

CLAIM SUMMARY / DETERMINATION FORM

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| Claim Number | : J05003-0004 |
| Claimant | : IMC Shipping Co. Pte. Ltd., Ayu Navigation Sdn Bhd, & The Swedish Club |
| Type of Claimant | : Corporate (US) |
| Type of Claim | : Removal Costs |
| Claim Manager | : [REDACTED] |
| Amount Requested | : \$3,690,621.97 ¹ |

I. INCIDENT

The M/V SELENDANG AYU (the vessel) was on a voyage from Seattle to China when, on the morning of December 6, 2004² while operating in adverse weather conditions, the crew shut down the main engine as a result of a casualty to the No. 3 cylinder. The vessel drifted toward Unalaska Island and eventually grounded on December 8 on a rocky shelf on the north shore of Unalaska Island, northeast of Spray Cape. The grounding ruptured the vessel's bottom tanks, releasing approximately 330,000 gallons³ of bunkers into the waters off Unalaska Island.

II. CLAIMANT AND CLAIM

The Claimants are the OPA responsible parties and their insurers. Ayu Navigation Sdn Bhd was the owner of the vessel and IMC Shipping Co. Pte. Ltd. was the operator of the vessel. Sveriges Angfartygs Assurans Forenging (The Swedish Club), members of the International Group of Protection and Indemnity Clubs ("International Group"), and the International Group's re-insurers were their subrogated underwriters.

III. PROCEDURAL BACKGROUND:

Pursuant to 33 U.S.C. § 2708(a)(2) Claimant presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) seeking a limit on its liability for the incident. At the time of the incident the applicable limit per ton was \$600; the gross tonnage for the *Selendang* was 39,755 gross ton; therefore, its limit on liability, if granted, was \$23,853,000.00. The Claims Adjudication Division conducted an analysis of evidence and facts and determined that IMC Shipping Co. Pte. Ltd, et al demonstrated entitlement to its limit of liability on 27 January 2012.

IV. REMOVAL COST CLAIM

Claimant asserts that it incurred approximately \$148,651,185.13 in removal costs and hired 153 vendors to conduct the removal actions. The removal actions at the site ended on or about 23 June 2006, per a Pollution Report (PolRep) #110 dated 27 June 2006 issued by the FOSC for this incident. As required by 33 CFR 136.203, the RP worked closely with the FOSC throughout the response; MSO Anchorage provided FOSC coordination.

Based on the magnitude of the costs associated with this response, the NPFC anticipates that adjudication of this claim will be lengthy. Claimant and the NPFC agreed to adjudicate the costs on a phased basis. The NPFC will separate the claim into smaller claims, based on vendors. Each smaller claim will bear a separate claim number and after adjudication the NPFC will offer an amount for that claim. Claimant may accept the offer or request reconsideration pursuant to the Claims Regulations at 33 CFR Part 136.

¹ The NPFC corrected the Amount Requested to be \$3,694,373.42.

² See, Claimant Submission, Attachment 24, Government's Videotape Deposition of [REDACTED] Vol. I, 00074.

³ See, Claimant's submission letter, page 3, paragraph 3.

V. THIRD REMOVAL COSTS CLAIM DETERMINATION⁴

The NPFC adjudicated this third claim (J05003-0004) in the amount of 3.69M. The RP, through its legal representative, provided 13 binders of invoices to document the \$3.694M in removal costs claimed in this third determination package for costs associated with the following response vendors: Alaska Industrial Hardware, Alaska Ship Supply, Alexander Gow, Black Enterprise, Emerald Alaska, Inc., F/V Patricia Lee, Inc., GCI, Joey H. Echevarria, K.H. Colburn, Inc., Marine Specialties of Alaska, NET Systems, and Randall Baker. The NPFC claims manager reviewed each and every submitted invoice as well as every "daily" sheet submitted to substantiate the invoices. Additionally, the NPFC claims manager reviewed the payment record against the claimed costs for each invoice. See Enclosure (1) for the summary spreadsheet of costs that make up this third determination and amount allowed for each invoice.

The review of the actual costs, invoices and dailies focused on (1) whether the actions were taken to prevent, minimize or mitigate the effects of the incident; (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOsc to be consistent with the NCP or directed by the FOsc, and (4) whether the costs were adequately documented.

