

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

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1/04/2012

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 6449

Ben Withers, INC.
ATTN: Ben Withers



RE: Claim Number: N10036-1294

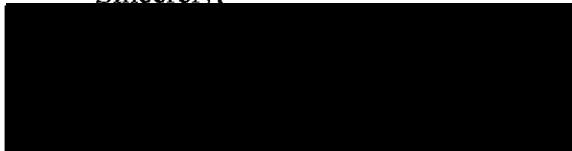
Dear Mr. Withers:

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 claim number N10036-1294 involving the Deepwater Horizon oil spill. Please see the enclosed Claim Summary/Determination Form for further explanation.

Disposition of this reconsideration constitutes final agency action.

If you have any questions or would like to discuss the matter, you may contact me at the above address and phone number.

Sincerely,



Chief, Claims Adjudication Division
U.S. Coast Guard

ENCL: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1294
Claimant	: Ben Withers, Inc.
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$1,044,427.00

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 claims for certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT:

On 10 August 2011, Mr. Ben Withers, on behalf of Ben Withers Inc. (collectively the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$1,044,427.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.¹

The Claimant is a general contractor in Panacea, Florida; company employs approximately 25 to 30 individuals.² The Claimant alleged that general economic effects of the Deepwater Horizon oil spill resulted in losses to the company totaling \$1,044,427.00 during the 4th quarter of 2010 and the first quarter of 2011.³ The Claimant alleged losses to his business from reductions in job orders of several types, including: (1) orders from real estate offices and real estate developers, (2) projects for small businesses and local homeowners, (3) septic tank installation, and (4) public works.⁴ Furthermore, the Claimant alleged economic effects of the oil spill have caused clients to default on payments to the Claimant, which has had a "crippling effect" on the Claimant's cash flow.⁵

On 21 September 2010, the Claimant presented an Emergency Advance Payment claim (EAP) to the RP/GCCF, seeking \$1,100,000.00 in loss of profits and impairment of earnings capacity.⁶ The Claimant was assigned ID 3016408 and the EAP claim was assigned Claim # 3008950. The RP/GCCF paid the EAP claim in the amount of \$376,700.00 on 8 October 2010.⁷

On 11 April 2011, the Claimant presented a Full Review Final claim (FRF) to the RP/GCCF, seeking loss of profits and impairment of earnings capacity in the amount of \$1,044,427.00.⁸ As of the date of this determination, the FRF claim remains under review.⁹

OPA allows the NPFC to adjudicate a claim if (1) the RP denies all liability for the claim, or (2) the claim is not settled by payment within 90 days after the date upon which the claim was presented.¹⁰ Therefore,

¹ Optional OSLTF Claim Form dated 30 July 2011.

² Letter from the Claimant to the NPFC, 30 July 2011.

³ Letter from the Claimant to the NPFC, 30 July 2011.

⁴ Response to request for additional information, dated 29 August 2011.

⁵ Response to request for additional information, dated 29 August 2011.

⁶ GCCF United States Coast Guard Report, 9 September 2011.

⁷ GCCF Claimant Status, accessed on 21 September 2011.

⁸ GCCF United States Coast Guard Report, 9 September 2011.

⁹ GCCF Claimant Status, accessed on 21 September 2011.

¹⁰ 33 C.F.R. § 136.103(c)(1)(2).

the NPFC adjudicated this claim for loss of profits and impairment of earnings capacity, in the amount of \$1,044,427.00, as presented to the NPFC on 10 August 2011.¹¹

The NPFC denied the claim on November 15, 2011 on the grounds that the Claimant did not establish (1) that he suffered an actual financial loss, and (2) that the loss was the result of the discharge or substantial threat of discharge of oil, caused by the Deepwater Horizon oil spill.

According to the administrative record the Claimant's business income is derived from septic tank installations, various orders from real estate offices and developers for excavations and swimming pool installations, and projects for small businesses and state and local public works. He alleges that economic effects of the Deepwater Horizon oil spill resulted in a general decrease in his business and the cancellation of specific construction projects.

The NPFC reviewed monthly profit and loss statements provided by the Claimant. The Claimant's monthly profits in 2009, 2010 and the first quarter of 2011 do not indicate that the Claimant maintained a steady stream of monthly income but instead his monthly profits varied significantly, depending on when payments were made to him on certain contracts. In 2009 for example, the Claimant earned monthly gross profits of \$41,738.38 in April, (-\$324,168.26) in May, and \$60,206.15 in June.¹² Based on the information provided by the Claimant his historic monthly income significantly varies; thus it was not possible to discern a decrease in income during the period in which the Claimant is alleging to have been affected by the Deepwater Horizon oil spill.

The NPFC also reviewed the Claimant's records of cancellations of contracts in order to determine whether or not the Claimant lost income on particular jobs due to the effects of the Deepwater Horizon oil spill. The Claimant alleged that contracts were cancelled with (1) Water Management Services, Inc. of St. George Island, Florida, and (2) the Florida Department of Environmental Protection.¹³ Furthermore, the Claimant alleged that (3) The Refuge subdivision, for whom the Claimant had installed water, sewer and other infrastructure, defaulted on a payment due to effects of the Deepwater Horizon oil spill.

1. Contract with Water Management Services Inc.

The Claimant alleged that Water Management Services, Inc. of St. George Island, Florida, "cancelled an agreement . . . for painting and maintenance of the water lines."¹⁴ The NPFC contacted a representative of the company who confirmed that Water Management Services temporarily halted the contract with the Claimant as of June 2011, because the company's revenue was down approximately 30%.¹⁵ When asked if the decrease in revenue was somehow caused by the Deepwater Horizon oil spill, the representative said, that it could have been "indirectly related" to the oil spill;¹⁶ however, the representative could not confirm that Water Management Services' decrease in revenue was due to the Deepwater Horizon oil spill.

2. Contract with the Florida Department of Environmental Protection.

The Claimant alleged that he lost potential income due to cancellation of construction projects which would have been completed by the Florida Department of Environmental Protection (the Department). Specifically, the Claimant stated that the Department has "cancelled or postponed many of their projects and/or additional phases of contracts, such as the Bald Point State Park canoe trails, etc."¹⁷

¹¹ Optional OSLTF Claim Form, dated 30 July 2011.

¹² Profit and Loss Statements, provided by the Claimant.

¹³ Response to Request for Additional Information, 29 August 2011.

¹⁴ Response to Request for Additional Information, 29 August 2011.

¹⁵ PHONECON: NPFC Staff and Water Management Services, Inc., 8 September 2011.

¹⁶ PHONECON: NPFC Staff and Water Management Services, Inc., 8 September 2011.

¹⁷ Response to Request for Additional Information, 29 August 2011.

However, the Claimant has not provided evidence to indicate that any particular contracts with the Department were actually cancelled, thereby resulting in an actual loss to the Claimant. In reference to the Bald Point State Park canoe trails, a representative of the Department, when contacted, stated that although the project had been discussed, it had not gone beyond the initial proposal phase.¹⁸ When questioned as to the reason for not going forward with the project, the representative stated that it was due to a general lack of funds, which “had nothing to do with the [Deepwater Horizon] oil spill.”¹⁹ She further noted that had the Department decided to move forward with the project, there was no guarantee that the contract would have been awarded to the Claimant.²⁰

3. Uncollected Payments - The Refuge.

The Claimant installed water, sewer and other infrastructure in The Refuge subdivision in Panacea, Florida and has an outstanding receivable in the amount of \$220,000.00.²¹ The Claimant has been unable to collect this payment, allegedly due to the effects of the Deepwater Horizon oil spill.²² The Claimant stated that “[A]fter April 20 2010, all sales in this subdivision grounded to a halt and the owner, we believe, filed bankruptcy and deeded the property to the bank in lieu of foreclosure.”²³

A copy of the “Claim of Lien” provided by the Claimant indicates that the Claimant had attempted to collect the remaining \$220,000.00 as early as 18 August 2009.²⁴ Therefore, the Claimant’s inability collect this payment does not appear to have been caused by the Deepwater Horizon, which occurred on 20 April 2010.

In summary, the claim was denied on November 15, 2011, on the grounds that the Claimant has not demonstrated that any general decline in business was 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, nor has the Claimant provided evidence that might demonstrate that specific contract cancellations were caused by the Deepwater Horizon oil spill.

