

U.S. Department of
Homeland Security

**United States
Coast Guard**



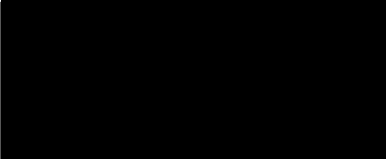
Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7012 2210 0001 7215 0124

5890/DWHZ
30 April 2013

Triton Industries, LLC



Re: Claim Number: N10036-1910

Dear Mr. Jones,

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 N10036-1910 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination Form for further explanation.

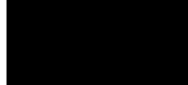
You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you 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 N10036-1910.


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 7215 0117

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1910
Claimant	Triton Industries, LLC
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$97,833,600.00

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 19 April 2013, Mr. Christopher Jones, on behalf of Triton Industries, LLC, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$97,833,600.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant is a business incorporated in Louisiana and engaged in the manufacturing, selling and leasing of high performance vacuums. After the oil spill, the Claimant leased several of its vacuums to BP and its contractors for use in response operations. The Claimant was compensated for the use of their products. Subsequently, the Claimant alleged that

the initial success of the vacuums, the media coverage and the praise by government officials, BP representatives and consumers resulted in the demand for [the Claimant's] vacuums to increase on an exponential basis.²

The Claimant stated that they "fielded call after call [from BP and their representatives] express[ing] interest in ordering 100 – 300 vacuum systems [. . .]."³ Although the Claimant never received any formal orders, they began to manufacture additional vacuums, relying on the idea that BP's "responsible party status" would require that BP pay the Claimant for their

¹ Claim cover letter, 16 April 2013.

² Claim cover letter, at 5.

³ Claim cover letter, at 5.

efforts.⁴ However, in spite of the Claimant's increase in manufacturing "no formal orders were placed and efforts to secure formal contracts for the lease or purchase of these units were fruitless."⁵

As such, the Claimant seeks to recover the profits they would have earned had their newly manufactured equipment been used by BP in oil spill response efforts. The Claimant estimated to have lost profits of \$24,458,400.00 and also seeks "punitive damages" in the amount of \$73,375,200.00.⁶

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. 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;

⁴ See, e.g., claim cover letter at 6. The Claimant states that they decided to move ahead with the increase in manufacturing "in reliance on the demands for vacuums and BP's responsible party status."

⁵ Claim cover letter, at 6.

⁶ Claim cover letter, at 12.

- (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:

- Claim Cover Letter, 16 April 2013;
- E&PD Settlement Opt-Out letter, 30 October 2012;
- BP acknowledgement of presentment, 12 January 2013;
- Complaint for damages, filed 4/15/13, Eastern District of Louisiana;
- Triton vacuum system product information pamphlet;
- Monthly Profit and Loss Statements, 2007 – 2011;
- Federal Income Tax Returns with schedules and attachments, 2010, 2011, 2007, 2008, 2009
- State Income Tax Returns, 2011, Mississippi;
- Original and Amended, Articles of Incorporation.
- Articles regarding the Claimant, Baton Rouge Advocate, 2010;
- BP Claim Form.

On 12 January 2013, the Claimant presented this claim to the BP Claims Program and was assigned Claimant ID 1001822-01. According to the Claimant, this claim has not been settled by payment and remains pending a determination by the Responsible Party.⁷

On 19 April 2013, the Claimant presented this claim to the NPFC seeking to recover \$97,833,600.00 in loss of profits or impairment of earning capacity damages from the OSLTF. Because this is the same claim, concerning the same damages as previously presented to the Responsible Party, and because the Responsible Party has not settled the claim within 90 days of presentment, this claim has satisfies OPA presentment requirements.⁸

Furthermore, evidence in this claim submission indicates that the Claimant has opted out of the Deepwater Horizon oil spill economic and property damages class action settlement (the E&PD Settlement).⁹

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)

⁷ Claim cover letter.

⁸ 33 C.F.R. § 136.103(c)(2).

⁹ E&PD Settlement Opt-Out letter, 30 October 2012.

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."¹⁰ The Claimant has included a copy of a Complaint filed in the 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.

2. Punitive damages or other damages not actually incurred by the Claimant are not compensable under OPA.

Included in the Claimant's sum certain of \$97,833,600.00 are \$73,375,200.00 in punitive damages. However, punitive 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].¹¹ Therefore, payment is initially denied on \$73,375,200.00 of this claim, which constitutes losses not allegedly incurred by the Claimant.

3. The Claimant has failed to prove that they sustained a loss of profits or earning capacity within the meaning of OPA.

In order to prove that the Claimant sustained an uncompensated loss or reduction in profits or earning capacity under OPA, several factors must be taken into consideration. Most importantly, the amount of compensation potentially available to a claimant "must clearly reflect adjustments for- (a) All income resulting from the incident [. . .]."¹² Therefore, in order for the Claimant to prove that they sustained an uncompensated financial loss, the Claimant must provide evidence documenting the amount of income they earned as a result of the oil spill. The Claimant would then be required to prove that they sustained losses which exceeded the income earned as a result of the oil spill. The Claimant indicates that their equipment was leased by BP for use in the spill response, but fails to indicate how much income was generated by these transactions.

Furthermore, successful attempts to mitigate losses must also be taken into account when determining the extent of the Claimant's loss of profits.¹³ In the description of their claim, the Claimant noted that the company "did not lose money in 2010,"¹⁴ but rather, that they did not have the opportunity to continue to grow, or to earn anticipated income as a result of the oil spill. However, "because of other revenue sources and the ability to raise money by selling some of the unused components at firesale prices"¹⁵ the Claimant was able to mitigate any alleged losses.

¹⁰ 33 C.F.R. § 136.103(d).

¹¹ 33 C.F.R. § 136.235.

¹² 33 C.F.R. § 136.235(a).

¹³ 33 C.F.R. § 136.235.

¹⁴ Claim cover letter, pg. 6.

¹⁵ Complaint, Case 2:13-cv-00841, at 13.

The Claimant's failure to profit as anticipated is not a loss under OPA. The NPFC further notes that the Claimant's asserted lost profits of \$24,458,400.00, allegedly incurred over a six-month period in 2010, far exceeds the Claimant's profits in any year prior to or following the oil spill.¹⁶

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

In order to prove a claim for loss of profits damages under OPA, a claimant must provide evidence sufficient to prove that their claimed loss "result[ed] from the discharge or substantial threat of discharge of oil [. . .]."¹⁷ The Claimant essentially argues that they would not have manufactured additional vacuums and then been unable to sell or lease the vacuums "had the oil spill not occurred."¹⁸ However, OPA does not provide compensation for any and all losses that would not have occurred in the absence of a particular oil spill. Rather, OPA specifically limits compensation for losses incurred "due to the discharge of oil" resulting from an oil spill. The Claimant's "loss" in this instance is based on the Claimant being unable to enter into purchase or lease agreements for equipment constructed in anticipation that it might be used for the oil response. In other words, the discharge of oil into the Gulf of Mexico created a business opportunity for the Claimant and was not the cause of the Claimant's loss.

Furthermore, the NPFC also notes that the Claimant has not provided any evidence to support their assertions that they were "solicited directly by BP and through its agents to supply vacuums for the clean-up effort."¹⁹ However, even if the Claimant had provided such evidence, their failure to be properly compensated would also not have been caused by the discharge of oil resulting from the Deepwater Horizon oil spill, and this claim would not be compensable under OPA.

Based on the foregoing, this claim is denied because (1) the Claimant is currently seeking to recover these damages through litigation, (2) the Claimant has failed to provide evidence sufficient to prove that they sustained a financial loss in the amount \$97,833,600.00, and (2) 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: *4/30/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁶ Federal tax returns indicate that the Claimant reported profits of \$1,171,236.00, \$1,588,871.00, and \$2,980,895.00 in 2008, 2009 and 2010 respectively; Under OPA's loss of profits damage category, losses are evidenced by comparing the claimed loss period with a similar, but unaffected period. See 33 C.F.R. § 136.233(c).

¹⁷ 33 C.F.R. § 136.1.

¹⁸ Claim cover letter, at 9.

¹⁹ Claim cover letter, at 9.