

U.S. Department of
Homeland Security

United States
Coast Guard

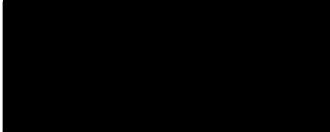


Director
National Pollution Funds Center
United States Coast Guard

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

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7012 2210 0001 7215 0421

5890/DWHZ
4 June 2013

Avlstock, Witkin, Kreis & Overholtz


Re: Claim Number: N10036-1930

Dear Mr. Witkin:

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 N10036-1930 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 N10036-1930.

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

cc: 

By Certified Mail:
No. 7012 2210 0001 7215 0414

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1930
Claimant	David Cooper
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$149,000.00

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 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 10 May 2013, Mr. David Witkin, legal representative of David Cooper, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$149,000.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant stated that his "income is tied to his ability to originate loans and related banking business in the Florida Gulf Coast region." Following the Deepwater Horizon oil spill, the Claimant alleged that many of his clients, particularly in the seafood and tourism industries, were no longer able to conduct business with him as these clients "sustained financial losses as a result of the oil spill."²

The Claimant receives yearly incentives in the form of cash awards and stock plan awards. In 2010, the Claimant's incentive earnings were reduced by about \$71,667.48 as compared to prior years. It is unclear, however, how the Claimant reached his sum certain of \$149,000.00, which he seeks to recover from the OSLTF.

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

¹ Optional OSLTF Claim Form, signed on 26 April 2013.

² Claim cover letter, 26 April 2013.

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. 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 26 April 2013;
- Fax Cover Sheet, dated 5/7/2013;

- Claim Cover Letter, 26 April 2013;
- 2010 Form 1040, showing wages of \$163,988.00;
- 2010 Schedule A Form 1040;
- 2010 Schedule M (Form 1040A or 1040);
- 2010 Schedule B (Form 1040A or 1040);
- 2009 Form 1040, showing wages of \$119,934.00;
- 2010 Schedule B (Form 1040A or 1040);
- 2009 Schedule B (Form 1040A or 1040);
- 2008 Form 1040, showing wages of \$139,834.00;
- 2008, 2009 and 2010 Form W-2 Wage and Tax Statements;
- Handwritten "summary of cash hands & key associate stock plan awards," 2007 – 2010;
- Handwritten lost earning calculation page;
- Manager review and ratings;
- 2008 - 2012 Compensation Statements;
- Key Associate Stock Plan Award Statements, 2008 - 2010;
- 2003 Key Associate Stock Plan Award Agreement;
- Mid-Year Performance Reports, 2008 – 2010;
- Pay check statements;
- Monthly Revenue Chart;
- 2007 W-2 Wage and Tax Statement;
- Common Stock Prospectus, April 28, 2010;
- 2012 Form 1040, showing earnings of \$113,767.00;
- 2012 Schedule A Form 1040;
- 2012 Schedule B (Form 1040A or 1040);
- 2011 Form 1040, showing earnings of \$120,596.00;
- 2011 Schedule A Form 1040;
- 2011 Schedule B (Form 1040A or 1040);
- 2012 Form W-2 Wage and Tax Statement;
- 2011 Form W-2 Wage and Tax Statement;
- Statement of Earnings Detail, January 2009 - April 2013.

The Claimant alleged to have presented this claim to the GCCF on 25 April 2011 and to the BP Claims Program on 18 January 2013. The Claimant's submission indicates that both claims were denied.³

On 10 May 2013, the Claimant presented this claim to the NPFC seeking to recover \$149,000.00 in loss of profits or impairment of earning capacity damages. The NPFC does not have information necessary to confirm the amounts and subject matter of claims previously presented to the GCCF and BP Claims Program. However, the NPFC will adjudicate this claim to the extent that OPA presentment requirements have been satisfied.⁴ Any damages now before the NPFC which were not previously presented to and denied by the Responsible Party are denied for improper presentment.⁵

Furthermore, evidence in this claim submission indicates that the Claimant is pursuing this claim through litigation in the U.S. District Court for the Eastern District of Louisiana.⁶

³ Optional OSLTF Claim Form, signed on 26 April 2013.

⁴ 33 C.F.R. § 136.103(a).

⁵ 33 C.F.R. § 136.103(c)(2).

⁶ Optional OSLTF Claim Form, signed on 26 April 2013.

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.

For the reasons explained below, this claim is not compensable under OPA.

1. The claim is currently the subject of an action in court by the Claimant to recover the same damages as now before the NPFC.

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."⁷ The Claimant has included a statement indicating that these damages are currently being pursued in the U.S. District Court for the Eastern District of Louisiana. As such, the NPFC would be precluded from making a payment on this claim.

The remainder of this determination addresses the substantive reasons for denial.

2. Future or other damages not actually incurred by the Claimant are not compensable under OPA.

In order to calculate his losses, the Claimant compares his sales incentives earned, including a stock plan award and cash plan award in 2010 to the incentives earned in 2009, for a total loss of \$75,013.70 and then calculates the difference in his 2010 incentive payments and the average of those payments from 2006 – 2009, for a total loss of \$68,321.26. The Claimant takes the average of these two amounts to come to a total loss amount of \$71,667.48. However, the Claimant alleged to have sustained losses of \$149,000.00, presumably including at least some amount of future damages. However, future damages are not compensable under OPA's loss of profits damage category, which limits potentially available compensation to "the actual net reduction or loss of earnings or profits *suffered*" [emphasis added].⁸ Therefore, payment is initially denied on \$77,332.52 of this claim, which constitutes losses not allegedly incurred by the Claimant.

3. The Claimant has failed to prove that alleged losses were due to the Deepwater Horizon oil spill.

In order to prove a claim for loss of profits damages under OPA, a claimant must provide evidence sufficient to prove that their claimed loss was due to damage property or natural resources resulting from the discharge or substantial threat of discharge of oil.⁹

The Claimant asserts that he was unable to meet certain business goals due to economic conditions throughout the Florida Gulf Coast, prompted in part by effects of the oil spill. However, OPA does not provide compensation for any and all losses that may be related to a particular oil spill. Rather, OPA specifically limits compensation for losses incurred "due the

⁷ 33 C.F.R. § 136.103(d).

⁸ 33 C.F.R. § 136.235.

⁹ 33 C.F.R. § 136.1.

injury, destruction or loss of real property or natural resources” resulting from an oil spill.¹⁰ The Claimant’s alleged loss stems from the Claimant’s inability to “originate loans and related banking business” due to financial effects of the oil spill and related events on his customer base.¹¹ There is no indication, however, that the Claimant’s loss could have somehow been caused by harm to property or natural resources resulting from oil discharged during the Deepwater Horizon oil spill.

Based on the foregoing, this claim is denied because (1) the Claimant is currently seeking to recover these damages through litigation, (2) the Claimant has failed to provide evidence sufficient to prove that they sustained a financial loss in the amount \$149,000.00, and (2) the Claimant has failed to prove 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.


Claim Supervisor: *NPTC Claims Adjudication Division*

Date of Supervisor’s Review: *6/4/13*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

¹⁰ 33 U.S.C. § 2702(b)(2)(e).

¹¹ Claim cover letter, 26 April 2013.