

U.S. Department of
Homeland Security

**United States
Coast Guard**

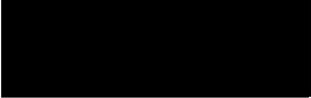


Director
National Pollution Funds Center
United States Coast Guard

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 2000 0001 1246 6816

5890/DWHZ
29 July 2013

Mr. Robert Mortensen


Re: Claim Number: N10036-1864

Dear Mr. Mortensen,

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 N10036-1864 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 N10036-1864.

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	N10036-1864
Claimant	Robert Mortensen
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$5,022.00

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 25 July 2012, Mr. Robert Mortensen, ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$5,022.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant resides in Ames, Iowa and owns a rental property in Pensacola Beach, Florida. The Claimant alleged that from May through December of 2010, they sustained rental income losses of \$5,022.00 due to reservation cancellations prompted by the Deepwater Horizon oil spill. In support of this claim, the Claimant provides several emails from would-be guests stating that they cancelled reservations as a result of the oil spill

The Claimant seeks to recover \$5,022.00, which is the difference in rental income generated by the unit for May to December 2010 and 2011.

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 on 8 July 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

The Claimant submitted the following documentation in support of this claim:

- Optional OSLTF Claim Form, signed on 8 July 2012;
- Signed statement by Svetlana Mortensen, 7 July 2012;
- Claim Cover letter, 18 July 2012;
- GCCF EAP Denial Letter, 16 December 2010;
- GCCF Interim Payment Denial Letter, 27 April 2011;
- GCCF Documentation, including protocol for EAP claim adjudication;
- Press Release, *BP to Pay Second Month of Loss of Income Claims*, 4 June 2010;

- Rental Cancellation List;
- Letter from Our Gulf Coast, 26 June 2010;
- Emails regarding cancellations due to oil spill;
- Receipts documenting cancellation refunds;
- Unit remodel expense report;
- Monthly Comparison of bookings/income, 2008 – 2011;
- Income and Expense Reports, 2009 – 2011;
- Monthly Profit and Loss Statements, 2009 – 2010;
- Escambia County Tax Documentation;
- 2009 Federal Income Tax Returns;
- 2009 Federal Income Tax Returns;
- Travel expenditure bar graph, 2000-2010.

Prior to presenting this claim to the NPFC, the Claimant submitted an Emergency Advance Payment (EAP) and Interim Payment claim to the GCCF. Both claims were denied.²

On 25 July 2012, the Claimant submitted this claim to the NPFC seeking \$5,022.00 in loss of profits or impairment of earning capacity damages. Because this claim was first presented to and denied by the RP through the GCCF, OPA presentment requirements have been satisfied.³

The Claimant indicated that he has opted out of the Economic and Property Damage Settlement Class (E&PD Settlement) but that he was pursuing recovery of these costs in addition to others not presented to the NPFC, through litigation against BP in the U.S. District Court for the Eastern District of Louisiana.⁴

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.

In accordance with OPA’s implementing regulations, the NPFC may not make payment on a claim “during the pendency of an action by the person in court to recover costs which are the subject of the claim.”⁵ On 18 January 2013, the Claimant confirmed that in lieu of pursuing this claim through the NPFC, the Claimant had filed a Complaint in the U.S. District Court for the Eastern District of Louisiana, attempting to recover the same damages as now before the NPFC.

Because the damages before the NPFC are the subject of litigation, the NPFC cannot make a payment on this claim. However, on 18 January 2013, the NPFC agreed to hold the claim in abeyance until the claim was resolved or the Claimant withdrew from litigation. The NPFC requested, however, that the Claimant provide a litigation update in six months, so that the NPFC could assess the status of the claim. The Claimant was specifically requested to provide this update by 18 July 2013.⁶ As of the date of this determination, the Claimant has not responded.

² Claim determination notifications included in claim submission.

³ 33 C.F.R. § 136.103.

⁴ Email from the NPFC to the Claimant, 18 January 2013; Email response from the Claimant to the NPFC 18 January 2013.

⁵ 33 C.F.R. § 136.103(d).

⁶ Supra, note 4.

As such, the NPFC does not have evidence sufficient to determine whether or not the claim has been resolved. If the claim has been settled, the Claimant would be ineligible to recover costs from the NPFC, as the Claimant would have no rights to the claim to subrogate to the NPFC. Furthermore, if the Claimant is still pursuing this claim through litigation, the NPFC is ineligible to pay during the pendency of that action in court.

As such, this claim is denied as the NPFC does not have evidence to determine whether or not the Claimant has maintained rights to pursue this claim. Should the Claimant wish to pursue this claim through reconsideration, the Claimant should provide an update of the status of the claim, as well as any and all evidence of payments made to the Claimant by any party for any and all losses resulting from the Deepwater Horizon oil spill.


Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *7/29/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments: