

CLAIM SUMMARY / DETERMINATION FORM

Claim Number : J05003-0016
Claimant : IMC Shipping Co. Pte. Ltd., Ayu Navigation Sdn Bhd, and The Swedish Club
Type of Claimant : Corporate (US)
Type of Claim : Limit of Liability
Claim Manager : [REDACTED]
Amount Requested : \$15,665,760.01¹

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 Forening (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 anticipated that adjudication of this claim will be lengthy. Claimant and the NPFC agreed to adjudicate the costs on a phased basis. The NPFC separated the claim into smaller claims, based on vendors. Each smaller claim bears a separate claim number and after adjudication the NPFC will offer an

¹ Claimant's Requested Amount is in error; the Claims Manager corrected the Sum Certain to \$15,686,116.55.

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.

amount for that claim. Claimant may accept the offer or request reconsideration pursuant to the Claims Regulations at 33 CFR Part 136.

V. FIFTH REMOVAL COSTS CLAIM DETERMINATION⁴

The NPFC adjudicated this fourth claim (J05003-0016) in the amount of 15.6M. The RP, through its legal representative, provided 26 binders of invoices to document the \$15.6M in removal costs claimed in this fifth determination package for costs associated with the following response vendors: Aramsco, Crowley, Labrador, Magone, MT Mitchell, Q&S Enterprises, Inc – EXITO, Roger Rowland – Commitment, Silent Lady and Solution Rentals. 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 fourth 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 fifth 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>
Aramsco	81	\$1,614,475.94	\$1,579,921.65	\$35,936.44
Crowley	172	\$912,074.98	\$912,074.98	\$0.00
Labrador – Co-Owners	177	\$1,038,874.03	\$1,038,874.03	\$0.00
Magone Marine	191-208	\$5,746,575.45	\$5,727,601.77	\$18,973.68
MT Mitchell	179-181	\$5,033,864.63	\$5,033,809.57	\$15,781.45
Q & S Enterprises	173	\$708,120.20	\$708,120.20	\$2,315.00
Roger Rowland - Commitment	182	\$103,148.50	\$103,148.50	\$933.00
Silent Lady	186	\$260,720.00	\$260,320.00	\$400.00
Solution Rentals	186	\$247,906.28	\$247,906.28	\$0.00
Total		\$15,665,760.01	\$15,611,776.98	\$74,339.57

Claimant’s sum certain for this claim is \$15,665,760.01. The claims manager determined, as more fully discussed below, that the Claimant was in error when it identified the claimed amount for every vendor included in this claim determination. The Claimant understated the claimed amount for these vendors by a total amount of \$20,356.54. Thus; the corrected overall sum certain is \$15,686,116.55.

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. Claimants accepted the offer on August 6, 2012. The NPFC adjudicated the third removal claim, Claim Number J05003-0004, and offered \$3,668,595.70 to the Claimants on July 3, 2012. Claimants accepted the offer on August 6, 2012. The NPFC adjudicated the fourth removal claim, Claim Number J05003-0015, and offered \$23,103,264.96 to the Claimants on August 20, 2012. Claimants accepted the offer on September 11, 2012.

The NPFC has determined that \$74,339.57 is not compensable from the OSLTF and will offer the Claimants \$15,611,776.98. As noted above, the NPFC deducted the RP's statutory limit on liability from the amount determined to be compensable under claim # J05003-001. Thus, \$15,611,776.98 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". 33 U.S.C. § 2701(31).

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 fourth 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:

AramSCO:

- Inv # A95430 - NPFC denied \$81.00. The shipment contained one less than the amount invoiced;
- Inv # A3652 – NPFC denied \$81.00. Invoice billed a quantity of 210 when the Resource Request was only for a quantity of 209 and the delivery receipt shows only 209 delivered. Difference is denied;

- Inv # A95423 – NPFC denied \$1,625.00. There was no Resource Request issued although GMS accepted shipment despite no prior authorization;
- Inv # A95423 – NPFC denied \$1,040.40. There was no Resource Request issued although GMS accepted shipment despite no prior authorization;
- Inv # A1316 – NPFC denied \$1,648.08 as the incorrect rate was charged for outer gloves so NPFC reduced unit price to proper rate;
- Inv # A1316 – NPFC denied \$512.00 as GMS reduced the amount of tax paid therefore the cost is not uncompensated;
- Inv # A3554 – NPFC denied \$3,737.49 in freight charges since GMS check payment # 1421 paid the invoice amount only and not the freight therefore the cost is not uncompensated;
- Inv # A6023 – NPFC denied \$1,848.00 as the incorrect rate was charged for tyveks. NPFC reduced to proper rate amount;
- Inv # 100369 – NPFC denied \$1,190.00 as the Resource Request for was a quantity of 365 vice the 400 billed. The shipment contained only 365 therefore difference is denied;
- Inv # 100368 – NPFC denied \$1,635.00 as the incorrect rate was charged for outer gloves so NPFC reduced unit price to proper rate;
- Inv # 100368 – NPFC denied \$3,280.32 as GMS did not pay the full freight charge therefore the difference is denied as not uncompensated;
- Inv # 100370 – NPFC denied \$2,502.00 as the incorrect rate was charged for tyveks. NPFC reduced to proper rate amount;
- Inv # A1325 – NPFC denied \$9,720.00 for 120 tyveks as there was no Resource Request for these items;
- Inv # A1325 – NPFC denied \$6,839.00 of freight as it was billed later under Inv # 119111;
- Inv # 105318 – NPFC denied \$189.00 as the invoice billed for a quantity of 5004 but only 4920 were delivered therefore the difference is denied;
- Inv # 105318 – NPFC denied \$8.15. The tax was reduced due to the quantity shipped reduction above;

Total Denied for Aramsco : \$35,936.44

Magone Marine:

- Inv # 29851 – NPFC denied \$.01 which is a rounding issue;
- Inv # 29870 – NPFC denied \$383.62 as no supporting documentation or GMS audit provided;
- Inv # 29903 – NPFC denied \$314.64 as the services were to repair damages which are not compensable;
- Inv # 42061 – NPFC denied \$77.25 in labor costs on 4/14 in the amount of \$75.00 due to a miscalculation by Magone and the associated 3% tax reduction based on the denied labor costs;
- Inv # 42070 – NPFC denied \$154.50 in labor costs on 4/23 for D. Magone as amt was denied by GMS therefore the cost is not uncompensated. NPFC also denied \$4.50 in 3% tax reduction based on the denied labor costs;
- Inv # 42098 – NPFC denied \$631.03 as \$612.65 are unidentified costs and \$18.38 in 3% tax reduction based on the denial of unidentified costs. GMS also denied these same costs and as such these costs are not uncompensated;
- Inv # 42132 – NPFC denied \$6,488.53 as GMS applied an incorrect adjustment of (\$3,893.40) because GMS failed to account for MMS Credit Memo of (\$1,980.00);

- Inv # 42138 – NPFC denied \$630.00 as GMS failed to account for MMS Credit Memo 42961 in the amount (\$630.00) causing an overpayment;
- Inv # 42189 – NPFC denied \$1,313.50 as GMS failed to account for MMS Credit Memo 42961 in the amount of (\$1,313.50) causing an overpayment;
- Inv # 42223 – NPFC denied \$1,732.23 of which \$981.00 is for labor, \$60.00 is for equipment, \$31.23 is the 3% tax reduction resulting from denied costs and GMS failed to account for MMS Credit Memo 42961 in the amount of (\$659.99) which caused an overpayment;
- Inv # 42253 – NPFC denied \$5,418.13 which consists of \$5,187.50 in labor costs and \$155.63 in 3% tax reductions as a result of denied costs. GMS originally indicated they made an audit adjustment of (\$5,231.37) but then later paid that amount under check 1902 thereby wiping away the adjustment in error;
- Inv # 42254 – NPFC denied \$959.39 which is the result of a debit adjustment made by GMS because Magone miscalculated the 3% tax. Because Magone did not issue a Debit Memo, the NPFC cannot pay for an amount not invoiced by Magone and as such, the GMS debit is denied;
- Inv # 42260 – NPFC denied \$126.18 as these charges are for damage repairs which are not compensable and therefore denied;
- Inv # 42272 – NPFC denied \$240.76 which is \$233.75 in labor costs and \$7.01 in the 3% tax reduction resulting from denied labor costs;
- Inv # 42399 – NPFC denied \$.01 as a rounding error;
- Inv # 42851 – NPFC denied \$550.50 which is associated with a mob/demob charge of \$400.00 based on sworn testimony but not invoiced therefore the NPFC cannot pay for something not invoiced by Magone and \$150.00 is denied for duplicate labor hours billed on Henning Construction invoice and then again billed on Magone invoice;
- Inv # 42850 – NPFC denied \$.01 as a rounding error;
- NPFC applied a credit of \$46.61 at the conclusion of the adjudication for an crediting an overage made.

Total Denied for Magone Marine : \$18,973.68

MT Mitchell:

- Inv # 20050631 – NPFC denied \$50.00 which was an adjustment made by GMS therefore this amount is not uncompensated;
- Inv # 20050713 - NPFC denied \$50.00 which was an adjustment made by GMS therefore this amount is not uncompensated;
- Inv # 20050815 - NPFC denied \$350.00 which was an adjustment made by GMS therefore this amount is not uncompensated;
- Inv # 20050931 – NPFC denied \$11,894.88 which was an adjustment made by GMS therefore this amount is not uncompensated;
- Inv # 20060228 – NPFC denied \$754.97 which was carpet replacement due to damaged carpeting – not compensable;
- Inv # 20060531-1 - NPFC denied \$40.00 which was an adjustment made by GMS therefore this amount is not uncompensated;
- Inv # 20060615-1 - NPFC denied \$866.80 which was an adjustment made by GMS therefore this amount is not uncompensated;
- Inv # 20060630-2 - NPFC denied \$1,774.78 which was an adjustment made by GMS therefore this amount is not uncompensated.

Total Denied for MT Mitchell : \$15,781.45

Q & S Enterprises - EXITO:

- Inv # 20805 – NPFC denied \$540.00 in costs adjusted by GMS therefore these costs are not uncompensated;
- Inv # Exito 28 – NPFC denied \$680.00 for per diem counted twice for 17 passengers; \$35.00 denied for per diem adjusted by GMS therefore the costs are not uncompensated; 540.00 for GMS adjustments made for week 3 therefore the costs are not uncompensated; \$1,000.00 for per diem charged for 25 unidentified passengers; \$40.00 denied for Bill Chace per diem not invoiced by vendor on 6/13 but paid by GMS; and \$20.00 denied for a GMS discrepancy.

Total Denied for Q & S Enterprises - EXITO : \$2,315.00

Roger Rowland - Commitment:

- Inv # 10029 – NPFC denied \$933.00 associated with the additional insurance required by GMS and its associated tax that was denied by GMS therefore these costs are not uncompensated.

Total Denied for Roger Rowland - Commitment : \$933.00

Silent Lady:

- NPFC denied \$400.00 on the basis that the food cost amount billed on invoice 1003 was calculated at \$40.00 per day, per crewmember, times 107 man days, which equaled \$4,280. The individual days chartered and respective crew complement at a rate of \$40.00 per day calculates to \$3,880. This \$400.00 line item represents the excess amount billed that could not be demonstrated based on the manner in which the days chartered have been itemized on this spreadsheet. Because there is no evidence to support this \$400.00 in food/meal costs, the NPFC denies this amount.

Total Denied for Silent Lady : \$400.00

OVERALL DENIED COSTS = \$74,339.57

The NPFC notes that the Summary Sheets for the vendors associated with this determination 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

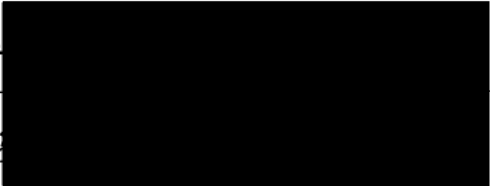
consuming and resulted in longer periods of time required to reconcile the invoices and to adjudicate this claim.

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, **\$15,611,776.98** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # J05003-0016.

AMOUNT: \$15,611,

Claim Supervisor: 

Date of Supervisor's review: *10/17/12*

Supervisor Action: *Approved*