

U.S. Department of
Homeland Security

**United States
Coast Guard**



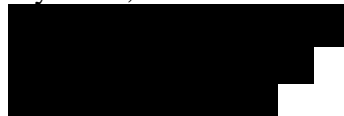
Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd. Suite 1000
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7012 2210 0001 7214 9777

5890/DWHZ
15 July 2013

Aylstock, Witkin Kreis & Overholtz



Re: Claim Number: N10036-1968

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 N10036-1968 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 N10036-1968.

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. 7012 2210 0001 7214 9760

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1968
Claimant	Theresa Ringland
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$100,000.00

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 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 10 July 2013, Mr. James Barger, on behalf of Mrs. Theresa Ringland, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$100,000.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant was living in Navarre, Florida and working for Bank of America. The Claimant alleges that the oil spill resulted in her sustaining "lost bonuses and incentives due to customer base losing jobs and income," further alleging that "customers moved away from the area and [were] not able to qualify for credit or mortgages."²

The Claimant seeks to recover \$100,000.00 in loss of profits or impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.

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.

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

² Optional OSLTF Claim Form, signed on 1 July 2013.

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, 1 July 2013;
- 2011 Form 1040, showing wages of \$116,397.00 (jointly filed);
- 2011 Form 2441;
- 2011 Form 5695;
- 2011 Form 3903;
- Earnings Reports, 2009 – January 2012.

The Claimant alleged that this claim was first presented to the Responsible Party on 17 January 2013 and that the RP denied payment on this claim.³

On 10 July 2013, the Claimant submitted this claim to the NPFC seeking \$100,000.00 in loss of profits or impairment of earning capacity damages. The NPFC does not have evidence sufficient to verify that the same amount of damages was first presented to and denied by the RP. However, the NPFC will adjudicate the claim to the extent that presentment requirements have been satisfied. Any amount of damages now before the NPFC, which were not first presented to the RP, are denied for improper presentment.⁴

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.

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."⁵ 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 discharge of oil caused by the Deepwater Horizon oil spill.

The Claimant alleged that the oil spill caused her to be unable to "earn bonus and incentive payments" in her work for Bank of America in or near Navarre, Florida. The Claimant provided evidence of her biweekly pay throughout 2009, 2010 and 2011. This evidence indicates that the Claimant's pay remained constant throughout 2010, and did not decrease following the oil spill.⁶ The Claimant identifies her "lost bonus and incentives" rather than a reduction in regular pay, as the source of her loss. However, the Claimant has not provided evidence regarding company policy for bonus and incentive payments that might indicate that such payments were guaranteed income. Because bonus and incentive payments are often contingent on various factors, they are generally not guaranteed income, and therefore not the basis of a claim for loss of profits damages.

³ Optional OSLTF Claim Form, signed on 1 July 2013.

⁴ 33 C.F.R. § 136.103.

⁵ 33 C.F.R. § 136.103(d).

⁶ The Claimant steadily earned bi-weekly income of about \$1,800.00 for each pay period of 2010.

Furthermore, even if these payments were guaranteed income, the Claimant has not provided any evidence to indicate that she was unable to earn bonus and incentive payments as a result of damage to real property or natural resources caused by the Deepwater Horizon oil spill. The Claimant alleged that her customer base lost jobs, left the area and were “not able to qualify for credit and mortgages”⁷ thereby causing the Claimant to be unable to earn bonus and incentive payments. However, this type of loss, which is allegedly caused by general economic conditions in Navarre, Florida, following the oil spill and subsequent drilling moratorium in the Gulf of Mexico, is not a loss that is compensable under OPA, which only provides the opportunity for compensation for financial losses when a “claimant’s income was reduced as a consequence of injury to, destruction of, or loss of property or natural resources”⁸ resulting from “the discharge or substantial threat of discharge of oil . . .”⁹

This claim is therefore denied because the Claimant has failed to provide evidence sufficient to prove (1) that she sustained a financial loss in the amount \$100,000.00, 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, 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: *7/15/13*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

⁷ Optional OSLTF Claim Form, signed on 1 July 2013.

⁸ 33 C.F.R. § 1356.233(a).

⁹ 33 C.F.R. § 136.1.