REQUEST FOR RECONSIDERATION:

On November 17, 2011, the Claimant sent a request for reconsideration to the NPFC stating he would like the NPFC to reconsider his claim. The Claimant also requested an extension of time to submit new information. The NPFC granted an extension until December 21, 2011 via an email dated November 21, 2011 at 10:06:38 AM. The Claimant submitted reconsideration documentation on two separate dates and are identified accordingly:

11/21/11:

- Three page letter requesting reconsideration;
- Twenty five pages itemizing ‘Work in Process’ for Claimant from 2005 – 2011;
- Schedule of Completed Contracts for year ending December 31, 2006;
- Schedule of Completed Contracts for year ending December 31, 2007;
- Schedule of Completed Contracts for year ending December 31, 2008;
- Schedule of Completed Contracts for year ending December 31, 2009;
- Schedule of Completed Contracts for year ending December 31, 2010;

¹⁸ PHONECON: NPFC Staff and Florida Department of Environmental Protection, 8 September 2011.

¹⁹ PHONECON: Claimant and the Florida Department of Environmental Protection, 8 September 2011.

²⁰ PHONECON: Claimant and the Florida Department of Environmental Protection, 8 September 2011.

²¹ Response to Request for additional information, 29 August 2011.

²² Response to Request for additional information, 29 August 2011.

²³ Response to Request for additional information, 29 August 2011.

²⁴ Claim of Lien, dated 18 August 2009.

- Schedule of Contracts in Progress for December 31, 2007 (2 pages);
- Copy of a deed in lieu of foreclosure dated August 18, 2010 along with the Notice of Lis Pendens filed by the Claimant on August 17, 2010.

12/20/11:

- Supplemental letter for reconsideration dated December 20, 2011;
- Copy of a letter dated December 15, 2011 from Water Management Services, Inc.;
- Copy of a letter dated December 20, 2011 from Brooks Concrete;
- Copy of a Notice of Lis Pendens filed by the FDIC as Receiver for Wakulla Bank against Ben Withers, Inc. dated July 18, 2011;
- Duplicate copy of the Claimant's original Request for reconsideration letter dated November 17, 2011.

NPFC DETERMINATION ON RECONSIDERATION:

Pursuant to 33 CFR 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 CFR § 136.233, a claimant must establish loss of profits or impairment of earning capacity and that the loss was due to the destruction or injury to real or personal property or natural resources. Further, the request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 CFR 136.115(d).

The NPFC performed a *de novo* review of the entire claim submission upon reconsideration, including a review of the information submitted on reconsideration and the previously submitted documentation.

The Claimant's argument in support of his alleged loss remains the same as originally presented to the NPFC. The Claimant's sum certain of \$1,044,427.00 in lost profits has been described by the Claimant as follows²⁵:

Claimant states his lost sales for the 4th Quarter of 2010 was \$133,703.00 based on a three year average which he then multiplied by a factor of 3 to represent three years of losses for a total of \$401,109.00.

Claimant states his lost sales for the 1st Quarter of 2011 was \$214,439.00 based on a three year average. He then multiplied this figure by a factor of 3 to represent three years of losses which totals \$643,318.00. This calculates the Claimant's total present and future claimed losses to \$1,044,427.00.

The Claimant submitted new letters to the NPFC on December 20, 2011; however, these letters do not establish that the alleged losses were due to the Deepwater Horizon oil spill incident. The first letter, from Water Management Services, Inc. dated December 15, 2011, states that the agreement in place with the Claimant was amended due to a decrease in the amount of water sold. Further, Water Management Services, Inc. stated that it has been losing several hundred thousand dollars a year over the past few years. Thus, the letter does not establish that Water Management Services, Inc.'s business losses were a result of the Deepwater Horizon oil spill. The letter also states that the maintenance and repainting portion of the Claimant's contract is being deferred until the utility company is in a better cash position. This is not a loss of income but a postponement of income to the Claimant. Thus, the Claimant has not demonstrated that any loss amounts associated with this client were a result of the oil spill, or were actual net or future losses to the Claimant. As more clearly discussed below, Claimant's sum certain includes future speculative losses.

²⁵ Attachment 1 to the Claimant's Full Review Final Payment Claim Form as presented by the Claimant to the NPFC.

The second letter submitted to the NPFC was dated December 20, 2011 from Brooks Concrete. It discussed the company's decrease in construction projects with the Claimant since April 2010. They state that the number of projects they put out for bid at their various properties has decreased some 70% and that the decrease is due to the drastic reduction in tourism and other business. The letter also states that they have found it necessary to delay certain phases of projects due to the oil spill and reduced budgets. The letter from Brooks Concrete fails to demonstrate any losses to the Claimant due to the oil spill. Brooks Concrete stated that they had a decrease in the number of projects they put out for bid. (Projects put out for bid do not guarantee work for a party that submits a bid.) Further, Brooks attributes the decrease to a reduction in tourism and other business and does not specifically attribute the reduced business to the Deepwater Horizon oil spill. Thus, the Brooks Concrete letter provided to the Claimant does not demonstrate any loss of profits associated with the Claimant were a result of the oil spill or were actual net losses to the Claimant.

Claimant asserts losses associated with the Florida Department of Environmental Protection projects, however, he produced no new information on reconsideration related to this alleged loss; therefore, the NPFC's original denial remains unchanged and requires no further discussion.

It is worth noting that the schedules of completed contracts for 2007- 2010 submitted by the Claimant evidence that a substantial portion of the business is for state and local projects. Typically, these projects are put out for bid; there is no guarantee that a bid will be awarded to a specific bidder. Further, state and local government budgets vary year to year for various reasons. Claimant argues that the reduced budgets for potential state and local projects were due to the Deepwater Horizon oil spill incident; however, he has provided no information to support this argument.

Claimant argues that the uncollected payment of \$220,000.00 associated with The Refuge and the Claimant's inability to collect this payment was due to the effects of the Deepwater Horizon oil spill. This allegation is unsupported by the administrative record.²⁶ The Claimant alleged, that "[a]fter April 20 2010, all sales in this subdivision grounded to a halt and the owner, we believe, filed bankruptcy and deeded the property to the bank in lieu of foreclosure."²⁷ A copy of the "Claim of Lien" provided by the Claimant indicates that the Claimant had attempted to collect the remaining \$220,000.00 as early as 18 August 2009.²⁸ Therefore, the Claimant's inability collect this payment does not appear to have been caused by the Deepwater Horizon, which occurred on 20 April 2010 but existed prior to the oil spill.

Furthermore, the Claimant's assertion that the Wakulla Bank went under and was taken over by the FDIC was a result of the Deepwater Horizon incident has also not been proven by the Claimant and is not relevant to any alleged losses associated with The Refuge.

Even if the Claimant had established that his alleged loss of profits was due to the Deepwater Horizon oil spill and was entitled to reimbursement of uncompensated damages Claimant's sum certain of \$1,044,427.00 is flawed for three reasons. First, the Claimant was reimbursed \$376,700 in October 2010 by the RP/GCCF for his 4th Quarter 2010 alleged losses; however, he did not deduct this amount from the sum certain presented to the NPFC. Pursuant to the Claims Regulations at 33 CFR 136.235, calculations for net reductions or losses must clearly reflect adjustments for income received.

Second, the Fund is available to pay for uncompensated removal costs and uncompensated damages. 33 USC 2712(a)(4). Claimant multiplied his alleged lost sales for the 1st Quarter of 2011 by a factor of three, representing both present and future losses. Future losses are speculative, are not uncompensated damages, and cannot be paid from the Fund.

Third, Claimant's sum certain is based on lost sales and do not factor in any saved overhead or normal expenses not incurred because the lost sales. 33 CFR 136.235(d). Thus, even if the Claimant had

²⁶ Response to Request for additional information, 29 August 2011.

²⁷ Response to Request for additional information, 29 August 2011.

²⁸ Claim of Lien, dated 18 August 2009.

established a loss of profits due to the Deepwater Horizon oil spill incident, the amount of lost profits is inaccurate.

Finally, a review of the facts and information contained in Claimant's claim contains a misrepresentation of some facts. Misrepresentation of facts is subject to prosecution under Federal law, including but not limited to, 18 U.S.C. §§ 287 and 1001 and 31 U.S.C. § 3729.

Based on the foregoing information, this claim is denied upon reconsideration.



Claim Supervisor

Date of Supervisor's review: *1/04/12*

Supervisor Action: *Denial on reconsideration approved*

Supervisor's Comments: