

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: 7012 2210 0001 7214 9906

5890/DWHZ  
25 July 2013

Mr. Kyle B Kramer  


Re: Claim Number: N10036-1969

Dear Mr. Kramer:

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 N10036-1969 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 N10036-1969.

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

## CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1969
Claimant	Kyle Kramer
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$12,560.00

### ***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 23 July 2014, Mr. Kyle Kramer, ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$12,560.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.<sup>1</sup>

The Claimant began working as a server at the Postcard Inn on the Beach, in St. Pete Beach, Florida, when the restaurant first opened in October of 2009. The Claimant alleged that after the oil spill in April 2010, tourist traffic in the area decreased, which lead to fewer visitors to the restaurant, and thus, decreased earnings for the Claimant whose income is largely reliant on tips. The Claimant has maintained his employment with the restaurant and alleged that business stabilized and "slowly returned to near normal levels within 18 months [of the oil spill]."<sup>2</sup>

The Claimant seeks to recover \$12,560.00, which is the difference between his earnings in 2010 and 2011.<sup>3</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 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 on 17 July 2013.

<sup>2</sup> Letter from the Claimant to the NPFC, dated 5 June 2013.

<sup>3</sup> The Claimant earned \$41,110.00 in 2011 and \$28,550.00 in 2010.

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:

- Optional OSLTF Claim Form, signed on 17 July 2013;
- Letter from the Claimant to the NPFC, dated 5 June 2013;
- BP Claim Program, Claim form for individuals, signed on 27 September 2012;
- Letter signed by Jeremy Flanery, director of operations, Postcard Inn on the Beach, undated;

- Letter from the Claimant to the BP Claims Program, 26 September 2012;
- Letter from the Claimant's father to the BP Claims Program, 26 September 2012;
- Close of Shift Reports, October 2009 - December 2011;
- Map showing Claimant's home and employment locations;
- Copy of the Claimant's driver's license;
- 2011 Federal Income Tax Returns, showing gross income of \$41,110.00;
- 2010 Federal Income Tax Returns, showing gross income of \$28,550.00;
- Pay Stubs, October 2009 - September 2012;
- Bank account statements documenting tips;
- Employee Payroll voucher register report, October 2009 – October 2010;
- 2011 Form W-2 Wage and Tax Statement;
- 2010 Form W-2 Wage and Tax Statement;
- 2009 Form W-2 Wage and Tax Statement;
- Letter from BP Claims Program to the Claimant, requesting additional information, 12 December 2012;
- Claimant response to BP request for additional information, 26 September 2012;
- BP Claim Determination Notification, 7 April 2013;
- Letter from the Claimant to the BP Claims Program, 5 June 2013;
- Copy of GCCF Final Payment offer to Claimant's colleague;
- Copy of 2010 W-2 for Claimant's colleague.

The Claimant first presented this claim to the Responsible Party (RP) through the BP Claims Program. The Claimant sought recovery of \$30,000.00 in loss of earnings damages resulting from the reduction in tip earnings in his employment at a restaurant in St. Pete Beach, Florida. The RP denied the claim in a letter dated 7 April 2013.<sup>4</sup>

On 23 July 2013, the Claimant submitted this claim to the NPFC seeking \$12,560.00 in loss of profits or impairment of earning capacity damages allegedly resulting from effects of the Deepwater Horizon oil spill.<sup>5</sup> Because it appears as though these damages have been presented to and denied by the RP prior to their presentment to the NPFC, OPA presentment requirements have been satisfied.<sup>6</sup>

Furthermore, the Claimant has stated that he has opted out of the Deepwater Horizon oil spill economic and property damages class action settlement (the E&PD Settlement).<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.

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<sup>4</sup> BP Claims Program, Claim Determination Notification, 7 April 2013; See also, BP Claim Form for individuals and businesses.

<sup>5</sup> Optional OSLTF Claim Form, signed on 17 July 2013.

<sup>6</sup> 33 C.F.R. § 136.103(a)-(c).

<sup>7</sup> BP Claim Form, at pg. 3.; The NPFC does not have evidence to confirm the Claimant's opt-out, but because this claim is denied for substantive reasons, lack of evidence of the Claimant's opt-out is immaterial to the outcome of the claim. Should the Claimant wish to pursue this claim on reconsideration, he should provide evidence to prove that he has indeed opted out of the E&PD Settlement class.

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 tourist traffic in St. Pete Beach, Florida, decreased as a result of the oil spill, thereby causing fewer guests to visit the restaurant where he worked as a server. However, the Claimant has failed to provide evidence to prove that the oil spill caused a drop in tourism in St. Pete Beach, Florida, which then might have lead to the Claimant earning fewer tips than he otherwise would have in 2010.

The Postcard Inn on the Beach opened for business in October of 2009. Therefore, the Claimant does not have record of 2009 income to demonstrate that customer traffic through the restaurant indeed decreased in 2010. Rather, the Claimant uses 2011 as a baseline for demonstrating that he sustained a loss of earnings in 2010. However, without evidence indicating that the oil spill caused fewer visitors to travel to St. Pete Beach, the fact that more guests visited the restaurant during its second year of business as compared to its first, does not prove that “the Claimant’s income was reduced as a consequence of injury to, destruction of, or loss of property or natural resources” in 2010.<sup>8</sup>

Furthermore, Pinellas County tourism statistics fail to support the Claimant’s assertion that tourist traffic in St. Pete Beach decreased following the Deepwater Horizon oil spill. Pinellas County tourism statistics indicate that tourism in the summer and fall of 2010 did not decrease as compared to the previous year. The 2010 Annual Visitors Profile for Pinellas County shows that the number of visitors to the county in May, June, July and August 2010, actually increased as compared to those months of 2009.<sup>9</sup> Likewise, the Visitors Profile indicates that expenditures in the spring and summer months of 2010, did not drop, but remained at 2009 levels.<sup>10</sup> These statistics are further supported by Pinellas County Bed Tax collections, which document year over year increases starting in July of 2010 and continuing through 2011.<sup>11</sup>

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that he sustained a financial loss in the amount \$12,560.00, 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.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor’s Review: *7/25/13*

Supervisor’s Action: *Denial approved*

Supervisor’s Comments:

<sup>8</sup> 33 C.F.R. § 136.233(b).

<sup>9</sup> St. Petersburg/Clearwater Area Convention and Visitors Bureau Annual 2010 Visitor Profile, <http://www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf>, at 6. Accessed on 3 January 2012.

<sup>10</sup> St. Petersburg/Clearwater Area Convention and Visitors Bureau Annual 2010 Visitor Profile, Available at, [www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf](http://www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf), at 7. Accessed on 3 January 2012.

<sup>11</sup> Pinellas County, CVB statistics, Bed Tax Information. Available at, [www.pinellascvb.com/cms/index.php?id=6](http://www.pinellascvb.com/cms/index.php?id=6). Accessed on 3 January 2012.