

CLAIM SUMMARY / DETERMINATION ON RECONSIDERATION

Claim Number:	J05003-0032
Claimant:	IMC Shipping Co. Pte. Ltd., Ayu Navigation Sdn Bhd et al
Type of Claimant:	Responsible Party
Type of Claim:	Costs related to third party claims
Claim Manager:	██████████
Amount Requested:	\$81,658.10

BACKGROUND

The Incident

On December 8, 2004, during a voyage from Seattle to China, the M/V SELENDANG AYU (SELENDANG or vessel) grounded on the north shore of Alaska's Unalaska Island, northeast of Spray Cape. The vessel discharged approximately 330,000 gallons of bunker oil into the waters of the United States off Unalaska Island, a navigable waterway of the United States.

The responsible parties for the incident were the owner of the vessel, Ayu Navigation Sdn Bhd (Ayu), and its operator, IMC Shipping Co. Pte. Ltd. (IMC). Sveriges Angfartygs Assurans Forening (The Swedish Club) and International Group of Protection and Indemnity Clubs (International Group) are the responsible parties' subrogated insurers.

RP Claims to the Fund

In a letter dated December 6, 2007, the responsible parties (now RP/Claimants), through their attorneys Keesal, Young and Logan (KYL), presented a claim for reimbursement of removal costs and damages paid, or to be paid, by the responsible parties.¹ The letter asserted that the RPs were entitled to their statutory limitation on liability, which if upheld was \$23,853,000. The letter focused on the facts associated with the incident, but also noted that removal costs and damages to date totaled \$148,651,185.13. The NPFC and KYL agreed that the NPFC would first determine if the responsible parties demonstrated entitlement to the statutory limitation on liability. If the limit was granted the RP/Claimants would submit documentation supporting their claimed removal costs and damages. On January 27, 2012, the NPFC determined that the responsible parties had demonstrated entitlement to their statutory limitation on liability, \$23,853,000.²

After the incident, the responsible parties received claims; and, in order to process, settle and pay these claims the responsible parties retained MR and Associates (MRA) to establish a claims office in Dutch Harbor. Attached to the initial claim letter was an "Expenditures and Claims Summary List", which itemized each vendor paid by the responsible party and each claim presented to the responsible party, the amount of the claim and the amount paid to the claimant. In this initial letter Polaris Applied Sciences was listed as a vendor in the Summary of Expenditures and Claims.³

¹ Keesal Young & Logan letter dated December 6, 2007.

² To date the NPFC has reimbursed the RP/Claimants approximately \$92 million in removal costs from the Fund.

³ This document was Attachment 2 to KYL's December 6, 2007 letter.

The NPFC acknowledged that the December 6, 2007, letter along with the attached Claims Summary, constituted presentment of all claims on the list including all third party claims listed. The NPFC also acknowledged that the RP/Claimants met the three-year period of limitations for presenting damages claims to the Oil Spill Liability Trust Fund (OSLTF or the Fund).

Via a letter from KYL dated March 21, 2012, the RP/Claimants supplemented their claim submission and attached a sheet entitled "Third Party Claim Detail" that listed all the third party claims and the vendors the RPs hired and paid in relation to the third party claims. This determination addresses Polaris Applied Sciences (Polaris), one of those vendors hired by the RPs and listed on the Third Party Claim Detail.⁴

THE INSTANT CLAIM

The RP/Claimants seek reimbursement for Polaris' costs "to help assess the degree of oiling of lands and the extent to which landowners would be entitled to a claim for damages."⁵ The claimed amount is \$81,658.10. No discussions of their work or arguments were presented to support their payment within the initial claim letter dated December 6, 2007.

In response to an NPFC verbal request for an explanation as to how the claimed costs were recoverable under OPA, KYL submitted a letter dated February 28, 2014, in which the RP/Claimants presented two arguments to support reimbursement of the Polaris costs-- (1) The plain language of OPA allows recovery of assessment costs as they are included in the definition of damages under 33 U.S.C. §2701(5); and (2) "Denying assessment costs when a damage claim is found non-compensable undercuts the efficient resolution of third party claims as contemplated by the OPA."

The RP/Claimants explained that they contracted with Polaris to conduct several types of activities, including response or cleanup, natural resource damages assessments, and third party claims (or TPC).⁶ In support of the claim for Polaris' costs RP/Claimants provided 15 Polaris invoices with backup documentation that listed personnel activity and time spent on each activity.⁷ The RP/Claimants apportioned the time and costs among each of the three types of activity. While the RP/Claimants provided some support documentation, including Polaris employee time-and-expense records, employee time charges, purchase receipts, invoices, and miscellaneous expense documentation, the descriptions of each activity were brief and generally without detail.

Polaris' activities relating to third party claims included development of shoreline data, research, and preparation to assist the RPs with landowner claims mediation and settlement. Polaris' work product was used by the RPs in their efforts to settle the claims of four Alaska native tribal corporations for real property damage.

The NPFC denied the claim on October 7, 2014, on the grounds that OPA contains no authority for the Fund to pay the Polaris costs related to the administrative and adjudicative costs of

⁴ The letter itself referred to Polaris' presenting of a binder of material outlining cleanup treatment and cleanup status of lands owned by Ounalashka Corporation. There were no other references to Polaris.

⁵ February 28, 2014 KYL letter p. 4

⁶ February 28, 2014 KYL letter p. 2

⁷ Attachment to March 21, 2012 KYL letter.

valuing third party damage claims. NPFC also stated that OPA provides for the recovery of such administrative and adjudicative costs from a Responsible Party (or any person liable under any law) when incurred by the Fund (see 33 U.S.C. § 2715(c)); however, OPA does not provide that a Responsible Party may recover from the Fund any administrative or adjudicative costs it may incur in relation to third party claims. Further, it was unclear to the NPFC whether some of the costs were related to Shoreline Cleanup and Assessment Technique (SCAT) activities, costs that were already compensated under claim J05003-0021 for removal actions.⁸

RP/Claimants' Request for Reconsideration

In a letter dated November 10, 2014, the RP/Claimants requested reconsideration of the denial of the claim. The request for reconsideration included the following arguments: (1) the costs related to a responsible party's efforts to "assess" third-party damage claims are recoverable as "damages" under OPA; (2) allowing a limitation claimant to recover its third-party damage assessment costs is consistent with the language of OPA and the claims regulations; and (3) allowing a limitation claimant to recover its damage assessment costs is consistent with the intent of Congress in enacting OPA.

The RP/Claimants provided additional information and explained that the Polaris costs were incurred to assist the RP in assessing third party damages claims. Specifically, the work descriptions supplied with the invoices listed numerous activities, including land ownership issues, conference calls, spreadsheets, research, communication, generating binders, preparation for meetings, creating DVDs, shoreline data review and proposal, data management, and providing technical support for negotiations.

Additionally, Polaris gathered data to help the RP determine what oiled shoreline segments were owned by a particular landowner and the extent of any oiling to the property. They also developed shoreline data, assembled information to be included in reports regarding cleanup or restoration required, and impairment of the lands. The RP/Claimants state that this information was then used by real estate appraisers and economists to assess the damage claims so the RPs could effectively settle them.

Finally, RP/Claimants cite to the Gatlin Oil Co. v. United States case as evidence that responsible parties may be reimbursed assessment costs associated with damages claims.

NPFC ANALYSIS

OPA provides that a 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 only if the responsible party demonstrates that it is entitled to a defense to liability under section 2703 of this title or demonstrates that it is entitled to a limitation on liability under section 2704 of this title. 33 U.S.C. § 2708(a)(1) and (2).

"Damages" means damages specified in section 2702(b) of this title, and includes the costs of assessing these damages." 33 U.S.C. § 2701(5). OPA damages include: damage to natural

⁸ According to the RP/Claimants' November 10, 2014 request for reconsideration they are only seeking recovery of Polaris costs related to third party claims, not SCAT. See footnote 1, p.7.

resources, loss of profits or impairment of earning capacity, damage to real or personal property, loss of subsistence use, loss of government revenues, and increased cost of public services. 33 U.S.C. §2702(b)(2)(A)-(F).

Relying on the OPA definition of “damages,” which includes the cost of assessing the damages, RP/Claimants broadly interpret OPA to mean that all expenses associated with “the costs of assessment” are reimbursable from the Fund. For the reasons discussed below this claim is denied.

Administrative costs incurred to assist an RP/Claimant in assessing damages claims and costs to support the RPs’ settlement of claims are not costs payable from the Fund.

The OPA definition of “damage assessment” does not include administrative or adjudicative costs and is not so broad as to include every cost incurred by a responsible party as he assesses damages presented to him. RP/Claimants seek \$81,658.10 for costs associated with “non-legal damage assessment claims handling.”⁹ It appears that some of the Polaris costs were to support the RPs’ assessment of third party damages claims. For instance, they prepared binders, arranged meetings, assisted in data management and created DVDs. These are administrative costs associated with RP activities to assess claims and are not reimbursable from the Fund.

Further, in the November 10, 2014, KYL letter the RP/Claimants admit that, “Polaris was retained by the RP/Claimants to assist with third-party claims for damages, and specifically to assess, analyze, review and hopefully settle claims submitted to the RP/Claimants.”¹⁰ They acknowledge that Polaris collected information that was utilized by appraisers and economists to assist the RPs in their settlement discussions.¹¹ For instance, Polaris incurred some costs to determine what oiled shoreline segments were owned by a particular landowner and the extent of oiling to that shoreline. They assembled information reflecting the type of cleanup or restoration likely to be required, and the length of time the property would be impaired or use interfered with by the oil. Thus, it appears that Polaris conducted activities that supported the RPs’ mediation and settlement of claims. If these costs are assessment costs, and the NPFC does not agree that they are, they are costs primarily associated with actions to limit the RPs’ liability and are not reimbursable from the Fund.

RP/Claimants also argue that denying assessment costs associated with a damage claim found to be non-compensable undercuts the efficient resolution of third party claims as contemplated by OPA. In this claim the record shows that Polaris assisted in the RPs’ review and assessment of one of the tribal corporation claims (TDX) and they seek reimbursement of the Polaris costs associated with this claim. As background, the NPFC denied the four tribal corporation claims (including TDX) because the RP/Claimants did not provide sufficient information evidencing that the settled amounts paid to the tribal corporations were for OPA compensable damages.

⁹ RP/Claimants’ argument that the NPFC denial of their assessment costs is contrary to Congressional intent is without merit. They argue that a denial of the assessment costs is a disincentive for a responsible party to assess and pay claims and a claimant would seek reimbursement from the Fund. However, if a responsible party fails to settle a claim a claimant may commence an action in court against the responsible party for those costs or present its claim to the Fund. If the Fund pays those costs it then seeks reimbursement from the responsible party for those costs and if the responsible party fails to pay, the United States will file suit against the responsible party for those costs.

¹⁰ November 10, 2014 KYL letter p. 7

¹¹ March 21, 2012 KYL Letter

RP/Claimants argue that even though the four claims were denied by the Fund the Polaris costs associated with the negotiation and settlement of those claims should be reimbursable from the Fund.

This argument is without merit. OPA contemplates that claimants present their claims to the responsible party in order to provide the responsible party and the claimant an opportunity to assess the claimed damage and then settle the claim. This is advantageous to both parties because it allows a responsible party and a claimant to settle a claim for reasons that may or may not be based on OPA-compensable damages and it avoids litigation between the parties. However, when a claimant – either a responsible party/claimant or a third party claimant - presents a claim to the Fund and the NPFC determines the claim to the Fund is not for OPA-compensable damages neither are the associated assessment costs for that claim reimbursable from the Fund.

Lastly, the RP/Claimants' reliance on Gatlin Oil Company, Inc. v. United States, 169 F.3d 2007 (4th Cir. 1999) as evidence that a responsible party is entitled to recover its costs for assessing damage claims under OPA is mislaid. Gatlin Oil Company is irrelevant to this claim. While it is true that under Gatlin Oil Company, a responsible party may recover its costs to assess its own damages, Gatlin Oil Company is inapposite for two reasons. First, a vandal entered the Gatlin facility and opened storage tanks, which resulted in the discharge of oil. The NPFC determined that Gatlin was entitled to a sole fault third party defense; therefore, Gatlin was no longer a responsible party. Second, Gatlin's claims to the Fund were costs to assess damage to its own facility caused by the discharged oil. The NPFC determined that Gatlin was entitled to a portion of its costs associated with assessing damages to its facility. In the instant case, contrary to Gatlin, the RP/Claimants were assessing and settling claims by third party claimants, not its own damages.

For the reasons stated above this claim is denied on reconsideration.

Claim Supervisor: 

Date of Supervisor's review:

Supervisor Action: *Approved*

Supervisor's Comments: