

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 2446 3633

5890/DWHZ
23 August 2012

Katherine Moulton


Re: Claim Number: N10036-1863

Dear Ms. Moulton:

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 N10036-1863 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 N10036-1863.

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	N10036-1863
Claimant	Katherine Moulton
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$581,170.00

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 19 July 2012, Mrs. Katherine Moulton (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$581,170.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant was the General Manager of The Colony Beach & Tennis Resort on Longboat Key, Florida. The Claimant alleged that the oil spill caused the resort to close in early August of 2010, after having sustained low and decreased bookings throughout that summer.² A letter from the Claimant's former employer in support of this claim states that, "last summer we were severely affected by the Deepwater Horizon Oil Spill and experienced a tremendous drop in our occupancies as a result."³ The letter goes on to state that "the damages was so great we simply see no chance of a recovery and will be closing, effective immediately."⁴

As of the date of this claim submission, the Claimant alleged to have lost a total of \$581,170.00 as a result of the loss of her management position following the oil spill.⁵ This total includes actual income and the value of employment benefits lost from August 2010 until July of 2012.⁶

¹ Optional OSLTF Claim Form, signed on 16 July 2012.

² Optional OSLTF Claim Form, signed on 16 July 2012.

³ Letter from the Claimant's employer, 15 August 2010.

⁴ Letter from the Claimant's employer, 15 August 2010.

⁵ Letter from the Claimant to the NPFC, 16 July 2012.

⁶ Letter from the Claimant to the NPFC, 16 July 2012.

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 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

In October of 2011, the Claimant presented a claim to the RP/GCCF seeking to recover losses incurred as a result of the loss of her resort management position following the Deepwater Horizon oil spill.⁷ The Claimant alleged that the GCCF denied payment on this claim on 22 February 2012 initially and then again on April 19, 2012 following a re-review of the claim.⁸

On 19 July 2012, the Claimant submitted this claim to the NPFC, seeking loss of profits or impairment of earning capacity damages incurred as a result of the Deepwater Horizon oil spill.⁹ Information in this claim submission indicates that the Claimant properly submitted this claim to the GCCF, prior to its submission to the NPFC. Any damages presented in this claim which were not first presented to the GCCF, however, would be denied for improper presentment.¹⁰

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 economic damages class 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 the NPFC to those rights.

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 she is a member of the economic damages class of the E&PD Settlement, she should submit evidence to indicate that she has either opted out or is excluded from the E&PD Settlement in her request for reconsideration of this claim.

However, even if this claim had not been settled, it is denied under OPA's loss of profits damage category because the Claimant has failed to prove that she 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 evidence 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.

The Claimant alleged that the Deepwater Horizon oil spill caused an immediate decline in occupancy, so that the resort was forced to cease operations at least as early as August 15, 2010. The Claimant's former employer cited the "tremendous drop in [hotel] occupancies" caused by

⁷ Letter from the Claimant to the NPFC, 16 July 2012.

⁸ Letter from the Claimant to the NPFC, 16 July 2012.

⁹ Optional OSLTF Claim Form, signed on 16 July 2012.

¹⁰ 33 C.F.R. S 136.103(a).

the oil spill as the reason for the closure of the resort less than four months after the start of the oil spill.¹¹

Beyond the letters provided by the Claimant's former employer, the Claimant has not provided any evidence of booking rates, reservation cancellations, or record of actual tourism decreases in the Sarasota area to demonstrate that the resort's occupancy rates were actually affected by the oil spill. The Claimant also has not demonstrated that low bookings caused the resort to close in early August of 2010.

Furthermore, research conducted by the NPFC indicates that certain factors other than the oil spill caused the resort to close in August of 2010. The bankruptcy proceedings surrounding The Colony Beach & Tennis Resort were widely documented throughout the Sarasota, Florida community. Information in the public record and from various local news sources indicates that The Colony's condominium unit owners association filed for Chapter 11 bankruptcy in November of 2008, causing the resort to suspend operations in September of 2009. Then in October of 2009, the resort management company also filed for Chapter 11 bankruptcy.

Following these filings, the resort secured certain loans and continued to engage in negotiations with the condominium unit owners association. However, the parties failed to come to an agreement, and in August of 2010, the court presiding over the proceedings converted the Chapter 11 bankruptcy reorganization into a Chapter 7 liquidation of The Colony, giving the condominium owners complete control over the property.¹²

No information in the record indicates that the oil spill had an effect on hotel occupancy in the summer of 2010. Rather, a July 11, 2010 Chapter 11 Trustees Report indicates that the resort had already secured over 1,000 bookings for that month, which was described by the Trustee as a "fairly strong showing."¹³ The report contains no mention of low booking generally or of the Deepwater Horizon oil spill specifically. After noting that July reservation rates were "fairly strong," the Trustee goes on to state that he "intend[s] to discontinue the hotel operations as early as August."¹⁴ Furthermore, it is clear that the Claimant was working closely with the Chapter 11 trustee and was aware that hotel operations would likely be suspended in August of 2010.

The resort's own website cites the above-referenced legal dispute as the reason for the August closure, stating that,

[t]he Colony Beach & Tennis Resort ceased operations on August 15, 2010. A years-long dispute between the Condominium Unit Owners and the operating company of the resort remains unresolved and, as a result, much needed renovations to the property have not yet been performed.¹⁵

In her claim submission, the Claimant has failed to provide any evidence that might prove that resort incurred cancelled and decreased bookings as a result of the oil spill. The Claimant has also failed to prove that low bookings caused the resort to cease operations in August of 2010.

Furthermore, the Claimant has materially misrepresented substantial elements of this claim. In her letter dated 16 July 2012 describing her alleged losses, the Claimant states that the "resort found itself in an untenable position caused by the spill and exacerbated by the failing economy

¹¹ Letter from the Claimant's employer, 10 August 2010.

¹² See, e.g., Schultheis, Kurt, Colony Collapse, The Observer Group, 11 August 2010, accessed on 15 August 2012.

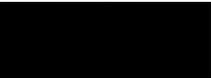
¹³ Chapter 11 Trustee Report, Submitted by William Maloney CPA, CVA, (U.S. Bankr. M.D. Fla) 22 July 2010.

¹⁴ Chapter 11 Trustee Report, at 7.

¹⁵ <http://www.colonybeachresort.com/>, accessed on 15 August 2012.

and, in August of that year was forced to close its doors” Thus, in her letter, the Claimant has identified the Deepwater Horizon oil spill and the general economy as the sole factors leading to the resort’s decline without so much as mentioning the ongoing legal proceedings that preexisted the oil spill by one and a half years. Claimants submitting false claims or making false statements in connection with those claims risk prosecution under Federal law, including but not limited to 18 U.S.C. §§ 287 and 1001.¹⁶ Additionally, those submitting written documentation supporting their claim that they know or should know is false may be subject to a civil penalty for each claim.

Based on the foregoing, this claim is denied because the Claimant failed to meet her burden to demonstrate (1) that she sustained an actual loss in the amount of \$581,170.00, 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 denied because (3) it is considered to have been settled by virtue of Claimant belonging to the economic damages class associated with the CSSP and (4) because the Claimant has materially misrepresented substantial elements of her claim through the written documentation that she has presented to the Fund.

<p>Claim Supervisor: <i>NPFC Claims Adjudication Division</i></p> <p>Date of Supervisor’s Review: <i>8/23/12</i></p> <p>Supervisor’s Action: <i>Denia</i> </p> <p>Supervisor’s Comments:</p>
--

¹⁶ 33 C.F.R. § 136.9.