

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 2397

5890/DWHZ
05 October 2011

Ms. Meghan Clarke
[REDACTED]

Re: Claim Number: N10036-1447

Dear Ms. Clarke:

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 N10036-1447 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 N10036-1447.

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	N10036-1447
Claimant	Ms. Meghan Clarke
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$8,500.00

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 certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT

On 26 September 2011, Ms. Meghan Clarke (Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$8,500.00 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 as a bar tender at Crabby Bill's Seafood, Inc. in Indian Rocks Beach, Florida.² The Claimant alleged that the restaurant "sustained a 20-30% loss in business," and that "[i]n September, the loss in shifts and tip averages was so great that [the Claimant] left this Crabby's location in search of a busier bar."³

The Claimant has not provided an indication as to how she calculated her losses to arrive at her sum certain amount of \$8,500.00.

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.
- (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.

¹ Optional OSLTF Claim Form, received on 26 September 2011.

² Optional OSLTF Claim Form, received on 26 September 2011.

³ Optional OSLTF Claim Form, received on 26 September 2011; Letter from the Claimant to the GCCF, 17 December 2010.

- (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, received on 26 September 2011;
- Document, "Table of Contents of Enclosures";
- Letter from the Claimant to the NPFC, dated 15 September 2011;
- Letter from the Claimant to the GCCF, describing losses, 17 December 2010;
- Letter from Jenn Drnach, Front of House Manager, noting estimated 15-20% drop in sales during the summer of 2010, 14 December 2010;
- Letter from Paul Jenkins, Front of House Manager, noting estimated 30-40% drop in sales during the summer of 2010;
- Letter from Advantec noting cancellation of benefits, 5 October 2010;
- Letter from Jill M. Conklin, Advantec, 9 December 2010;
- Spreadsheet showing the Claimant's earnings;
- Pay stub, 2/2/2011 – 8/31/2011;
- 2007 Form 8879, showing adjusted gross income of \$23,722.00;
- 2007 Form 1040, showing adjusted gross income of \$23,722.00;
- 2007 Schedule A (Form 1040);
- 2007 Form 8917;
- Form 8283(Rev. 12-2006);
- Employee Business Expense Statement (Schedule A, Line 21);
- 2008 Form 8879, showing adjusted gross income of \$20,209.00;

- 2008 Form 1040A, showing total income of \$20,209.00;
- 2008 Form 8863;
- 2009 Form 8879, showing adjusted gross income of \$19,021.00;
- 2009 Form 1040A, showing adjusted gross income of \$19,021.00;
- 2009 Form 8863;
- 2009 Schedule M (Form 1040A or 1040);
- 2010 Form 8879, showing adjusted gross income of \$18,920.00;
- 2010 Form 1040A, showing total income of \$18,920.00;
- 2010 Form 8863;
- 2010 Schedule M (Form 1040A or 1040).

Prior to presentment to the NPFC, the Claimant presented an Emergency Advance Payment (EAP) claim to the RP/GCCF, seeking lost profits and earnings damages. The Claimant was assigned ID 3449265 and the EAP claim was assigned Claim # 534643. This claim was denied on 14 December 2010.⁴

The Claimant then submitted a First Quarter (ICQ12011), Second Quarter (ICQ22011) and Third Quarter (ICQ32011) Interim Claim to the RP/GCCF. These Claims were assigned Claim ID #'s 9139659, 9343963, and 9440127.⁵ The Claimant's Interim Claims were denied, but the Claimant was offered a final payment of \$9,034.89 on 22 September 2011, which the Claimant accepted on 23 September 2011.⁶ The Claimant indicated via phone conversation that she executed the Release and Covenant Not to Sue in return for final payment.⁷

On 26 September 2011, the Claimant presented this claim to the NPFC, seeking loss of profits and impairment of earnings capacity in the amount of \$8,500.00. Because this claim has been previously presented by the Claimant to the RP/GCCF in ICQ12011, ICQ22011 and ICQ32011, all of which were denied, the NPFC may adjudicate this claim in the amount of 8,500.00. However, if any of this amount was not presented to the RP/GCCF prior to presentment of this claim, that amount is denied for improper presentment.⁸

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.

This claim is denied because the Claimant (1) has released her rights regarding loss of profits damages to the RP/GCCF in return for final payment, and (2) the Claimant has not demonstrated that she sustained an actual financial loss.

⁴ GCCF Claimant Status, accessed on 30 September 2011.

⁵ GCCF Claimant Status, accessed on 30 September 2011.

⁶ GCCF Claimant Status, accessed on 30 September 2011.

⁷ PHONECON: NPFC Staff and the Claimant, 30 September 2011.

⁸ 33 C.F.R. 136.103(a).

1. Release of Rights to the RP/GCCF

Based on the information available to the NPFC, the Claimant has accepted a Final payment from the RP/GCCF in the amount of \$9,034.89.⁹ The Claimant has executed a Release and Covenant Not to Sue in return for final payment.¹⁰ By signing this document, the Claimant has released to the RP/GCCF, any rights to additional recovery regarding this injury.¹¹ The Release executed by the Claimant specifically states,

By signing this document, you are forever waiving and releasing all claims that you may have against BP or any other party . . . in connection with the [Deepwater Horizon oil spill].¹²

The Claimant has therefore waived rights to further recovery regarding the losses presented to the NPFC. Any payment from the Oil Spill Liability Trust Fund (the Fund) requires the acquisition of rights from the RP/GCCF. Because these rights have been released by the Claimant to the RP/GCCF, the Claimant cannot also recover from the Fund.

If the Claimant believes that payments received from the RP/GCCF are for damages other than those that are the subject of this claim, the Claimant must explain this in her request for reconsideration. The Claimant must also include copies of any and all waivers and covenants signed by the Claimant regarding injuries related to the Deepwater Horizon oil spill.

2. Failure to demonstrate actual financial losses in the amount of \$8,500.00

The Claimant alleged that she sustained a 25-30% loss in tips in the months following the oil spill until the Claimant chose to leave her job in September of 2010.¹³ Inasmuch as the Claimant voluntarily decided to leave her position, any losses incurred after September of 2010 are not attributable to the Deepwater Horizon oil spill. The remainder of this section of the determination considers the Claimant's alleged losses from May – September 2010.

According to a spread sheet showing the Claimant's hours and earnings during her time at Crabby Bill's, it appears that the Claimant grossed a total of \$2,748.89 from May to September of 2009 and grossed \$2,378.67, during that period of 2010, failing to support the Claimant's alleged losses of \$8,500.00.¹⁴

The Claimant also failed to provide documentation to substantiate her claim that she "sustained a 25 – 30% loss in tips."¹⁵ The Claimant's reported tips and wages on her tax returns indicate that she earned \$19,021.00 in 2009 and \$18,920.00 in 2010, for a difference in earnings of only \$101.00.¹⁶ The Claimant stated that she began her job at Crabby Bill's in March of 2009, and left in September of 2010.¹⁷ Therefore the Claimant's 2009 earnings reflect 10 months of employment, compared to only 8 months in 2010. Based on this information, the Claimant has not demonstrated that she sustained an actual loss or reduction in profits due to effects of the Deepwater Horizon oil spill.

⁹ GCCF Claimant Status, accessed on 30 September 2011.

¹⁰ GCCF Claimant Status, accessed on 19 September 2011.

¹¹ Standard GCCF Release and Covenant Not to Sue, Available on GCCF Claimant Status, accessed on 30 September 2011.

¹² GCCF Release and Covenant Not to Sue.

¹³ Letter from the Claimant to the NPFC, dated 17 December 2010

¹⁴ Spread sheet of hours and earnings, provided by the Claimant.

¹⁵ Letter from the Claimant to the NPFC, dated 17 December 2010.

¹⁶ Letter from the Claimant to the NPFC, dated 17 December 2010; Tax documentation provided by the Claimant.

¹⁷ Letter from the Claimant to the NPFC, dated 17 December 2010.

This claim is denied because the Claimant (1) has released rights to further recovery to the RP/GCCF, and (2) has failed to show that she sustained a loss or reduction in profits due to the discharge or substantial threat of discharge of oil resulting from the Deepwater Horizon oil spill.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *10/5/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments: