

U.S. Department of
Homeland Security

United States
Coast Guard



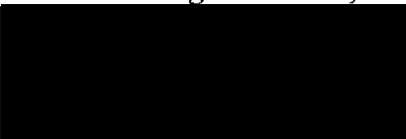
Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 8510

5890/DWHZ
13 August 2012

Home Building Consultants, LLC



Re: Claim Number: N10036-1857

Dear Mr. Tolbert:

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 N10036-1857 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 N10036-1857.

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	N10036-1857
Claimant	Home Building Consultants, LLC
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$144,420.00

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 05 July 2012, Mr. Anthony Tolbert (the Claimant), on behalf of Home Building Consultants, LLC (HBC), submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$144,420.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon incident.¹

The Claimant owns and operates HBC, a residential construction and renovation company located in Biloxi, Mississippi.² The Claimant alleges that two customers reneged on their contracts to build homes due to the Deepwater Horizon incident.³

As a result, the Claimant filed this claim seeking \$144,420.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon incident.⁴

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.

¹ Optional OSLTF Claim Form, signed 16 June 2012.

² Hardship Letter, dated 11 November 2010.

³ Hardship Letter, dated 11 November 2010.

⁴ Optional OSLTF Claim Form, signed 16 June 2012.

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 this claim, the Claimant submitted the following documentation:

- Optional OSLTF Form, signed 16 June 2012;
- Hardship Letter, dated 11 November 2010;
- Construction Management Contract with Evette Caple, dated 05 April 2010;
- Cancellation Letter from Evette Caple, dated 07 May 2010;
- Construction Management Contract with Lewis Tolbert, dated 03 May 2010; and
- Cancellation Letter from Lewis Caple, dated 05 June 2010.

On 05 July 2012, the Claimant presented this claim to the NPFC, seeking \$144,420.00 in loss of profits and impairment of earning capacity damages.⁵ The Claimant stated that prior to presenting this claim to the NPFC; he presented a claim to the RP/GCCF on 11 November 2010.⁶ The NPFC requested verification that the Claimant had indeed presented his claim to the RP by requesting copies of all correspondence between the Claimant and the GCCF. The Claimant has not provided any verification and, as described below, he has not established that his claim was properly presented to the RP before presenting his claim to the Fund.

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

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 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 a request for reconsideration of this claim.

This claim is also denied for improper presentment because the Claimant has failed to prove that he first presented his claim to the RP/GCCF in accordance with the claims regulations at 33 C.F.R. § 136.103. OPA presentment requires that "all claims for removal costs or damages must be presented first to the responsible party . . ." Here, the evidence presented by the Claimant does not establish that his claim was first presented to the RP/GCCF and he has not provided a claim number or claimant identification number associated with any Deepwater Horizon RP claims process. In a letter dated 06 July 2012, the NPFC requested that the Claimant provide copies of all prior correspondence between the Claimant and the GCCF. The Claimant has not provided the evidence requested and, therefore, proper presentment cannot be verified.

Furthermore, this claim for loss of profits and impairment of earning capacity damages is also denied on its merits, as the Claimant has failed to establish either a financial loss or that his alleged loss is the result of the Deepwater Horizon incident. In order to prove a claim for loss of profits damages, a claimant must provide documentation sufficiently proving (1) that the claimant sustained an actual financial loss, and (2) that the discharge of oil resulting from the Deepwater Horizon oil spill caused that loss.

⁵ Optional OSLTF Claim Form, signed 16 June 2012.

⁶ Optional OSLTF Claim Form, signed 16 June 2012.

The Claimant filed this claim seeking \$144,420.00 in loss of profits and impairment of earning capacity damages.⁷ In a letter dated 06 July 2012, the NPFC requested that the Claimant provide supporting documentation and answers to questions in order to substantiate his alleged loss.⁸ The Claimant did not respond to this request for additional information. Accordingly, the NPFC will review the claim based on the documentation originally submitted to the NPFC.

The Claimant has not provided the NPFC with documentation to substantiate his alleged loss. The Claimant estimated that HBC would have received \$99,900.00 in profit on the contract with Evette Caple and \$44,520.00 in profit on the contract with Lewis Tolbert.⁹ The Claimant has not, however, provided any financial documentation substantiating this number, and did not respond to the NPFC's request to supply such documentation. This allegation, without more, is insufficient to establish that the Claimant has suffered a financial loss in the amount alleged.

The Claimant has also failed to prove that the Deepwater Horizon incident caused his alleged financial loss. The Claimant provided two letters from customers citing the Deepwater Horizon incident as the impetus for canceling the construction contract—one written by Evette Caple,¹⁰ the other by Lewis Tolbert.¹¹ The Claimant did not, however, provide documentation and information requested by the NPFC to verify the sources and substance of those letters.¹² As such, the Claimant has failed to provide reliable evidence linking the alleged financial loss to the Deepwater Horizon incident.

Accordingly, the Claimant's request for \$144,420.00 is denied in its entirety because the Claimant has failed to prove that he properly presented his claim to the RP or the GCCF prior to submitting his claim to the Fund as required by law. Additionally, the Claimant has failed to demonstrate (1) a financial loss in the amount claimed, 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 discharge of oil. Finally, 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: *8/13/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

⁷ Optional OSLTF Claim Form, signed 16 June 2012.

⁸ NPFC Request for Additional Information, dated 06 July 2012.

⁹ The Claimant used an estimated cost figure of \$45 per square foot.

¹⁰ Cancellation Letter from Evette Caple, dated 07 May 2010. Based on HBC's corporate filings with the Mississippi Secretary of State, it appears as though Ms. Caple is a HBC officer or director. Certificate of Formation, Home Building Consultants, LLC, dated 25 October 2004; Mississippi Secretary of State, Home Building Consultants, LLC Directors and Officers, available at <https://business.sos.state.ms.us/corp/soskb/Names.asp?PItemID=370280> (retrieved on 08 August 2012).

¹¹ Cancellation Letter from Lewis Tolbert, dated 05 June 2010.

¹² NPFC Request for Additional Information, dated 06 July 2012.