts where he manages sales. For example, Sales and Use Tax Records for Hillsborough County, Florida indicate that monthly sales for May through December of 2010, showed consistent increases as compared to the same period of 2009.<sup>11</sup> September of 2010 was the only month of 2010 following the oil spill, in which sales tax collections did not increase as compared to 2009. Therefore, if for example, Hillsborough County is one of Claimant’s districts, it seems unlikely that the Claimants sales in this particular county would have been affected in 2010.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$33,358.00, 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. Further, the Claimant is considered to have settled his claim by virtue of belonging to the economic damages class associated with the CSSP.

  
Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor’s Review: *8/13/12*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

<sup>9</sup> AmeriGas Area Sales Manager 2010 Incentive Plan, pg. 3, Financial Qualifier for Incentive

<sup>10</sup> 2009 Individual Income Tax Return; 2010 Individual Income Tax Return.

<sup>11</sup> See, Hillsborough County, Florida, Taxable Sales Records, available at, <http://www.hillsboroughcounty.org/index.aspx?NID=1116>, accessed on 9 August 2012.