Please see Enclosure (1) for an itemization of the vendor invoices and their associated documents, which make up this third claim determination. This determination is only deemed full and final for the identified vendor invoices located in Enclosure (1).

| <u>Vendor</u> | <u>Binder #</u> | <u>Amount Claimed</u> | <u>NPFC Approved</u> | <u>NPFC Denied</u> |
|------------------------------|-----------------|-----------------------|-----------------------|--------------------|
| Alaska Industrial Hardware | 1 | \$5,319.18 | \$5,257.26 | \$61.92 |
| Alaska Ship Supply | 73 | \$81,421.99 | \$79,764.44 | \$1,657.55 |
| Alexander Gow | 1 | \$94,294.63 | \$93,162.06 | \$1,132.57 |
| Black Enterprise | 189 | \$42,339.23 | \$42,189.55 | \$149.68 |
| Emerald Alaska, Inc. | 113 | \$218,225.72 | \$206,230.48 | \$15,559.24 |
| F/V Patricia Lee, Inc. | 183 | \$1,280,717.30 | \$1,280,717.04 | \$26 |
| GCI | 114 | \$18,347.51 | 18,347.43 | \$0.08 |
| Joey H. Echevarria | 189 | \$50,808.03 | 46,670.00 | \$4,138.03 |
| K.H. Colburn, Inc. | 174-176 | \$1,132,116.94 | \$1,132,117.44 | \$60.50 |
| Marine Specialties of Alaska | 182 | \$715,900.00 | \$715,900.00 | \$0.00 |
| NET Systems | 119 | \$216.13 | \$0.00 | \$216.13 |
| Randall Baker | 189 | \$50,870.31 | \$48,240.00 | \$2,756.76 |
| Total | | 3,690,621.97 | \$3,668,595.70 | \$25,777.72 |

Claimant's sum certain for this claim is \$3,690,621.97. The claims manager determined, as more fully discussed below, that the Claimant was in error when it identified the claimed amount for the following four vendors included in this claim determination: Emerald Alaska, Inc., F/V Patricia Lee, Inc., K.H. Colburn, Inc., and Randall Baker. The Claimant understated the claimed amount for these vendors by a total amount of \$3,751.45. Thus; the corrected sum certain is \$3,694,373.42.

The NPFC has determined that \$25,777.72 is not compensable from the OSLTF and will offer the Claimants \$3,668,595.70. As noted above, the NPFC deducted the RP's statutory limit on liability

⁴ The NPFC adjudicated the first removal cost claim, Claim Number J05003-001, in the amount of \$24,500,453.89. The NPFC deducted the statutory limit on liability of \$23,853,000.00 and offered \$546,484.54 as full and final compensation on or about May 21, 2012. Claimants accepted the offer on June 7, 2012. The NPFC adjudicated the second removal claim, Claim Number J05003-003, and offered \$2,168,445.20 to the Claimants on June 26, 2012. At this time Claimants have not responded to the offer.

from the amount determined to be compensable under claim # J05003-001. Thus, \$3,668,595.70 is payable from the Oil Spill Liability Trust Fund.

VI. APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90. A responsible party's liability will include "removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan". 33 USC § 2702(b)(1)(B).

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, 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. Removal costs are defined as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident".

The responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of discharge of oil, may assert a claim for removal costs and damages under section 2713 only if the responsible party demonstrates that it is entitled to a defense to liability under section 2703 or to a limitation of liability under section 2704. 33 USC § 2708(a)(1) and (2).

33 U.S.C. §2713(d) provides that "If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund."

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.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, "a claimant must establish -

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC."

Under 33 CFR 136.205 "the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC." [Emphasis added].

VII. DETERMINATION OF LOSS:

A. Findings of Fact:

1. MSO Anchorage, as the FOSC for this incident, determined that the actions undertaken by the Claimant are deemed consistent with the NCP. 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4);
2. The incident involved the discharge of "oil" as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters;
3. A Responsible Party was identified. 33 U.S.C. § 2701(32).
4. The claim was submitted within the six-year period of limitations for claims. 33 U.S.C. § 2712(h)(2);
5. The NPFC Claims Manager reviewed all documentation submitted with the claim and determined which removal costs were incurred for removal actions in accordance with the NCP and whether the costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205. The Claims Manager also identified denied costs and the grounds for denial.

B. Analysis:

NPFC CA reviewed the actual cost invoices and dailies to confirm that the Claimant had obtained all rights, claims and causes of actions for the costs claimed. The review focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

The NPFC has determined that the majority of costs incurred by the Claimant in this third claim determination were reasonable and necessary to mitigate the effects of the incident. Upon review of the information provided by the Claimant, the NPFC has determined that the costs were billed in accordance with the rate schedules and/or contracts/charter agreements in place at the time the services were rendered, unless otherwise indicated below, and were determined to be consistent with the NCP.

Itemizations of denied costs are broken down by Vendor invoice:

Alaska Industrial Hardware – Inv # 848453:

- The NPFC denied \$29.96 for an overcharge of rakes. The purchase request (PR) authorized 200 and this invoice purchased 204; therefore, the NPFC denied the cost of 4 rakes;
- The NPFC denied \$31.96 for an overcharge of pitchforks. The PR request authorized 100 and this invoice purchased 102; therefore, the NPFC denied the cost of 2 pitchforks.

Total Denied: \$61.92

Alaska Ship Supply – Check # 1715:

- Inv # 40003529 – no purchase request for the purchase of bomber jacket;

- Inv # 40003278 – purchase request is for rain gear not bomber jacket – deny;
- Inv # 40003528 – purchase request is for only 1 not two; therefore, one rainier is denied;
- Inv # 40008423 – this invoice was paid under check # 1228 and thus is denied under check # 1715.

Total Denied: \$1,657.55

Alexander Gow – Inv # 241022-K/P:

- Royal Coachman Inn bill in the amount of \$71.68, NPFC denied because GMS did not pay this charge; therefore, it is not uncompensated;
- The NPFC denied \$1,601.90 for an Alaska Airline charge on 5/11/05 because the NPFC paid that charge under invoice # 241149-KP;
- The NPFC denied \$31.00 for beer charges between 5/16 & /18 on the Grand Aleutian charge;
- The NPFC denied \$242.03 in Markup charges because the underlying costs are denied;
- The NPFC denied \$1.74 on a food receipt on 4/10/05. Receipt was for \$20 and claimant requested \$21.74; therefore, the difference is unsupported;
- The NPFC denied the following charges for no receipts: \$161.00 for auto reimbursement, \$41.00 for long distance charges, and \$40.00 for parking;
- The NPFC denied \$18.01 in Markup charges because the underlying costs are denied;

Total Denied: \$1,132.57

Black Enterprise – Inv # 05-09:

- The NPFC denied \$149.68 in cost for repairs for damages made to a skiff by the Equipment Operator.

Total Denied: \$149.68

Emerald Alaska – Inv # 6200:

- The NPFC denied 11 separate charges for damages that occurred to tanks in the total amount of \$8,582.04. See Encl (1) for an itemization of which tanks were damaged

Inv # 6505:

- The NPFC denied 4 separate charges for damages to rental tanks in the amount of \$6,977.20. See Encl (1) for an itemization of which tanks sustained damage.

Total Denied: \$15,559.24

F/V Patricia Lee – Inv # 81005:

- The NPFC denied \$0.26 as the RP overpaid the invoice. The RP has the invoice listed as \$ 1,624.17 when in fact the items on the invoice total \$1,623.91; therefore, the NPFC denied the overage.

Total Denied: \$0.26

GCI – Inv # 8660872:

- The NPFC denied \$0.08 due to a miscalculation on the invoice.

Total Denied: \$0.08

Joey Echevarria – Inv # 502:

- The NPFC denied \$1,188.03 in repairs for damage to skiffs in May 2005;
- The NPFC denied \$2,950.00 in repairs for damage to skiffs in Sept 2005.

Total Denied: \$4,138.03

K.H. Colburn – Inv # 20:

- The NPFC denied \$.50 of this invoice. The invoice was for \$25,169.28 but GMS only paid \$25,168.78; therefore, the difference not paid is denied;

Inv # 34:

- GMS denied 1 passenger victuals in the amount of \$40.00; therefore, the NPFC denied the same amount even though GMS paid the invoice 100% in error;

Inv # 52:

- GMS denied \$20.00 in passenger victuals; therefore, the denied the amount not paid.

Total Denied: \$60.50

Net Systems – Inv # 32386:

- The NPFC denied this entire invoice because it is for the replacement of a sewage pump on the F/V Exito that was still under warranty. Also the vessel was charged at a daily rate which covered all costs incurred while on charter.

Total Denied: \$216.13

Randall Baker – Inv #003:

- GMS denied \$126.45 on Invoice # 03; therefore, the NPFC denied the cost as not incurred by the Claimant;

Inv # 007:

- The NPFC denied \$88.71 in repairs for damage to skiffs;
- The NPFC denied \$2,541.60 in repairs for damage to skiffs.

Total Denied: \$2,756.76

OVERALL DENIED COSTS = \$25,777.72

The NPFC notes that the Summary Sheets for Emerald Alaska, Inc., F/V Patricia Lee, Inc., K.H. Colburn, Inc. and Randall Baker included numerous accounting and mathematical errors. The NPFC claims manager could not, and did not, rely on these sheets when adjudicating this claim. Additionally, the claims manager could not easily review the invoices because adjustments to certain invoices were either not documented or not well organized in the binders. While the final determination may not reflect these difficulties the accounting errors and disorganization of the

invoices in the binders were time consuming and resulted in longer periods of time required to reconcile the invoices and to adjudicate this claim.

VIII. SUMMARY

All costs determined payable included in this determination have been reviewed and determined to be compensable as presented and in accordance with 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136.203 and 136.205. The costs determined to be payable are for uncompensated removal costs that are determined to be consistent with the National Contingency Plan.

The NPFC hereby determines that the NPFC offers, and the OSLTF is available to pay, **\$3,668,595.70** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # J05003-0004.

AMOUNT: \$3,668,595.70

Claim Supervisor:

Date of Supervisor's review: *6/28/12*

Supervisor Action: *Approved*

Supervisor's Comments: