

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1150 0000 4636 2502

5890/DWHZ
26 September 2011

Ms. Cynthia Folk
[REDACTED]

Re: Claim Number: N10036-1427

Dear Ms. Folk:

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 N10036-1427 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 N10036-1427.

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 Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1427
Claimant	Ms. Cynthia Folk
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$15,000.00

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 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 15 August 2011, Ms. Cynthia Folk (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$15,000.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant was working at the Gathering Place Family Restaurant in Bradenton Beach, Florida.² The Claimant alleged that she lost “70 – 80% of her income” due to reduction in tourism, which the Claimant attributed to the oil spill.³ The Claimant stated that, “people thought there was oil the beaches and seafood was tainted.”⁴

The Claimant estimates that she lost \$15,000.00 in earnings in her position as a server at the Gathering Place Restaurant.⁵

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 waters or adjoining shorelines or the exclusive economic zone, as described in Section 2702(b) of OPA.

The OSLTF which is administered by the NPFC, is available, pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, to pay claims for uncompensated damages. 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.

¹ Optional OSLTF Claim Form, dated 1 September 2011.

² Letter from the Claimant to the NPFC, 2 September 2011.

³ Optional OSLTF Claim Form, dated 1 September 2011.

⁴ Optional OSLTF Claim Form, dated 1 September 2011.

⁵ Optional OSLTF Claim Form, dated 1 September 2011.

- (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.
- (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.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support this claim, the Claimant submitted the following documentation:

- Optional OSLTF Claim Form, dated 1 September 2011;
- GCCF Determination Letter on Interim Payment/Final Payment Claim, 12 July 2011, Claimant ID 3525403;
- 2010 Form W-2, Gathering Place Family Restaurant;
- 2009 Form W-2, Gathering Place Family Restaurant;
- IRS Account Transcript, 2008;
- Letter from the Claimant's employer, dated 20 July 2011;
- Gathering Place, pay stub, 15 April 2011;
- Gathering Place, pay stub, 22 April 2011;
- Gathering Place, pay stub, 8 April 2011;
- Gathering Place, pay stub, 20 February 2011;
- Gathering Place, pay stub, 21 January 2011;
- Wage Transcript and Determination, effective as of 17 April 2011;
- Document, "Verification of Employment/Loss of Income, 1 May 2011;
- Witness Statements, noting the Claimant's employment with Gathering Place Restaurant, 10 May 2011;
- Letter from the Claimant to the NPFC, 2 September 2011;

Prior to presentment to the NPFC, the Claimant presented a Second Quarter Interim Claim (ICQ22011) to the RP/GCCF, seeking loss of profits and impairment of earnings capacity.⁶ The Claimant was assigned ID 3525403 and ICQ22011 was assigned Claim # 9399141. In a letter dated 16 August 2011, the Claimant received a determination on Re-Review of this claim, in which the RP/GCCF noted that the Claimant had not demonstrated that she sustained any actual losses.⁷

On 20 September 2011, the Claimant presented this claim to the NPFC, seeking \$15,000.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.⁸ The NPFC may properly adjudicate this claim to the extent that it was first presented to the RP/GCCF. Any amount of damages now before the NPFC, which were not first presented to the RP/GCCF are denied.⁹

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 to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support this claim.

In order to prove a claim for loss of profits and impairment of earnings capacity, the Claimant must demonstrate (1) that she sustained a loss of income, and (2) that the loss of income was caused by the discharge or substantial threat of discharge of oil, resulting from the Deepwater Horizon oil spill.

The Claimant alleged that she lost “70% to 80%” of her income due to the decrease in tourism in Bradenton, Florida, following the Deepwater Horizon oil spill.¹⁰ However, the Claimant has not presented financial documentation to indicate that her income decreased following the oil spill. The Claimant has provided pay stubs for January – April 2011, which only indicate that the Claimant’s pay remained steady. There is no evidence to show that in prior years, during those months, the Claimant was earning a higher income. Rather, the only documentation showing 2008 and 2009 earnings indicated that the Claimant earned substantially less in those years than she did in 2010. W-2 forms and tax transcripts provided by the Claimant indicated that in 2008, 2009 and 2010, the Claimant’s income grew from \$5,956.00 in 2008 to, \$6,633.37 in 2009 and \$13,525.61 in 2010.¹¹

⁶ GCCF Claim Status, accessed on 23 September 2011.

⁷ GCCF Claimant Status, accessed on 23 September 2011.

⁸ Optional OSLTF Claim Form, dated 1 September 2011.

⁹ 33 C.F.R. 133.103(a).

¹⁰ Optional OSLTF Claim Form, dated 1 September 2011.

¹¹ 2009, 2010 W-2 Forms, 2008 IRS account transcript.

This claim is denied because the Claimant failed to meet her burden to demonstrate (1) that she sustained a loss in the amount of \$15,000.00, and (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 a discharge of oil.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *9/23/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments: