

CLAIM SUMMARY / DETERMINATION FORM

Date	: 6/19/2012
Claim Number	: J05003-003
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	: \$2,186,715.51

I. INCIDENT

The M/V SELENDANG AYU (the vessel) was on a voyage from Seattle to China when, on the morning of December 6, 2004¹ 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 gallons² 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 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

¹ See, Claimant Submission, Attachment 24, Government's Videotape Deposition of [REDACTED] Vol. I, 00074.

² See, Claimant's submission letter, page 3, paragraph 3.

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.

V. SECOND REMOVAL COSTS CLAIM DETERMINATION³

The NPFC adjudicated this second claim (J05003-003) in the amount of \$2.186M. The responsible parties (RPs), through their legal representative, provided 4 binders of National Response Corporation (NRC) invoices to document the \$2.186M. The NPFC claims manager reviewed each submitted invoice as well as every "daily" sheet submitted to substantiate the invoices. 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. 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 second determination and amount allowed for each invoice.

Please see Enclosure (1) for an itemization of the NRC invoices and their associated documents, which make up this second determination. This determination is for the identified NRC invoices located in Enclosure (1) and listed below.

<u>NRC Invoice #</u>	<u>Date</u>	<u>NRC</u>	<u>NPFC Approved</u>	<u>NPFC Denied</u>
01614	07/25/2005	427,783.26	\$401,098.66	\$1,414.70
CM510135		(\$21,911.97)		
CM510608		(\$1,572.81)		
CM51107		(\$1,785.25)		
		1,260.00	\$1,259.87	
02103	11/22/2005	1,515,753.89	\$1,512,149.06	\$3,604.83
511372	05/31/2006	122,548.12	\$122,548.12	
514039	08/24/2006	2,900.00		\$2,900.00
512064	05/13/2006	41,765.00	\$35,161.49	\$5,643.51
CREDIT to 512064		(960.00)		
511606	06/20/2006	96,228.00	\$96,228.00	
510172	03/30/2006	4,707.27		\$4,707.27
Total		2,186,715.51	\$2,168,445.20	\$18,270.31

³ 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.

Claimant's sum certain for this second claim is \$2,186,715.51. The claims manager determined, that \$18,270.31 is not compensable from the OSLTF. 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, the total amount in this claim to be paid exceeds the claimant's limit on liability by \$2,168,445.20. Therefore, the NPFC will offer this amount for this claim.

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 at 33 USC § 2701(31), to mean "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).

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 FOOSC 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 FOOSC, to be consistent with the NCP or directed by the FOOSC, 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 second claims determination were reasonable and necessary in order 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.

Itemization of denied costs broken down by NRC invoice:

NRC Invoice # 01614:

- On 12/19/04, the Claimant charged a total amount of \$1,901.07 for an ALASKA Airline ticket for which the Claimant provided no supporting documentation;
- On 1/03/05, the Claimant should have issued a credit for \$436.00 but only issued a credit for \$380.00 therefore the NPFC denied the unresolved per diem amount of \$56.00;
- On 1/4/05-1/6/05, a credit was given twice each day in error. Therefore the NPFC allowed the credit of \$972.00 total for the three days; see binder 122 for details;
- On 1/14/05, NRC gave credit twice therefore the NPFC allowed credit amount of \$344.00; see binder 122 for details;
- On 1/18/05, the NPFC denied the Alaska Air charges as no documentation was provided to support charges of \$57.50 and \$416.14; and
- On 2/6/05, NRC billed 2 hrs each for [REDACTED] who were not on the daily therefore the NPFC denied \$100.00 each person per day.

Total denied for NRC Invoice # 01614 = \$1,414.71

NRC Invoice # 02103:

- On 4/8/05, the Claimant billed 4 hours for [REDACTED] when the daily indicated that she was out buying supplies and there should be no charge for her in the amount of \$216.00;
- On 6/5/05, the Claimant billed 16 hours for the ten people listed that day when a maximum limit of 12 hours was agreed to; therefore, 4 hours of OT for each person is denied in the total amount of \$2,580.00;
- On 4/23/05, the Claimant billed \$206.23 for food plus 15% markup but did not provide a copy of the receipt; therefore, it is denied;
- On 9/14/05, the Claimant billed \$602.60 for airfare plus 15% markup but did not provide a copy of the receipt and ticket to the NPFC for [REDACTED] therefore, this charge is denied.

Total denied for NRC Invoice # 02103 = \$3,604.83

NRC Invoice # 514039:

- Damages identified for the LUND 1748, Hull # LCWJ0178D505 were quoted at \$850.00 for the replacement of the propeller and engine skeg assembly which resulted from 'rough handling' as quoted in the survey;
- Damages identified for the LUND 1748, Hull # LCWJ0217D505 were quoted at \$850.00 for the replacement of the propeller and engine skeg assembly which resulted from 'rough handling' as quoted in the survey;
- Damage identified for the QBSY5364D505 was quoted at \$500.00 for damage to the starboard chine (remove the SPLASH GUARD and patch the hole). This damage is not normal wear and tear;
- Damage identified for the PACKMAN, Wash. Reg # WN 0077 RE, Hull # 06PXD595 is quoted at \$700.00 for repair to the port and starboard engines in the amount of \$350.00 plus a weld repair to the starboard push knee estimated at \$250.00, and the repair to the VHF antenna which was estimated at \$100.00.

The NPFC denied all repairs needed for rough handling of equipment in the amount of \$2,900.00 as this is not a proper use of the OSLTF.

Total denied for NRC Invoice # 514039 = \$2,900.00

NRC Invoice # 512064

- This invoice came to a total of \$41,765.00. The Claimant issued a credit memo of \$960.00 which reduced the total invoice amount to \$40,805.00. GMS approved the \$40,805.00 as did the NPFC but the Claimant only issued a payment in the amount of \$35,161.49; therefore, the NPFC denies the difference of \$5,643.51 because the OSLTF is not available to pay more than the RP incurred via the copy of the payment amount.

Total denied for NRC Invoice # 512064 = \$5,643.51

NRC Invoice # 510172

- This invoice came to a total of \$4,707.27. This invoice was for skiff repairs surveyed and denied by the NPFC as follows as an inappropriate use of the OSLTF:

	pump repair, running lights replaced, bow door
	straightened, cap rails straightened, new outboard
\$997.26	guard, and dutch rail straightened
	pump repair, transom gusset repaired, and dents
\$370.35	repaired

	nose repaired, aft port & starb corners repaired, fwd
	port side 2 places repaired, 3 cracks short welds
\$865.35	repaired, and 6 rivits repaired
\$260.35	nose and pump repairs
\$980.35	nose and pump repairs
\$287.85	nose and pump repairs
\$205.35	pump repairs
\$205.35	pump repair and port fed chine repaired
\$150.35	pump repairs
\$384.71	Tax

\$4,707.27

Total denied for NRC Invoice # 510172 = \$4,707.27

The NPFC hereby determines that the NPFC offers, and the OSLTF is available to pay, **\$2,168,445.20** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # J05003-003 as the second removal cost claim determination associated with this incident. All costs claimed are for charges paid for by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs payable by the OSLTF as presented by the Claimant.

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, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan.

AMOUNT: \$2,168,445.20

Claim Supervisor: [REDACTED]

Date of Supervisor's review: 6/13/12

Supervisor Action: *Approved*

Supervisor's Comments: