

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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5890/DWHZ
15 July 2013

Mr. Mitchell Toups


Re: Claim Number: N10036-1966

Mr. Toups:

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 claims submitted by you on behalf of certain free fisherman who are foreign nationals (claim N10036-1966). 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.

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	N10036-1966
Claimant	Weller, Green, Toups & Terrell
Type of Claimant	Foreign Claimants (Mexico)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	unspecified

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

In a letter dated 24 April 2013, the NPFC acknowledged receipt of what appeared to be claims for loss of profits or impairment of earning capacity damages filed by Mr. Mitchell Toups on behalf of 3,706 Mexican nationals and businesses (Foreign Claimants or Claimant). Each of these Foreign Claimants claimed to have sustained economic losses as a result of the Deepwater Horizon oil spill. There was no evidence in this claim submission to indicate the dollar amount requested (sum certain) for each Foreign Claimant represented in this claim.

The NPFC requested certain additional information in its 24 April letter, while also noting that to the extent that the potential claimants were foreign nationals residing in Mexico; these claims would not be compensable under the Oil Pollution Act. In the letter, the NPFC explained that there is no treaty or executive agreement between the United States and Mexico which would authorize a Mexican national to recover costs or damages under OPA.

The Claimant was then provided thirty days from the 24 April 2013 letter to clarify the nature of their submission to the NPFC. On 20 May 2013, the Claimant provided a letter confirming that the documents previously presented to the NPFC were submitted as claims on behalf of 3,706 Foreign Claimants for recovery of loss of profits damages under the Oil Pollution Act of 1990.

The Claimant stated that recovery by these Claimants was authorized under OPA, citing various sources of law. The Claimant also asserted that sum certainties for each Claimant had indeed been provided to the NPFC. Furthermore, the Claimant noted that the damages presented to the NPFC by these Claimants are also the subject of an action within MDL 2179 in the U.S. District Court for the Eastern District of Louisiana.

In support of these claims, the Claimant provided an explanation of their arguments regarding entitlement to recovery under OPA, as well as emails and a letter confirming that these claims were also submitted to the responsible party.

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.

Required showing by foreign claimants, 33 U.S.C. 2707

(1) In general

In addition to satisfying the other requirements of this Act, to recover removal costs or damages resulting from an incident a foreign claimant shall demonstrate that -

(A) the claimant has not been otherwise compensated for the removal costs or damages; and

(B) recovery is authorized by a treaty or executive agreement between the United States and the claimant's country, or the Secretary of State, in consultation with the Attorney General and other appropriate officials, has certified that the claimant's country provides a comparable remedy for United States claimants.

(2) Exceptions

Paragraph (1)(B) shall not apply with respect to recovery by a resident of Canada in the case of an incident described in subsection (b)(4) of this section.

(b) Discharges in foreign countries

A foreign claimant may make a claim for removal costs and damages resulting from a discharge, or substantial threat of a discharge, of oil in or on the territorial sea, internal waters, or adjacent shoreline of a foreign country, only if the discharge is from -

(1) an Outer Continental Shelf facility or a deepwater port;

(2) a vessel in the navigable waters;

(3) a vessel carrying oil as cargo between 2 places in the United States; or

(4) a tanker that received the oil at the terminal of the pipeline constructed under the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.), for transportation to a place in the United States, and the discharge or threat occurs prior to delivery of the oil to that place.

(c) "Foreign claimant" defined

In this section, the term "foreign claimant" means -

(1) a person residing in a foreign country;

(2) the government of a foreign country; and

(3) an agency or political subdivision of a foreign country.

DETERMINATION OF LOSS

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. Foreign claimants, as statutorily defined, must also prove that a reciprocal treaty or executive agreement is in place to authorize recovery under OPA.

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."¹ The Claimant has indicated that they have filed a claim in the U.S. District Court for the Eastern District of Louisiana, in which the Claimant is attempting to recover the same damages as now before the NPFC. 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. The Claimant has failed to meet basic claims requirements, including failing to provide a sum certain indicating the amount of costs or damages sought.

In order for the NPFC to process a claim, it must meet certain general claim requirements. According to 33 C.F.R. § 136.103.105(b), each claim "must be in writing for a sum certain for compensation for each category of uncompensated damages or removal costs." Furthermore, "each claim must be signed ink by the claimant."² If claims are presented by legal representatives, the claim must provide "proof of authority to act for the claimant."³

The Claimant has not presented sum certain to indicate the amount of damages sought by each Foreign Claimant through the OSLTF. Furthermore, the legal representative presenting this claim has not provided evidence of his authority to act on behalf of each of the 3,706 Foreign Claimants, none of which has provided any signed document indicating their intent to pursue claims against the OSLTF.

In response to the NPFC's notice regarding the Claimant's failure to present a sum certain, the Claimant stated that a sum certain had been presented and that the NPFC stating otherwise was in error. However, if the Claimant presented of a sum certain to the responsible party, which operates a claim process independently from the NPFC, this presentment does not substitute for the requirement that the Claimant present a sum certain to the NPFC. As such, because the Claimant's submission fails to meet basic claim requirements, the Claimant has failed to present a claim that might be compensable under OPA.

3. The Claimant is unauthorized to recover loss of profits damages through the OSLTF.

As previously indicated in the NPFC's 24 April 2013 letter to the Claimant, foreign claimants as defined in OPA to include "a person residing in a foreign country"⁴ may only recover uncompensated damages or removal costs if

recovery is authorized by a treaty or executive agreement between the United States and the claimant's country, or the Secretary of State, in consultation with the Attorney General and other appropriate officials, has certified that the claimant's country provides a comparable remedy for United States claimants.⁵

The Claimant cites the North American Agreement on Environmental Cooperation between the U.S. and Mexico, indicating that part of its purpose is to promote pollution prevention policies. Furthermore, allows private access to remedies including the right "to sue another person under

¹ 33 C.F.R. § 136.103(d).

² 33 C.F.R. § 136.105(c).

³ 33 C.F.R. § 136.105(d)(3).

⁴ 33 U.S.C. § 2707(c)(1).

⁵ 33 U.S.C. § 2707(a)(1)(B).

that Party's jurisdiction for damages."⁶ Although the agreement cited by the Claimant concerns environmental protection and private rights of action by individuals, there is no indication that this agreement would authorize Mexican Nationals to recover removal costs or damages through the OSLTF by means of a claim under the Oil Pollution Act of 1990.

The Claimant also cites the Alien Tort Claims Act (ACTA) as a treaty which allows foreign claimants to recover costs or damages under OPA. The ACTA allows that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁷ This statute is concerning federal jurisdiction for alien tort claims stemming from violations of international laws and treaties. It does not have any implications on a foreign national's right to recover funds from the OSLTF by means of a claim with the NPFC.

Based on the foregoing, this claim is denied because (1) the damages presented in this claim are currently the subject of litigation (2) the claimant has failed to meet basic claims requirements, and (3) no agreement to which the U.S. and Mexico are party would allow the Claimant to recover uncompensated removal costs or damages from the OSLTF.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *07/15/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

⁶ Quoted by the Claimant, Letter from the Claimant to the BP Claims Program, 2 April 2013.

⁷ 28 U.S.C. § 1350.