

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
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Arlington, VA 20598-7100
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 2445 2149

5890/DWHZ
20 November 2012

Kenneth Browne



Re: Claim Number: N10036-1865

Dear Mr. Browne:

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 N10036-1865 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 N10036-1865.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely,



National Pollution Funds Center
U.S. Coast Guard

Enclosure: Claim Summary/Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	N10036-1865
Claimant	Waveland Resorts Inns Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$10,000.00

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 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 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 03 August 2012, Waveland Resorts Inns, Inc. (Claimant) presented an optional Oil Spill Liability Trust Fund (OSLTF) claim form seeking \$10,000.00 for accounting fees associated with putting the underlying claim together to the National Pollution Funds Center (NPFC) alleging damages resulting from the Deepwater Horizon oil spill.

The Claimant received an interim payment from the GCCF on 23 May 2012 in the amount of \$150,839.23 after receiving \$330,000.00 in emergency payments from the RP.¹ However, line four of the GCCF determination is for accounting fees which was awarded \$0.00.² The Claimant billed Waveland Resorts once on 17 November 2011 for \$5,000.00 and again on 02 March 2012 for \$5,000.00 for a total of \$10,000.00.³

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 waters or adjoining shorelines or the exclusive economic zone, as described in Section 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.

¹ GCCF determination letter on interim payment dated 23 May 2012.

² Ibid.

³ Invoice #11555 dated 17 November 2011 & Invoice #11579 dated 02 March 2012.

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.

Pursuant to 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

To support his claim, the Claimant submitted:

- 1) Optional OSLTF claim form dated 25 July 2012;
- 2) GCCF determination letter on interim payment dated 23 May 2012;
- 3) Invoice #11555 for accounting services dated 17 November 2011;
- 4) Invoice #11579 for accounting services dated 02 March 2012;
- 5) Statement of work for CPA Bruce Smith dated 03 November 2011;
- 6) Minutes of the special meeting of directors of Coast Inn & Suites undated;
- 7) Waveland Resort Inn, Inc. state of Mississippi tax license;
- 8) Business permit from the state of Mississippi issued to Waveland Resorts Inns, Inc on 26 May 1976.

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).⁴

On 03 August 2012, the Claimant submitted this claim to the NPFC, seeking \$10,000.00 in loss of profits or impairment of earning capacity damages resulting from effects of the Deepwater Horizon oil spill.⁵ OPA requires that all claims for costs or damages be presented first to the RP prior to presentment of the claim to the NPFC.⁶ Claimant stated that this claim has been first presented to and “GCCF paid claim and forgot to include Accounting Fees due the Forensic Accountant who put the Claim Packet together.” Presentment requirements are therefore satisfied to the extent that the damage amount now before the NPFC does not exceed that presented to the GCCF. Any damages now presented to the NPFC, which were not first presented to the GCCF are denied for improper presentment.

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 or destruction or loss of real or personal property or 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 the claim. The NPFC considered all the documentation submitted by the Claimant.

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).⁷ 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 and impairment of earning capacity 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.

Under 33 U.S.C. §2701 (5) “damages” means damages specified in section 2702 (b) of this title, and includes the cost of assessing these damages. Under 33 U.S.C. 2702 (b) 2 (B) Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property and (E) Damages equal to the loss of profits or impairment of

⁴ The Claimant was sent an economic loss letter via certified mail with tracking #7011 1570 0001 2445 2057, dated 01 October 2012 however it was returned to the NPFC as undeliverable.

⁵ Optional OSLTF Claim Form, signed on 29 April 2012.

⁶ 33 C.F.R. § 136.103(a).

⁷ The Claimant was sent an economic loss letter via certified mail with tracking #7011 1570 0001 2445 2057, dated 01 October 2012 however it was returned to the NPFC as undeliverable.

earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

The Claimant did not provide to the NPFC evidence of the underlying claim and the accounting work performed that was allegedly presented to the responsible party. One prerequisite for the NPFC to pay assessment fees is that the underlying claim is compensable under the Oil Pollution Act.⁸ The NPFC sent the Claimant a certified letter requesting additional information dated 11 October 2012. The NPFC requested that the Claimant provide the NPFC with a copy of the underlying claim submission, an explanation and itemization of the accounting preparation, and whether the accounting fees were presented to the RP. However, the certified mail was returned to the NPFC as undeliverable as addressed.⁹ The NPFC has confirmed the address given by the Claimant as the correct mailing address.¹⁰ Since the Claimant's alleged damages have not been proven to be OPA compensable, this claim for assessment costs is considered not OPA compensable under the statutes¹¹ and such denied.

Based on the foregoing, this claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$10,000.00 (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, (3) 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, and (4) the Claimant has failed to demonstrate the assessment costs are an OPA compensable damage.

Claim Supervisor: 

Date of Supervisor's Review: *11/20/12*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

⁸ 33U.S.C. §2701 (5).

⁹ USPS tracking #7011 1570 0001 2445 2101.

¹⁰ Claimant provided their address as Waveland Resorts Inns Inc. 4040 Hwy 90 Waveland, MS. 70535.

¹¹ 33U.S.C. §2701 (5) & 33 U.S.C. 2702 (b) 2 (B).