

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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US COAST GUARD
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 2000 0001 1246 6908

5890/DWHZ
5 August 2013

Avalon Landing, LLC


Re: Claim Number: N10036-1963

Dear Mr. Bordelon:

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 N10036-1963 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 N10036-1963.

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: Rebecca Collins
2721 Gulf Breeze Pkwy.
Gulf Breeze, FL 32563

By Certified Mail:
No. 7011 2000 0001 1246 6892

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1963
Claimant	Avalon Landing, LLC
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$553,933.58

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 26 June 2013, Mr. John Bordelon, legal representative of Avalon Landing, LLC, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$553,933.58 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant owns and operates an RV park in Milton, Florida, which first opened for business in the summer of 2008. The Claimant's revenue increased substantially throughout 2009, and the Claimant expected the same increase to continue throughout 2010. Anticipating revenue growth in 2010, the Claimant began planning a "42 site expansion" of the RV Park to be completed by early 2011. The Claimant alleged that "due to the [oil spill] United Bank of Alabama (the "Bank") was unwilling to provide the additional financing necessary to compete the development due to the Park's inadequate occupancy rates."²

Thus, the Claimant delayed construction of the additional sites until sometime in 2013. The Claimant alleged that had the oil spill not occurred, they would have generated sufficient revenues so that the Bank would have approved their loan request and the expansion would have been completed by early 2011. The Claimant alleged that the delay in funding approval, caused by decreases in tourist traffic through Santa Rosa County, Florida in 2010 and 2011, resulted in their business sustaining uncompensated profit losses in the amount of \$553,933.58. The Claimant has not specifically indicated how this amount was calculated.³

¹ Optional OSLTF Claim Form, signed on 21 June 2013.

² Statement of Effect of the oil spill on the Claimant's business.

³ Optional OSLTF Claim Form, signed on 21 June 2013.

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. 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 21 June 2013;
- Claim cover letter, 21 June 2013;
- Prior Claim Determinations issued by RP;
- *Statement of the Effect of the April 20, 2010 Deepwater Horizon Incident on Avalon Landing RV park's Loss of Profits and Impairment of its Earning Capacity*;
- Maps showing location of the spill/Claimant's business;
- Letter from Claimant to GCCF, 10 February 2011;
- GCCF Interim Payment Claim Form;
- Financial Documentation, including revenue projections, profit and loss statements;
- Fla. Dept of Revenue, monthly tax liability;
- Invoice for Order, Silicon Solar;
- Lowes, Receipt;
- Statement indicating that Claimant was not represented by an attorney when filing claims with the GCCF;
- Letter from Claimant to the GCCF, 23 June 2011;
- GCCF Determination Letter on Interim Payment/Final Payment Claim, 24 June 2011;
- Letter from the Claimant to the GCCF, 21 July 2011;
- GCCF Re-Review Determination Notice, Claimant ID 3013946;
- GCCF Determination Letter on Interim Payment/Final Payment Claim, 11 October 2011;
- Letter from the Claimant to the GCCF, 9 November 2011;
- Santa Rosa County Development Order, approved on 18 March 2009, expired on 18 March 2011;
- U.S. Army Corps. of Engineers Permit, 11 February 2009, including project specifications;
- Florida DEP, Environmental Resource Permit, issued 29 June 2009;
- Various proposals for construction;
- NPDES Stormwater Package, 7 April 2010;
- Photographs of property and improvement sites;
- Letter from the Claimant to the GCCF, 13 December 2011;
- GCC Re-Review Determination Letter on Final Payment Claim, 26 December 2011;
- GCCF Determination Letter on Interim Payment/Final Payment Claim, 15 February 2012;
- Letter from the Claimant to the GCCF, 29 February 2012;
- GCCF Determination Letter on Interim Payment, 6 April 2012;
- Monthly Profit and Loss Statements;
- 2011 Federal Income Tax Returns showing total income of \$150,070.00;
- 2011 Florida Income Tax Returns;

Prior to presenting this claim to the NPFC, the Claimant submitted multiple claims to the RP through the GCCF and BP Claims Program. The Claimant received compensation from the GCCF totaling at least \$53,671.93.⁴ The Claimant has continued to submit claims to the RP throughout 2012 and 2013. In a determination letter on 26 April 2013, the BP Claims Program denied payment on the Claimant's most recently submitted claim, indicating that they had determined that the Claimant had been fully compensated for any losses they may have sustained as a result of the oil spill.

⁴ GCCF Determination Letter on Interim Payment, Claimant ID 3013946, 6 April 2012.

On 26 June 2013, the Claimant submitted this claim to the NPFC, seeking \$553,933.58 in loss of profits or impairment of earning capacity damages. If a Claimant has submitted a claim to an RP and the claim is denied or not settled by payment within ninety days of presentment, the Claimant may then present this same claim to the NPFC. Because the Claimant has presented this claim to the RP and has been denied payment to some extent, the NPFC may properly adjudicate this claim to the extent that payment has been denied.⁵

The Claimant indicated that they have opted out of the Economic and Property Damage Class Action Settlement (E&PD Settlement).⁶

NPFC Determination

Under 33 U.S.C. § 2702(b)(2)(d) and 33 C.F.R. Part 136, a claimant must prove that any net loss of revenue 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 order to prove a claim for loss of profits or impairment of earning capacity damages a claimant must provide evidence sufficient to prove (1) that “the claimant’s income was reduced,”⁷ and (2) that the income reduction was due to damage to real or personal property or natural resources resulting from the Deepwater Horizon oil spill.

The Claimant has failed to prove either that their income was reduced or that they sustained a reduction in income due to the oil spill. The Claimant’s loss is based on the fact that their business failed to achieve projected monthly growth rates. The Claimant had anticipated that monthly revenue would double in 2010 as compared to 2009, due to the fact that the Claimant was a relatively new business which began operations in July of 2008. Although revenue did not increase by 100% each month, it did in fact increase substantially each month as compared to the prior year. According to profit and loss statements, the Claimant generated more revenue each month of 2010 than it did in the corresponding month of 2009, with the exception of December. This alleged loss is therefore speculative and not compensable under OPA, which only allows compensation for “the actual net reduction or loss of earnings or profits suffered.”⁸

Furthermore, the Claimant has received over \$53,000.00 in compensation from the RP for losses related to the oil spill. Because the Claimant has not provided evidence to prove that they sustained a loss or reduction in income in any amount, compensation previously paid to the Claimant has fully compensated the Claimant for any alleged losses.

Finally, the Claimant has not provided evidence to prove that their business was harmed by damage to real or personal property or natural resources resulting from the oil spill. The Claimant alleged that their business was unable to grow due to decreased tourist traffic in and through northwest Florida as a result of the oil spill. However, for the months which were most affected by decreases in tourism in northwest Florida, July and August 2010, the Claimant’s revenue increased substantially over 2009 levels. In July 2009 and 2010, the Claimant reported revenue of \$10,099.73 and \$20,889.67 respectively.⁹ In August of those two years, the

⁵ 33 C.F.R. § 136.103(a).

⁶ The Claimant has not provided proof of their opt-out status, but because this claim is being denied for other reasons, the NPFC will assume that the Claimant has indeed opted out of the class.

⁷ 33 C.F.R. § 136.233(b).

⁸ 33 C.F.R. § 136.235(c).

⁹ June 2008 – January 2011, Actual v. Budget/Prior Year Analysis.

Claimant's revenue was \$7,032.78 and \$12,060.60. It does not seem then, that decreases in tourist traffic through Santa Rosa County had an identifiable affect on the Claimant's income.

Based on the foregoing, this claim is denied because the Claimant failed to provide evidence sufficient to prove (1) that the Claimant sustained an uncompensated loss of profits in the amount of \$553,933.58 and (2) that the alleged loss was due to the destruction of real or personal property or natural resources resulting from the Deepwater Horizon oil spill.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *8/05/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments: