

U.S. Department of  
Homeland Security

**United States  
Coast Guard**



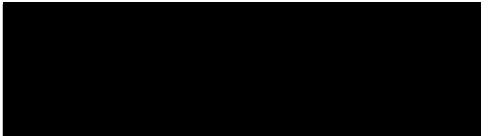
Director  
National Pollution Funds Center  
United States Coast Guard

NPFC CA MS 7100  
US COAST GUARD  
4200 Wilson Blvd. Suite 1000  
Arlington, VA 20598-7100  
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**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**  
Number: 7011 1570 0001 2446 4302

5890/DWHZ  
23 April 2012

Ms. Kristen Brendel



Re: Claim Number: N10036-1733

Dear Ms. Brendel:

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 N10036-1733 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 N10036-1733.

Mail reconsideration requests to:

Director (ca)  
NPFC CA MS 7100  
US COAST GUARD  
4200 Wilson Blvd, Suite 1000  
Arlington, VA 20598-7100

Sincerely,



Claims Rejection Division  
National Pollution Funds Center  
U.S. Coast Guard

Enclosure: Claim Summary/Determination Form

CC: Kristin Brendel

117 Beech Street

Pensacola, FL 32506

**CERTIFIED MAIL-RETURN RECEIPT REQUESTED: 7011 1570 0001 2446 4296**

## CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1733
Claimant	Kristin Brendel
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$49,894.02

### ***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 March 2012, Arthur S. Barksdale IV, Esq., on behalf of Ms. Kristin Brendel, (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$49,894.02 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.<sup>1</sup>

The Claimant moved from Sullivan, Missouri to Pensacola Florida in May of 2010.<sup>2</sup> On May 25, 2010, the Claimant began working as a full-time server at the Jellyfish Bar, a sushi bar in Perdido Key, Florida.<sup>3</sup> The Claimant alleged that decreases in tourism following the oil spill caused her to lose tip income, and also caused a reduction in her working hours.<sup>4</sup> In July of 2011, the Claimant resigned, noting that in the summer of 2011, “[the restaurant] honestly was not any busier than it was the summer the oil spill happened.”<sup>5</sup>

In order to calculate her losses, the Claimant subtracted her 2010 income from the average of her 2008 and 2009 income to calculate an average monthly loss of \$941.40. The Claimant then multiplies her average monthly loss by a “monthly actuarial forecast loss due to industry effect multiplier” of 36, to come to a total sum certain of \$49,894.00.<sup>6</sup>

### ***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

<sup>1</sup> Claim Cover Letter, 14 March 2012.

<sup>2</sup> Letter from the Claimant, describing losses, undated.

<sup>3</sup> Letter from the Claimant, describing losses, undated.

<sup>4</sup> Letter from the Claimant’s former employer

<sup>5</sup> Letter from the Claimant, describing losses, undated.

<sup>6</sup> Lost Earnings/Income Worksheet.

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.
- (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 undertake, 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:

- Claim cover letter, 26 March 2012;
- NPFC Authorization Agreement, 12 March 2012;
- GCCF Full Review Final Payment Claim Form;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 9 November 2011;
- Lost Earnings/Income Worksheet;
- Letter from the Claimant, describing losses;
- Letter from the Claimant's employer regarding losses;
- 2009 W-2 Wage and Tax Statement, showing income of \$8,742.00;
- 2009 Form W-2 Wage and Tax Statement, showing income of \$988.13;
- 2009 Form W-2 Wage and Tax Statement, showing income of \$8,004.28;
- 2011 Employee Pay History;

- 2010 Employee Pay History;
- 2010 W2 & Earnings Summary, showing wages of \$8,337.17;
- GCCF Client Authorization Form.

On 30 August 2010, the Claimant submitted an Emergency Advance Payment (EAP) claim to the RP/GCCF, seeking \$23,400.00 in loss of profits and wages damages.<sup>7</sup> The Claimant was assigned Claimant ID 1102892 and the EAP Claim was assigned claim # 39147.<sup>8</sup> The RP/GCCF denied payment on this claim.

On 19 January 2011, the Claimant submitted a First Quarter Interim Claim (ICQ12011) to the RP/GCCF, seeking \$35,384.00 in loss of profits and impairment of earning capacity damages. The ICQ12011 was assigned claim # 9228991 and was also denied by the RP/GCCF.<sup>9</sup>

On 10 October 2011, the Claimant submitted a Full Review Final (FRF) claim to the RP/GCCF, seeking \$49,894.00 in loss of profits and impairment of earning capacity damages.<sup>10</sup> The FRF claim was assigned claim # 9523210 and was also denied.<sup>11</sup>

On 26 March 2012, the Claimant presented this claim to the NPFC, seeking \$49,894.02 in loss of profits and impairment of earning capacity damages. Because these damages have first been presented in a claim to the RP/GCCF, OPA presentment requirements have been met,<sup>12</sup> and the NPFC may properly adjudicate the entirety of this claim for \$49,894.02 in loss of profits damages.

### **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 earning capacity damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an actual financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

Furthermore, prospective future damages are not compensable under OPA's loss of profits damage category, which limits potentially available compensation to "the actual net reduction or loss of earnings or profits *suffered*" [emphasis added].<sup>13</sup> Therefore, payment is initially denied for \$33,890.29 of this claim, which constitutes losses not allegedly incurred by the Claimant.<sup>14</sup>

Regarding the remaining \$16,003.75 of this claim, the Claimant has not provided evidence to prove that the Claimant sustained a financial loss under OPA, or to prove that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

<sup>7</sup> GCCF United States Coast Guard Report, 17 April 2012.

<sup>8</sup> GCCF United States Coast Guard Report, 17 April 2012.

<sup>9</sup> GCCF United States Coast Guard Report, 17 April 2012.

<sup>10</sup> GCCF United States Coast Guard Report, 17 April 2012.

<sup>11</sup> GCCF United States Coast Guard Report, 17 April 2012.

<sup>12</sup> 33 C.F.R. § 136.103(a).

<sup>13</sup> 33 C.F.R. § 136.235.

<sup>14</sup> Lost Earning/Income Worksheet, showing sum certain of \$160,371.76

## 1. Failure to prove a financial loss.

In determining the extent of a Claimant's financial loss, OPA requires that the NPFC consider "the amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered."<sup>15</sup> Based on earnings in comparable periods, a Claimant must provide evidence sufficient to prove that "the Claimant's income was *reduced* as a consequence of [the oil spill]" [emphasis added].<sup>16</sup>

The Claimant began working at the Jellyfish Bar as a full-time server in late May 2010.<sup>17</sup> The Claimant does not have pre-oil spill earnings on which to base a loss, but rather states that she sustained a loss because her income was never as high as anticipated, due to a decrease in tourism following the Deepwater Horizon oil spill.

The Claimant provided earning statements for the entire period of her employment, from June of 2010 until July of 2011. The statements indicate that throughout the tenure of her employment, the Claimant's earnings remained fairly steady on a month-to-month basis, with no discernable decrease in the period following the oil spill. The Claimant's 2010 income in the period following the spill is not lower than her income in 2011, in spite of the fact that tourism had increased significantly in 2011.<sup>18</sup> Therefore, the Claimant has failed to prove that her income was reduced for any particular period of time following the Deepwater Horizon oil spill.

## 2. Failure to prove loss as a result of the oil spill.

The Claimant's alleged loss is based on the Jellyfish Bar's reliance on tourism, and the decrease in tourism in Pensacola and Perdido Key area following the Deepwater Horizon oil spill. A letter from the former general manager of the restaurant states that "being oceanside we rely heavily on tourism."<sup>19</sup> However, as noted above, the Claimant's earning statements indicate that the Claimant's income remained fairly constant, and does not appear to be reflective of increases or decreases in tourism. Although tourism in 2011 had significantly increased over 2010, the Claimant's income did not also increase, indicating that factors other than tourism fluctuations were causing the Claimant's income to remain lower than what she states that she anticipated.

Tourism statistical reports provided by the Pensacola Bay Area Convention and Visitors Bureau indicate that tourism in Escambia County in 2011 was much improved over any year from 2008 to 2010.<sup>20</sup> For example, by July of 2011, Tourism Development Tax collection had increased by 21% over the previous fiscal year, and lodging revenues and direct spending were both increased significantly for the period of January to July 2011, as compared to the same period of 2010.<sup>21</sup> Based on this data, it is unclear why the Claimant's income did not increase as tourism in Pensacola and Perdido Key increased in 2011. Therefore, the Claimant has failed to prove that her lower-than-anticipated income was a result of decreases in tourism caused by the Deepwater Horizon oil spill as opposed to other potential factors.

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<sup>15</sup> 33 C.F.R. § 136.233(c).

<sup>16</sup> 33 C.F.R. § 136.233(b).

<sup>17</sup> Letter from the Claimant, describing losses, undated.

<sup>18</sup> See e.g., Jones, Charisse, *Tourism returning a year after the Gulf oil spill*, USA Today, 22 April 2011, stating, "[i]n Escambia County, Fla. – home to Pensacola and Perdido Key, and where roughly 3 million overnight visitors ordinarily come each year – revenue from hotels and motels since Oct. 1 is up almost 15% over the previous year."

<sup>19</sup> Letter from the Claimant's former employer, undated.

<sup>20</sup> Visit Pensacola, Reports. Available at, <http://www.visitpensacola.com/reports>. Accessed on 20 April 2012.

<sup>21</sup> Tourism Statistical Report, Annual and FY year-to-date Comparison, July 2011. Available at, <http://www.visitpensacola.com/reports>. Accessed on 20 April 2012.

This claim is denied because the Claimant failed to meet her burden to demonstrate (1) that she sustained a loss in the amount of \$160,371.70, 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**  **ion Division**

Date of Supervisor's Review: **4/23/12**

Supervisor's Action: ***Denial approved***

Supervisor's Comments: