

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
Arlington, VA 20598-
7100
Staff Symbol: (CA)
Phone: 202-493-6839
E-mail:

[REDACTED]
5890
01/21/2009

VIA EMAIL: [REDACTED]@DUNAEMORRIS.COM

Duane Morris LLP
Attn: Mr. Carbin
744 Broad Street Suite 1200
Newark, NJ 07102-3889

RE: Claim Number: P06005-001

Dear Mr. Carbin:

The National Pollution Funds Center (NPFC) finds, in accordance with Title I of the Oil Pollution Act of 1990, 33 U.S.C. § 2701, *et seq.* (OPA) and 33 CFR Part 136, that the responsible party is not entitled to a defense to liability and therefore denies payment on Claim Number P06005-001, presented regarding the T/B Piney Point incident. Compensation is denied for the reasons stated in the enclosed determination.

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. If you find that you will be unable to gather and submit particular information within the time period, you may request an extension of time for a specified duration with your reconsideration request. Reconsideration of the denial will be based upon information in the record and the additional 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 P06005-001.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100



Claims Manager
U.S. Coast Guard

Encl: Claim Summary / Determination Form

(1) Statement by Mr. Day and CG Form 2692 completed by Mr. Day

CLAIM SUMMARY / DETERMINATION FORM

| | |
|------------------|--|
| Date | : January 16, 2009 |
| Claim Number | : P06005-001 |
| Claimant | : Certain Underwriters at Lloyds of London as subrogee of Dann Marine Towing |
| Type of Claimant | : Corporate |
| Type of Claim | : Affirmative Defense |
| Claim Manager | : [REDACTED] |
| Amount Requested | : \$804,330.25 |

I. FACTS

At about 2:30 in the morning on November 28, 2005, the tug BARBARY COAST was pushing the tank barge PINEY POINT upriver at the Kingsland Reach section of the James River, Virginia. PINEY POINT carried a cargo of 1.26 million gallons of 270 degree heated asphalt.

The tug and barge missed the turn in the vicinity of James River Light Number 157, left the channel toward the right descending bank, allided with one or more fixed structures and grounded. Apparently the structures may have included remains of a former Federal navigation aid. As a result of these events the PINEY POINT's hull was breached and asphalt was discharged.

At the time of the incident PINEY POINT was owned by Vane Brothers, Incorporated. BARBARY COAST was owned and operated by Dann Marine Towing and piloted by Walter M. Day, a mate and employee of Dann Marine Towing. Mr. Day made a statement to the Coast Guard on the day of the incident explaining that he got too far over on the port side of the river while looking at the radar and when he looked up from the radar he was too far over to make the turn. Mr. Day was eventually charged by the Coast Guard for negligent failure to maintain a proper lookout. Mr. Day admitted to the jurisdictional and factual allegations and his license was suspended for three months with an additional three month suspension remitted on twelve months probation.

II. THE CLAIM

On November 24, 2008, the law firm Duane Morris LLP submitted a claim to the NPFC on behalf of its client, Certain Underwriters at Lloyd's of London. In the claim, designated Claim No. P06005-001 by the NPFC, Lloyd's Underwriters ("Underwriters") has come to the Fund as subrogee of its insured Dann Marine Towing, LC. Underwriters has respectfully requested that Dann Marine be fully exonerated from liability for the November 2005 oil spill incident on the James River. Underwriters is seeking reimbursement of removal costs and damages in excess of \$800,000, including removal costs of \$693,730.25, attorneys fees of \$60,000, and costs assessed by public authorities of \$52,600.

Underwriters provided pollution insurance to Dann Marine, the owner and operator of the tug BARBARY COAST. Under its policy, U.S. Vessel Pollution Insurance Policy No. 4868-03, Underwriters paid the costs to remove the asphalt as well as other costs associated with the spill. Underwriters became subrogated to the rights of Dann Marine under this policy.

