

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

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 2000 0001 1246 6915

5890/DWHZ
5 Aug 2013

Aylstock, Witkin Kreis & Overholtz


Re: Claim Number: N10036-1972

Dear Mr. Barger:

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 N10036-1972 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 N10036-1972.

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. 7011 2000 0001 1246 6922

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1972
Claimant	Paul S. Cox
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$953,243.29

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 1 August 2013, Mr. James Barger, on behalf of Mr. Paul Cox, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$953,243.29 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant lives in Pensacola, Florida, where he has worked in insurance sales since 2002.² The Claimant's income is purely commission-based. Following the Deepwater Horizon oil spill, the Claimant alleged that his "clientele was losing their income and could no longer pay their premium and ended up with them canceling their policies."³ The Claimant specified that "many of [his] clients living on the Gulf Coast lost their income because of the lack of tourist trade."⁴

In total, the Claimant estimated to have lost \$97,300.00 in sales and renewals as a result of economic conditions in Pensacola, allegedly created by the oil spill.⁵ The Claimant seeks recovery, however, of \$953,243.29.⁶ The Claimant has provided no indication as to how this amount was calculated.

¹ Optional OSLTF Claim Form, signed on 1 July 2013.

² Claimant statement of loss.

³ Transcribed directly from OSLTF Claim Form, signed on 11 July 2013.

⁴ Claimant statement of loss.

⁵ Claimant statement of loss.

⁶ Optional OSLTF Claim Form, signed on 11 July 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 11 July 2013;
- Claim Cover Letter, 24 July 2013;
- Pre-Paid Legal Services, Inc., non employee compensation report;
- 2011 Forms 1099;
- 2011 Forms 1099-R;
- 2011 Forms 1099-MISC;
- Fact References Form;
- 2011 Federal Income Tax Returns;
- 2011 Form W-2 Wage and Tax Statement;
- U.S. District Court for the Eastern District of Louisiana, Notice of Electronic Filing;
- BP Claims Program denial letter, 26 April 2013;
- 2008 Form W-2 Wage and Tax Statement;
- 2008 Forms 1099-MISC;
- 2008 Federal Income Tax Returns;
- 2009 Form W-2 Wage and Tax Statements;
- 2009 Form 1099-MISCs;
- 2009 Federal Income Tax Returns;
- 2010 Form W-2 Wage and Tax Statements;
- 2010 Form 1099-R;
- 2010 Federal Income Tax Returns;
- Modern Woodmen of America, Status Statements, 2010;
- Written statement regarding nature of Claimant's loss.

Prior to presenting this claim to the NPFC, the Claimant presented a claim to the BP Claims Program. The BP Claims Program denied payment on the claim in a letter dated 26 April 2013. The Claimant has not provided evidence to indicate the amount or nature of that claim.

On 1 August 2013, the Claimant submitted this claim to the NPFC, seeking to recover \$953,243.29 in loss of profits or impairment of earning capacity damages. The Claimant has satisfied OPA presentment requirements to the extent that this is the same claim for the same amount of damages as was previously presented to and denied by the RP.⁷ If any damages subject of this claim were not first presented to the RP, the claim is initially denied in that amount.

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.

⁷ 33 C.F.R. § 136.103(c)(2).

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."⁸ The Claimant indicates that a Complaint has been filed 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.

In order to prove a claim for loss of profits damages, a Claimant must provide evidence sufficient to prove (1) that the Claimant sustained a loss or reduction in income, and (2) that the financial loss was caused by damage to real property or natural resources resulting from the Deepwater Horizon oil spill.

The Claimant alleged to have lost \$97,300.00 in earnings as a result of the oil spill. However, the Claimant is seeking to recover \$953,243.29 from the OSLTF. The OSLTF is only available to compensate a Claimant's actual losses. To the extent that the amount claimed against the OSLTF represents future losses, punitive damages, or other speculative losses not actually incurred by the Claimant, this claim is denied.

Furthermore, the Claimant has not proven that losses sustained in his capacity as an insurance sales person, were "due to injury to, destruction of, or loss of real or personal property or natural resources"⁹ resulting from the Deepwater Horizon oil spill. Rather, the Claimant alleged that generally weak economic conditions in Pensacola, Florida and surrounding areas caused him to lose business. However, the Claimant has not provided any evidence other than the fact that his business is located in Pensacola, Florida, to tie his losses to the Deepwater Horizon oil spill. Claims based on generally poor economic conditions in a particular area following the oil spill, are not compensable unless the Claimant can prove that the financial losses allegedly sustained were factually caused by damage to property or natural resources resulting from the Deepwater Horizon oil spill.

This claim is therefore denied because the Claimant has failed to provide evidence sufficient to prove (1) that he sustained a financial loss in the amount \$953,243.29, or (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 discharge of oil. Furthermore, had the Claimant met his burden of proof, the NPFC could not compensate the Claimant as these damages are the subject of ongoing litigation.


Claim Supervisor: *NPFC Claims Adjudication Division*

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

Supervisor's Action: *Denial approved*

Supervisor's Comments:

⁸ 33 C.F.R. § 136.103(d).

⁹ 33 C.F.R. § 136.231(a).