

CLAIM SUMMARY / DETERMINATION ON RECONSIDERATION FORM

Date	: 06/09/2010
Claim Number	: P05005-144
Claimant	: [REDACTED] DBA Golden Point Marina
Type of Claimant	: Corporate (US)
Type of Claim	: Real or Personal Property
Claim Manager	: (b) (6)
Amount Requested	: \$144,511.08

I. BACKGROUND:

Oil Spill Incident:

On 26 November 2004, the Cypriot-flagged tank vessel ATHOS I struck a submerged anchor as it approached the CITGO Asphalt Refining Company terminal at Paulsboro, New Jersey. The anchor punctured the hull and caused the release of Venezuelan crude oil into the Delaware River. The federal on-scene coordinator (FOOSC) issued a Notice of Federal Interest designating the vessel's owner, Frescati Shipping Company Limited, as the Responsible Party (RP). The RP denied all claims under the Oil Pollution Act of 1990 (OPA). The National Pollution Funds Center (NPFC) advertised for claims relating to the oil spill, so claimants were eligible to submit claims directly to the Oil Spill Liability Trust Fund through the NPFC.

Claimant:

The claimant owns a marina, Golden Point Marina, located along the Delaware River at Front and Jansen Streets in Essington, Pennsylvania. At the time of the spill, the claimant had begun renovation and expansion of the marina.

Synopsis of Claims Process

In his initial claim submission dated November 2007, Claimant sought reimbursement for real and personal property damage at the marina in the amount of \$935,991.00¹. This amount represented costs for materials to replace docks, walkways and to install pilings at Golden Marina. The Claimant submitted undated pictures that evidenced some oiling on the docks and walkways.

The NPFC requested further information and documentation needed to adjudicate the claim. In an e-mail dated August 6, 2008, Claimant stated that a cleanup contractor came to the property and cleaned oil throughout the property including a parking lot, a house and the riverbank adjoining the marina. On or about May 9, 2009, the Claimant reduced his claimed amount to \$144,511.08, and submitted documentation reflecting his costs to repair the docks, pilings and walkways. The documentation consisted of invoices from P and C Construction LLP., dated from May 6, 2005 through April 11, 2008. The invoices included labor costs for disassembling 25 finger docks, inspecting and power washing them and replacing wood decking. The costs included heavy equipment rental, boat rental and providing a container for waste storage and removal. The invoices provided no information as to whether these costs were for oil removal

¹ In his initial claim, Claimant also sought reimbursement of lost profits resulting from the discharge of oil in the amount of \$35,247. Claimant did not seek reconsideration of denial of the lost profits claim.

activities, for materials to replace oiled docks and walkways, or for further renovation and expansion of the marina.

The NPFC denied the claim on August 12, 2009, stating that the Claimant had not met his burden of proving that the claimed damages were caused by the spill and did not provide the value of such damages. Additionally, the NPFC found that if the claimed costs were for removal costs, the claimant had not met his burden of showing that the activities were directed by the FOSC or determined by the FOSC to be consistent with the National Contingency Plan.

In a letter dated September 15, 2009 from his attorney, the Claimant seeks reconsideration of the NPFC's initial decision to deny the claim based on the NPFC's finding that the Claimant failed to meet his burden of proving that the costs incurred to repair the damages to his marina were the result of the discharge of oil from the ATHOS I. The Claimant again argues that his marina was significantly damaged by the Athos I oil spill, and damages total \$144,511.08. Claimant also asserts that the documentation provided by the Claimant supports its claim that the spill damaged the marina property. Claimant further asserts that he does not bear the burden of refuting or rebutting evidence proffered by the NPFC.

II. APPLICABLE LAW on RECONSIDERATION:

The Oil Spill Liability Trust Fund (OSLTF) is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages.

A claimant must establish that the removal actions were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. See 33 CFR Part 136.203(c)

Compensable damage types are natural resource damages, damage to real or personal property, loss of subsistence use of natural resources, lost government revenues, lost profits or impairment of earning capacity, and increased costs of public services. See 33 U.S.C. 2702(b)(2).

The provisions of 33 CFR 136.213 – 136.217 provide the details for claims for real or personal property damages. 33 CFR 136.215 provides the proof requirements. The claimant must provide proof of the cost of repair or replacement, and the value of the property before and after the spill. Under 33 CFR 136.217, the amount of compensation for damaged property is the lesser of (1) actual or estimated net cost of repairs necessary to restore the property to substantially the same condition which existed immediately before the damage; (2) the difference between the value of the property before and after the damage; or (3) the replacement value.

Under 33 CFR 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.

III. CLAIMANT'S REQUEST FOR RECONSIDERATION

The claimant seeks reconsideration of the NPFC's decision to deny his claim. In doing so, the claimant argues generally that his claim satisfies all necessary criteria under the Oil Pollution Act

of 1990 (OPA). He argues that he must only provide evidence to support his claim, which he argues he did, and does not bear the burden of refuting or rebutting evidence proffered by the NPFC. As referenced above at 33 CFR 136.105, the claimant bears the burden to prove its claim, i.e., to show that the uncompensated damages or removal costs were incurred as a result of a discharge of oil. In the case of removal costs, claimant must show that the removal actions were consistent with the National Contingency Plan (NCP) or approved by the FOSC. In the case of damages claimant must provide proof of the value of the losses in three forms: (1) repair costs; (2) replacement costs; and (3) difference in value before and after the spill. If sufficiently proven, a claimant would be entitled to the lesser of these values.

To support his request for reconsideration, the claimant provided two affidavits. The first affidavit, signed, dated and notarized on September 15, 2009, states that Claimant received a new permit for construction on October 12, 2005, to accommodate planned expansion of the marina.² Claimant also stated that pilings and floating docks associated with the planned expansion were being stored in the water at the time of the release of oil and were impacted by the discharge. The Claimant acknowledged that he contacted Hudson Marine Management Services, the company accepting claims for the responsible party and was assigned Claim No. 565. Claimant also notes that he attended meetings with other marina owners and local governmental officials to discuss the damages to the marinas and the claims process. Claimant avers that some cleanup was conducted along the shoreline adjoining the marina between February 21, 2005, and February 23, 2005. A cleanup crew attempted to power wash one of the marina's walkways; however, the power wash damaged the walkway and no further attempts were made to clean the docks or walkways. Claimant states that no other cleanup was conducted at the marina.³ Finally, Claimant states that between March 2005 and June 2008, he removed the oiled docks, power washed them and replaced necessary wood impacted by the oil.

The second affidavit was unsigned and undated. Attached to this affidavit were sixteen photos, most of which the Claimant stated were taken on February 25, 2005 at the marina. The photos reflect some oiling on several docks. Some photos reflect many bags of oiled debris that were to be picked by response crews. Some photos evidence oil in the water surrounding the marina. There is no good photo reflecting 25 docks or walkways rafting in the water. The Claimant's attorney points out that this February 25, 2005, date is after the response contractor had completed its activities at Golden's property. However, since the photos are not dated, they cannot be verified independent of the Claimant's statements in the affidavit.

IV. NPFC's Analysis on Reconsideration

The NPFC's initial determination denying reimbursement noted that the Claimant likely suffered some damages from the discharge of oil from the ATHOS I. The Golden Point Marina was in the area of impact. However, the Claimant did not, in his initial claim, clearly identify the damage or show that the costs associated with the damage were a result of the oil spill. He did not provide a valuation of the property just before and just after the damage or the replacement value of the damaged docks or walkways, even though he asserted that he had to replace oiled docks and walkways. Alternatively, he argued that the Coast Guard failed to conduct needed removal

² Claimant submitted a copy of the Army Corps permit, which included diagrams and schematics showing substantial expansion of the marina, including the construction of three new dock sections and new slips and finger docks.

³ However, this assertion conflicts with claimant's August 6, 2008 e-mail to the NPFC stating that cleanup crews had cleaned oil from a parking lot, residence and shoreline at the marina.

activities; therefore, he conducted the removal activities. Under either theory for recovery, i.e., property damage or removal costs, the claimant's claimed amount is \$144,511.08. For the reasons discussed below, Claimant's submitted documentation does not support reimbursement under either theory because it does not meet the burden of proof by a preponderance of the evidence.

Claimant's submitted evidence is: (1) undated pictures showing some oil in the water surrounding Golden Point Marina, and some minor oiling of docks and walkways, (2) two affidavits, (3) invoices from a construction company dated from March 2005 through June 2008, and (4) a 2005 Army Corps permit and some accompanying drawings reflecting Claimant's proposed expansion of the marina.

The Coast Guard evidence representing cleanup activities and status reports specific to cleanup activities and status reports at Golden Point Marina are as follows:

1. Marina Ready for Decon – 2/17/05 – tasking number D21, brief description of the marina dock and fingers, and that Mr. (b) (6) gave permission to decontaminate 240 linear feet of dock with 5 finger docks.
2. Marina Ready for Decon – 2/20/05 – Decon started in PM.
3. Unit Lot – 2/21/05 – States “Golden Point was started yesterday.”
4. Marina Ready for Decon – 2/22/05 – 75% complete by end of day.
5. Marina Ready for Decon – 2/23/05 – 80% complete. Must work with the tide on last 20%.
6. ICS 209 – Incident Status Summary – 4/16/2005 – 4/18/2005. These summaries show Marina Decon Status as of 3/20/05, including Golden Point Marina with a 100% Decon Status.
7. ATHOS I Incident Response Shoreline Sign-Off Record – 5/9/05 – Division PA-5, Segment C (within which Golden Point Marina was located) signed off by the FOSC and the State onscene coordinators (SOSCs).
8. ATHOS I Incident Response Shoreline Sign-Off Inspection Form for PA-5C – “Golden Point – Looked OK – Observed 5/7/05. Accessed by boat.”

The Coast Guard's cleanup contractor conducting removal activities in the area of Golden Point Marina was The O'Brien's Group. This group prepared “Marina Decontamination Procedures” for cleanup of oil on the Delaware River and the surrounding marinas. Golden Point Marina is listed as an affected area on O'Brien's documentation. Also, there is a document in the record, “Marina Ready for Decon,” dated February 17, 2005, noting that Mr. (b) (6) gave permission to clean 240 linear feet of dock with five fingers. (Tasking Number D 21) A second “Marina Ready for Decon”, dated February 20, 2005, notes that the cleanup at the marina began on February 20, 2005. Related documents reflect that cleanup at Golden Point Marina was ongoing from February 17, 2005 through February 20, 2005. A Shoreline Sign-Off Inspection Form, dated May 4, 2005, with a later handwritten addendum evidences that Golden Point Marina was inspected by boat on May 7, 2005 and it “looked good.”

Claimant's primary argument is that his costs (\$144,511.08) were incurred to inspect, power wash and repair 25 finger docks, remove and repair main docks, and remove, dispose of and replace 26 pilings. In anticipation of the renovation and expansion of the marina, these docks and pilings were allegedly stored in the water because there was insufficient area at the marina to store them. He asserts that his actions were taken because the finger docks, docks and pilings

were oiled by the discharge of oil and the Coast Guard failed to conduct removal activities on these docks and pilings.

Claimant's allegations are in conflict with the Coast Guard evidence. The inspectors inspected the marina by boat on May 7, 2005, and would be able to see if there were oiled walkways and docks rafting in the water or other oiled property requiring additional cleanup activities. Since they signed off on Golden Point Marina, without further evidence from the Claimant, i.e., pictures reflecting the 25 oiled walkways and docks rafting in the water, we must assume that there was no further cleanup required at the marina.

Importantly, there is a conflict between the Claimant's documentation asserting damage to 25 finger docks and walkways and the Coast Guard records evidencing that the Claimant approved the cleanup of 240 linear feet of dock and five finger docks. Thus, Claimant has not proven that there were 25 docks rafting in the water or, alternatively, that the docks were in the water and they were oiled. Without such evidence, Claimant has not met his burden of proving that oil from the ATHOS I caused his damage, rather than costs associated with the renovation and expansion of his marina.

Even if Claimant conducted removal actions on the docks and walkways, he has not shown that the cleanup was approved by the FOSC or deemed consistent with the NCP. Removal costs are not compensable without FOSC approval. While he did submit invoices reflecting labor costs for disassembling, cleaning and reinstalling finger docks for this time period, there is no documentation evidencing that the FOSC approved the cleanup or deemed it consistent with the NCP. Further, the Coast Guard removal actions in the area continued until June 21, 2005. The Claimant was familiar with cleanup contractors because he gave permission for them to clean 240 linear feet and five finger docks. He was in communication with other marina owners in the area. If in fact the Coast Guard failed to conduct all removal actions at the Golden Point Marina, Claimant could have requested that the FOSC conduct further cleanup activities at the marina, approve his removal actions or deem them consistent with the NCP. There is no record reflecting that Claimant acted on any of these options.

V. DETERMINATION ON RECONSIDERATION

Based on the analysis above, Claimant's request for reconsideration is denied.

IV. AMOUNT: \$0.00

Claim Supervisor: Thomas S. Morrison
Date of Supervisor's review: 6/10/10
Supervisor Action: DENIED
Supervisor's Comments: DENIED ON RECONSIDERATION