We also note that the claimed amounts are the subject of current litigation between the claimant as plaintiff and the United States. We understand from claimant's letter of November 19, 2008 to the Honorable J. Frederick Motz, that the litigation may have been stayed pending this claim to the NPFC.

III. APPLICABLE LAW

The liability and compensation provisions of the OPA (33 USC §2701 et seq) govern the disposition of this claim.

"...each responsible party for a vessel or facility from which oil is discharged...is liable for the removal costs and damages...that result. OPA §1002(a)(33 USC §2702(a).

"'liable' or 'liability' shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act (33 USC 1321);" OPA §1001(17)(33 USC §1001(17)). The standard of liability under section 311 of the FWPCA has been determined repeatedly to be strict, joint and several. Conference Report, House Report No. 101-653 (August 1, 1990), p. 102.

In the case of a vessel, responsible party means "any person owning, operating or demise chartering the vessel." OPA §1001(32)(A)(33 USC §2701(32)(A).

"'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body;" OPA §1001(27)(33 USC §2701(27)).

The Oil Spill Liability Trust Fund is "available...for...the payment of claims in accordance with section 1013 for uncompensated removal costs...or uncompensated damages;" OPA §1012(a)(4)(33 USC §2712(a)(4).

Claims may be presented first to the Fund "by a responsible party who may assert a claim under section 1008;" OPA §1013(b)(1)(B)(33 USC §2713(b)(1)(B).

"The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 1013 only if the responsible party demonstrates that –

- (1) the responsible party is entitled to a defense to liability under section 1003; or
- (2) The responsible party is entitled to a limitation of liability under section 1004." OPA §1008(a)(33 U.S.C. §2708(a))

"A responsible party is not liable for removal costs or damages under section 1002 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by...

- (3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party..., if the responsible party establishes, by a preponderance of the evidence, that the responsible party-
 - (A) exercised due care with respect to the oil concerned, ... in light of all relevant facts and circumstances; and

2005. As a result of Mr. Day's actions, the vessel left the channel and struck one or more submerged structures. Mr. Day was eventually charged with negligence by the Coast Guard to which Mr. Day admitted to the charge. Mr. Day's license as suspended for three months with an addition three months remitted on twelve months probation. In light of these uncontroverted facts, Underwriters has failed to meet its burden to show that the incident was caused solely by an act of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party. Although the evidence indicates negligence in this case, even the non-negligent operation of the barge outside the channel would not prevent the actions of the responsible parties from being a contributing cause under OPA, which is a strict liability statute.

There is very limited case law interpreting the OPA third party defense and no case law interpreting the sole causation prong of the defense. But there is a substantial body of case law interpreting a similar defense to liability for oil discharges under the FWPCA, OPA's predecessor liability statute. See U.S. v West of England Ship Owner's Mutual Protection & Indemnity Association, 872 F.2d 1192 (5th Circuit 1989)(The court considered application of the sole cause third party defense under the FWPCA, and determined that where the discharging vessel struck a submerged vessel outside the channel, vessel owner could not establish the defense, because the owner's decision to navigate the vessel outside the channel was a contributing cause of the discharge and the sole causation element of the defense could not be established); See also Reliance Insurance Company v. U.S., 677 F.2d 844 (Ct. Cl. 1982)(Any conduct on the part of the owner or operator contributing to a spill would negate relief and owners dredging was a cause of the spill).

OPA additionally requires a responsible party to prove that it exercised due care with respect to the oil and took precautions against the foreseeable acts of third parties to successfully assert a third party defense. 33 U.S.C. § 2703(a)(3)(A) and (B). Given its cargo of a 1.26 million gallons of 270 degree asphalt and the increased risk of a collision with submerged objects as the vessel navigated outside the channel, the NPFC finds that Underwriters has failed to satisfy its burden to prove that its insured exercised due care with respect to the oil.

Finally, the NPFC finds that granting a third party defense under the facts of this case would be inconsistent with the statutory requirements of OPA and Congress' intent to impose strict liability upon the spillers of oil. One of principle purposes Congress intended to achieve with OPA was to expand polluter liability by imposing strict liability for clean-up costs and damages. See Apex Oil Company v. United States of America, 208. F. Supp. 2d 642 (E.D. La. 2002). The defenses to liability under the Act are very limited and the courts have interpreted the defenses extremely narrowly. OPA does not shift the responsibility for this spill from the polluter to the Fund when the responsible party was in the best position to exercise and take the necessary precautions to avert a spill but failed to do so.

VII. CONCLUSION

The NPFC finds that the claimant did not meet its burden of proving by a preponderance of the evidence that the responsible party Dann Marine is entitled to a defense to liability on the basis of a sole third party defense. The responsible party Dann Marine, to which the claimant is a subrogee, failed to maintain proper watch and as a result, its operation of the tug and barge outside the channel was a contributing cause of the incident. The PINEY POINT struck the submerged fixed object while transiting outside the boundaries of the navigation channel, in an area of charted shallows and charted obstructions. Moreover, Mr. Day, an employee of the Dann Marine, admitted to negligent operation of the vessels. Underwriters, therefore, has not

established that the incident was solely caused by the actions of a third party other than an employee or agent of the responsible party. Additionally, the NPFC finds that Underwriters has failed to satisfy its burden to prove that its insured exercised due care with respect to the oil. Therefore, based on the record before it, the NPFC finds that Dann Marine is not entitled to a defense to liability for the spill.

VIII. DETERMINATION

Underwriters' request that its insured Dann Marine be fully exonerated from liability under OPA is denied and, on that basis, the Underwriters' claim for reimbursement of its removal costs of \$804,320.25 is also denied.

Claim Supervisor:



Date of Supervisor's review: 1/21/09

Supervisor Action: Denial Allowed

Supervisor's Comments:



WITNESS STATEMENT FORM

Please Print Clearly:

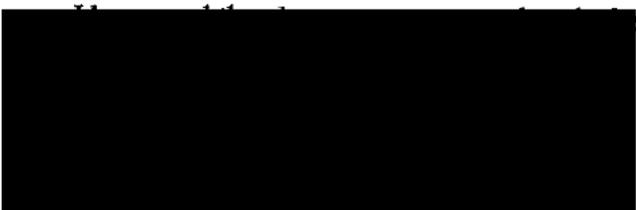
| | |
|-----------------------|-------------------------|
| Witness Name: _____ | Employer Name: _____ |
| Street Address: _____ | Employer Address: _____ |
| City/State/Zip: _____ | City/State/Zip: _____ |
| Phone No: _____ | Phone No: _____ |
| Position: _____ | License/Doc. # _____ |

I, the undersigned, make the following statement voluntarily, without threat, duress or promise of reward:

At 0245 on the way up River to Richman VA. NCTD
The tug Barbary Coast and Puckin Barge being out.

While operating marker 157 at Kings Reach I got
to Pan one on the port side of the River Nile Ladder
at Raisher and when I look up I was to far over
to make the turn so I put Rudder Hard to Starboard and
back the Boat Full Reverse.

I must have look at Raisher longer than I think
marker 157 is on a turn and does not have a
port side light. I am not making the or an
estimate



... of my knowledge and belief, it is true and correct.

11-28-05
DATE

Prepared by:
Witnessed by:

| DEPARTMENT OF TRANSPORTATION U. S. COAST GUARD CG-2692 (Rev. 6-87) | | REPORT OF MARINE ACCIDENT, INJURY OR DEATH | | | | RCS No. G-MMI 2116-003 UNIT CASE NUMBER | |
|--|---|---|--|---|--|---|--|
| SECTION I. GENERAL INFORMATION | | | | | | | |
| 1. Name of Vessel or Facility BARBARY COAST | | 2. Official No. 565070 | 3. Nationality U.S. | 4. Call Sign WCW 6137 | 5. USCG Certificate of Inspection issued at: | | |
| 6. Type (Towing, Freight, Fish, Drill, etc.) TOWING | 7. Length 65.9 | 8. Gross Tons 137 | 9. Year Built 1975 | 10. Propulsion (Steam, diesel, gas, turbine...) Diesel | | | |
| 11. Hull Material (Steel, Wood...) Steel | 12. Draft (ft. - in.) FWD. 8'6" AFT. 9'0" | 13. If Vessel Classed, By Whom: (ABS, LLOYDS, DNV, BV, etc.) | | 14. Date of occurrence 11-28-05 | 15. TIME Local 0245 | | |
| 16. Location (See Instruction No. 10A) JAMES RIVER #157 | | | | 17. Estimated Loss or Damage TO: | | | |
| 18. Name, Address & Telephone No. of Operating Co. DANN MARINE TOWING LLC PO. BOX 250 - CHESAPEAKE CITY, M.D. 21915 410-885-5055 | | | | VESSEL \$ _____ CARGO \$ _____ OTHER \$ _____ | | | |
| 19. Name of Master or Person in Charge [REDACTED] | | USCG License <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO | 20. Name of Pilot [REDACTED] | | USCG License <input type="checkbox"/> YES <input type="checkbox"/> NO | State License <input type="checkbox"/> YES <input type="checkbox"/> NO | |
| 19a. Street Address (City, State, Zip Code) WILKINSON, NC PO. BOX 726 - 28589 | | 19b. Telephone Number 252 1722 0745 | 20a. Street Address (City, State, Zip Code) | | 20b. Telephone Number () | | |
| 21. Casualty Elements (Check as many as needed and explain in Block 44.) | | | | | | | |
| NO. OF PERSONS ON BOARD 5 | | <input type="checkbox"/> FLOODING; SWAMPING WITHOUT SINKING | | <input type="checkbox"/> FIREFIGHTING OR EMERGENCY EQUIPMENT FAILED OR INADEQUATE (Describe in Block 44.) | | | |
| <input type="checkbox"/> DEATH- HOW MANY? _____ | | <input type="checkbox"/> CAPSIZING (with or without sinking) | | <input type="checkbox"/> LIFESAVING EQUIPMENT FAILED OR INADEQUATE (Describe in Block 44.) | | | |
| <input type="checkbox"/> MISSING- HOW MANY? _____ | | <input type="checkbox"/> FOUNDERING OR SINKING | | <input type="checkbox"/> BLOW OUT (Petroleum exploration/production) | | | |
| <input type="checkbox"/> INJURED- HOW MANY? _____ | | <input type="checkbox"/> HEAVY WEATHER DAMAGE | | <input type="checkbox"/> ALCOHOL INVOLVEMENT (Describe in Block 44.) | | | |
| <input type="checkbox"/> HAZARDOUS MATERIAL RELEASED OR INVOLVED (Identify Substance and amount in Block 44.) | | <input type="checkbox"/> FIRE | | <input type="checkbox"/> DRUG INVOLVEMENT (Describe in Block 44.) | | | |
| <input checked="" type="checkbox"/> OIL SPILL-ESTIMATE AMOUNT: 1000 | | <input type="checkbox"/> EXPLOSION | | <input type="checkbox"/> OTHER (Specify) _____ | | | |
| <input type="checkbox"/> CARGO CONTAINER LOST/DAMAGED | | <input type="checkbox"/> COMMERCIAL DIVING CASUALTY | | | | | |
| <input type="checkbox"/> COLLISION (Identify other vessel or object in Block 44.) | | <input type="checkbox"/> ICE DAMAGE | | | | | |
| <input checked="" type="checkbox"/> GROUNDING <input type="checkbox"/> WAKE DAMAGE | | <input type="checkbox"/> DAMAGE TO AIDS TO NAVIGATION | | | | | |
| | | <input type="checkbox"/> STEERING FAILURE | | | | | |
| | | <input type="checkbox"/> MACHINERY OR EQUIPMENT FAILURE | | | | | |
| | | <input type="checkbox"/> ELECTRICAL FAILURE | | | | | |
| | | <input type="checkbox"/> STRUCTURAL FAILURE | | | | | |
| 22. Conditions | | | | | | | |
| A. Sea or River Conditions (wave height, river stage, etc.) CALM | | B. WEATHER <input checked="" type="checkbox"/> CLEAR <input type="checkbox"/> RAIN <input type="checkbox"/> SNOW <input type="checkbox"/> FOG <input type="checkbox"/> OTHER (Specify) | C. TIME <input type="checkbox"/> DAYLIGHT <input type="checkbox"/> TWILIGHT <input checked="" type="checkbox"/> NIGHT | D. VISIBILITY <input checked="" type="checkbox"/> GOOD <input type="checkbox"/> FAIR <input type="checkbox"/> POOR | E. DISTANCE (miles) (of visibility) 1 MILE | F. AIR TEMPERATURE (F) 54 | G. WIND SPEED & DIRECTION 0 0 |
| | | | | | H. CURRENT SPEED & DIRECTION EBB | | |
| 23. Navigation Information <input type="checkbox"/> MOORED, DOCKED OR FIXED <input type="checkbox"/> ANCHORED <input checked="" type="checkbox"/> UNDERWAY OR DRIFTING | | | | SPEED AND COURSE 8.5 | 24. Last Port Where Bound BALT. MD RICHMOND, VA. | | 24a. Time and Date of Departure 11-26-05 |
| 25. FOR TOWING ONLY | 25a. NUMBER OF VESSELS TOWED | Empty | Loaded | Total | 25b. 3400 TOTAL H.P. OF TOWING UNITS | 25c. MAXIMUM SIZE OF TOW WITH TOW-BOAT(S) 310 65 Length Width | 25d. (Describe in Block 44.) <input checked="" type="checkbox"/> PUSHING AHEAD <input type="checkbox"/> TOWING ASTERN <input type="checkbox"/> TOWING ALONGSIDE <input type="checkbox"/> MORE THAN ONE TOW-BOAT ON TOW |
| SECTION II. BARGE INFORMATION | | | | | | | |
| 26. Name PINEY PT. | | 26a. Official Number 534896 | | 26b. Type ASPHALT | 26c. Length 250 | 26d. Gross Tons 91675 | |
| 26f. Year Built JAN. 1975 | 26g. <input type="checkbox"/> SINGLE SKIN <input checked="" type="checkbox"/> DOUBLE SKIN | 26h. Draft FWD 11 | AFT 11-6 | 26i. Operating Company VANE BROS | | | |
| 26j. Damage Amount BARGE \$ _____ CARGO \$ _____ OTHER \$ _____ | | | 26k. Describe Damage to Barge HOLE IN BON RAKE & 1. CARGO TANK | | | | |

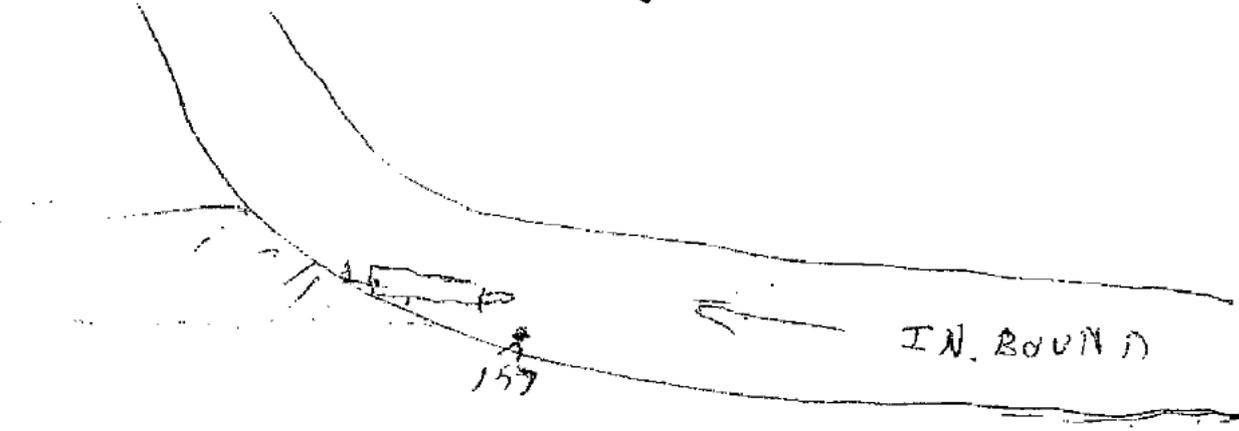
SECTION III. PERSONNEL ACCIDENT INFORMATION

| | | | | |
|---|--|--------------------------------------|--|--|
| 27. Person Involved <input type="checkbox"/> MALE or <input type="checkbox"/> FEMALE <input type="checkbox"/> DEAD <input type="checkbox"/> MISSING <input type="checkbox"/> INJURED | | 27a. Name (Last, First, Middle Name) | | 27c. Status <input type="checkbox"/> CREW <input type="checkbox"/> PASSENGER <input type="checkbox"/> OTHER (Specify) |
| 28. Birth Date | | 27b. Address (City, State, Zip Code) | | |
| 29. Telephone No. | | 30. Job Position | | 31. (Check here if off duty) <input type="checkbox"/> |
| 32. Employer (If different from Block 18., fill in Name, Address, Telephone No.) | | | | |
| 33. Person's Time | | | 34. Industry of Employer (Towing, Fishing, Ship, Crew Supply, Drilling, etc.) | |
| A. IN THIS INDUSTRY - | | | YEAR(S) | MONTH(S) |
| B. WITH THIS COMPANY - | | | _____ | _____ |
| C. IN PRESENT JOB OR POSITION - | | | _____ | _____ |
| D. ON PRESENT VESSEL/FACILITY - | | | _____ | _____ |
| E. HOURS ON DUTY WHEN ACCIDENT OCCURRED - | | | _____ | _____ |
| 35. Was the Injured Person Incapacitated 72 Hours or More? <input type="checkbox"/> YES <input type="checkbox"/> NO | | | | 36. Date of Death |
| 37. Activity of Person at Time of Accident | | | | |
| 38. Specific Location of Accident on Vessel/Facility | | | | |
| 39. Type of Accident (Fall, Caught between, etc.) | | | | |
| 40. Resulting Injury (Cut, Bruise, Fracture, Burn, etc.) | | | 41. Part of Body Injured | |
| 42. Equipment Involved in Accident | | | 43. Specific Object, Part of the Equipment in Block 42., or Substance (Chemical, Solvent, etc.) that directly produced the injury. | |

SECTION IV. DESCRIPTION OF CASUALTY

44. Describe how accident occurred, damage, information on alcohol/drug involvement and recommendations for corrective safety measures. (See instructions and attach additional sheets if necessary).

ON WAY UP RIVER I MISS THE TURN



| | | | |
|--|--|---------------------------|--------------------------------------|
| 45. Witness (Name, Address, Telephone No.) | | PERSON MAKING THIS REPORT | 47c. Title MEL. CAPT. |
| 46. Witness (Name, Address, Telephone No.) | | | 47d. Telephone No. (212) 228-0749 |
| FOR COAST GUARD USE | | 47e. Date 7-28-08 | REPORTING OFFICE: |

| | | | |
|---------------------|---------------------|------|--------------------|
| CASUALTY CODE A B C | INVESTIGATOR (Name) | DATE | APPROVED BY (Name) |
|---------------------|---------------------|------|--------------------|