

U.S. Department of  
Homeland Security

United States  
Coast Guard



Director  
National Pollution Funds Center  
United States Coast Guard

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US COAST GUARD  
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Arlington, VA 20598-7100  
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED  
Number: 7012 2210 0001 7214 9579

5890/DWHZ  
21 June 2013

Aylstock Witkin Kreis & Overholtz  


Re: Claim Number: N10036-1934

Dear Mr. Guentner:

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 N10036-1934 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 N10036-1934.

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 (1): Claim Summary/Determination

cc: Gregory M. Guentner  
8508 Figland Ave.,  
Pensacola, FL 32571

By Certified Mail:  
No. 7012 2210 0001 7214 9562

## CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1934
Claimant	Gregory M. Guentner
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$403,200.00

### ***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 15 May 2013, Mr. Justin Witkin, legal representative of Mr. Gregory Guentner, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$403,200.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.<sup>1</sup>

At the time of the oil spill, the Claimant, a resident of Pensacola, Florida, was employed by an offshore catering company, servicing the "Ocean Confidence."<sup>2</sup> Following the oil spill, the Claimant alleged that the Ocean Confidence "was forced to stop drilling and leave the area."<sup>3</sup>

As a result of decreased drilling activity in the Gulf of Mexico following the oil spill, the Claimant alleged that his employer placed him "on standby indefinitely"<sup>4</sup> causing him to sustain loss of profits damages totaling \$403,200.00.

### ***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 water, adjoining shorelines, or the exclusive economic zone of the United States, as described in § 2702(b) of OPA.

<sup>1</sup> Optional OSLTF Claim Form, signed 15 May 2013.

<sup>2</sup> Pay Stubs, 2010 Form 1040, Optional OSLTF Claim Form, signed on 15 May 2013.

<sup>3</sup> Optional OSLTF Claim Form, signed 15 May 2013.

<sup>4</sup> Optional OSLTF Claim Form, signed 15 May 2013.

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. 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:

- 1) Optional OSLTF Claim Form dated May 15, 2013, received at NPFC May 16, 2013.
- 2) Various documents:
  1. Internal Revenue Service (IRS) Tax Return Forms for years 2008-2010;
  2. Claim Cover Letter, signed by James D. Barger, 15 May 2013;
  3. ESS Support Services, Inc. employee statement of earnings and deductions 6/1/2010 and 2/1/unknown year, year obscured.

Prior to submitting this claim to the NPFC, the Claimant stated that they attempted to recover loss of profits or impairment of earning capacity damages through the Responsible Party (RP). The Claimant stated that the RP denied their claim.<sup>5</sup>

On 16 May 2013, the NPFC received the Claimant's presentment of their claim seeking to recover \$403,200.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill. Because this claim was previously presented to and denied payment by the RP, the Claimant satisfied OPA presentment requirements.<sup>6</sup>

Furthermore, evidence in this claim submission indicates that the Claimant is pursuing this claim through litigation in the U.S. District Court for the Eastern District of Louisiana.<sup>7</sup>

### **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."<sup>8</sup> The Claimant has included a statement indicating that these damages are currently being pursued through litigation in the U.S. District Court for the Eastern District of Louisiana.<sup>9</sup> 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.

2. The Claimant has failed to prove that they sustained a loss of profits or impairment of earning capacity.

A financial loss under OPA is evidenced by "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>10</sup> Copies of federal tax returns provided in support of this claim submission indicate that the Claimant earned income of \$1,008.00 in 2008, \$179.00 in 2009 and \$18,802.00 in 2010. The Claimant's prior earnings therefore fail to establish that the Claimant sustained a loss of profits over any particular time period following the Deepwater Horizon oil spill which began in April of 2010.

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<sup>5</sup> Optional OSLTF Claim Form, signed 15 May 2013.

<sup>6</sup> 33 C.F.R. § 136.103(a).

<sup>7</sup> Optional OSLTF Claim Form, signed 15 May 2013.

<sup>8</sup> 33 C.F.R. § 136.103(d).

<sup>9</sup> Case Number: 2:10-cv-08888-CJB-SS.

<sup>10</sup> 33 C.F.R. § 136.233(c).

3. The Claimant has failed to prove that alleged losses were due to the Deepwater Horizon oil spill.

The Claimant did not provide evidence sufficient to prove, among other things, that “the claimant’s income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources”<sup>11</sup> resulting from an oil spill. The Claimant alleged that his work schedule was impacted when the Ocean Confidence was “forced to stop drilling”<sup>12</sup> and he was put on “standby indefinitely.”<sup>13</sup> Furthermore, copies of pay stubs provided by the Claimant indicate that he began his employment with the catering company near the time when the well was capped, in July of 2010.<sup>14</sup> The loss of the Claimant’s employment then, is due to the a reduction in drilling activity in the Gulf of Mexico and not a result of damage to property or natural resources caused by oil discharged during the Deepwater Horizon oil spill. As such, the Claimant’s loss of employment would not result in a compensable loss under OPA.

Based on the foregoing, this claim is denied because (1) these damages are currently the subject of litigation, (2) the Claimant has failed to provide evidence sufficient to prove that he sustained a financial loss in the amount \$403,200.00, and (3) the Claimant has failed to prove 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.

Claim Supervisor: *NPFC Claims Adjudication Division* 

Date of Supervisor’s Review: *6/21/13*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

<sup>11</sup> 33 C.F.R. § 136.1.

<sup>12</sup> Optional OSLTF Claim Form, signed 15 May 2013.

<sup>13</sup> Optional OSLTF Claim Form, signed 15 May 2013.

<sup>14</sup> Statement of earnings and deductions, deposited on 7/7/2010.