

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
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Arlington, VA 20598-7100
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7012 2210 0001 7215 0483

5890/DWHZ
10 June 2013

Aylstock, Witkin, Kreis & Overholtz


Re: Claim Number: N10036-1941

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 N10036-1941 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 N10036-1941.

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: Brian Siverly
4391 Highway 90 Box 100
Milton, FL 32571

By Certified Mail:
No. 7012 2210 0001 7215 0490

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1941
Claimant	Brian Siverly
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$381,780.00

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 21 May 2013, Mr. James Barger, legal representative of Brian Siverly, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$381,780.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant is an Offshore Rigger² who alleges that he was "laid off due to C & G's loss of business after the oil spill."³

The Claimant does not provide an indication as to how he calculated his losses to arrive at the sum certain of \$381,780.00.

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.

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 15 May 2013.

² IRS Form 2106 Employee Business Expenses 2008 and 2009

³ Optional OSLTF Claim Form, signed 15 May 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:

- 1) Brian Siverly, Optional OSLTF Claim Form dated May 15, 2013, received at NPFC May 22, 2013.
- 2) Various documents:
 1. Internal Revenue Service (IRS) Tax Return Forms 1040 and 2106 for years 2008-2011;
 2. Claim Cover Letter, signed by James D. Barger, 16 May 2013;
 3. Louisiana Non-Resident Individual Income Tax Return Form 2009-2010;
 4. Triple C Enterprises, Inc. employee compensation history 2010;

5. Emerald Coast Irrigation, LLC pay stubs 2011;
6. Louisiana Resident Individual Income Tax Return Form 2011.

On 21 May 2013, the Claimant submitted this claim to the NPFC seeking to recover \$381,780.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.⁴ The Claimant asserts that they previously presented to the Responsible Party (RP), who denied payment on the claim. The NPFC does not have evidence sufficient to confirm that the claim was indeed presented to and denied by the RP, but will adjudicate this claim to the extent presentment requirements have been met. If any damages subject of this claim were not included in a claim previously presented to the RP, those damages are denied for improper presentment.⁵

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.⁶

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."⁷ 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.⁸ 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.

The Claimant has not specifically indicated how they calculated their losses to arrive at the sum certain of \$381,780.00. In order to prove claim for loss of profits or impairment of earning capacity damages, a claimant must first prove "that the claimant's income was reduced . . .".⁹ The amount of compensation available to a claimant is limited to "the actual net reduction or loss of earnings or profits suffered," taking into account any other income the Claimant earned in the period in which the Claimant alleged to have sustained losses due to the oil spill.¹⁰ Financial

⁴ Optional OSLTF Claim Form, signed 15 May 2013.

⁵ 33 C.F.R. § 136.103(c)(2).

⁶ Optional OSLTF Claim Form, signed 15 May 2013.

⁷ 33 C.F.R. § 136.103(d).

⁸ Case Number: 2:10-cv-08888-CJB-SS.

⁹ 33 C.F.R. § 136.233(b).

¹⁰ 33 C.F.R. § 136.235.

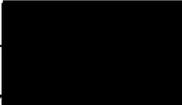
documentation provided in support of this claim fails to indicate the amount of the Claimant's regular income at the time of the oil spill. Rather, the Claimant provides evidence of yearly earnings in the form of tax returns and pay stubs documenting his 2011 earnings. Tax returns indicate that the Claimant earned a higher income in 2010 than in 2009 or 2011. It is unclear then, that the Claimant's income was actually reduced at a certain point in 2010, thereby causing the Claimant to lose a certain amount of income. As such, the Claimant has not sufficiently demonstrated that he sustained a certain amount of lost profits for a particular period of time following the Deepwater Horizon oil spill.

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

In addition to proving a financial loss, a claimant must provide evidence to prove that the loss was "a consequence of injury to, destruction of, or loss of the property or natural resources"¹¹ resulting from an oil spill.

The Claimant has not provided any evidence to prove that any financial loss the Claimant may have incurred was caused by the oil spill. The Claimant's federal income tax returns for the year 2010 indicate that the Claimant was employed as an "offshore rigger."¹² However, the Claimant has provided no evidence to prove that his employment was terminated as a result of damage to real or personal property or natural resources, caused by the Deepwater Horizon oil spill.

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 they sustained a financial loss in the amount \$381,780.00, 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: *6/10/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹¹ 33 C.F.R. § 136.1.

¹² 2010 Form 1040.