

## RECONSIDERATION

Date	: 5/2/2012
Claim Number	: P05005-153
Claimant	: City of Gloucester
Type of Claimant	: Local Government
Type of Claim	: Real Property
Claim Manager	: [REDACTED]
Amount Requested	: \$516,606.85

### **I. BACKGROUND:**

#### ***A. Oil Spill Incident:***

On 26 November 2004, the Cypriot-flagged tank vessel ATHOS I (ATHOS) 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 (FOSC) 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.

#### ***B. Responsible Party:***

Frescati Shipping Company Limited owned the ATHOS I at the time of the incident and is a responsible party (RP) under the Oil Pollution Act.

#### ***C. Claimant:***

The City of Gloucester (City or Claimant) is incorporated in New Jersey. The Claimant owns and operates the Gloucester City Marina and Proprietor's Park that sits on the banks of the Delaware River, approximately five miles upriver from the ATHOS spill. The marina was contaminated by residual oil carried on tidewaters.

#### ***D. Claim:***

Claimant alleged that cleanup contractors damaged its marina seawall-bulkhead and four pilings that held a wave attenuator and damaged its sidewalk-promenade.<sup>1</sup> On July 8, 2008, Claimant submitted a binder with estimated combined property damages of \$427,663.00.<sup>2</sup> Along with property damages, Claimant submitted property damage assessment fees of \$88,943.85 from the Claims Assessment Group (CAG). Claimant's sum certain including assessment costs is \$516,606.85 (\$427,663 + \$88,943.85 = \$516,606.85).

On August 30, 2010 the NPFC emailed an offer to the City for \$54,797.00. This represented proven OPA compensable losses that included \$25,000.00 for sidewalk repairs, \$26,685.00 for lost piling and \$3,112.00 for proven OPA compensable assessment costs. The NPFC denied the Claimant's alleged damages to the seawall on the basis that the Claimant failed to prove its allegation that the mortar in the seawall was damaged by cleanup contractors. Additionally, the NPFC denied assessment costs that it determined were unrelated to the City's alleged OPA damages.

#### ***E. Request for Reconsideration:***

<sup>1</sup>Claimant's initial submission of March 4, 2008 sought \$120,000 in alleged Property Damage; an \$80,000 in Government Revenue that was changed to Removal see NPFC Claim file P05005-152.

<sup>2</sup>Claimant's sum certain includes \$374,643.75 estimated repairs for the seawall, \$28,019.25 invoice for the replacement of lost pilings and repair estimated for \$25,000 to repair its sidewalk.

On September 29, 2010, Claimant requested reconsideration by email. Claimant also requested a 60-day extension of time to submit additional evidence showing that cleanup contractors damaged its seawall using hot-water pressure washers.

The NPFC extended Claimant's 60-day deadline to submit additional evidence by granting the Claimant an additional 30 additional days or until November 30, 2010 to submit its evidence. On December 1, 2010, Claimant requested a second extension for an additional 30 days, which the NPFC granted making the new deadline December 30, 2010. On that date, Claimant submitted an email of its "Findings of Facts Relative to Athos I Claim," with attachments. The NPFC also received a package of engineering blueprints January 4, 2010.

Claimant's documents for reconsideration summarized below:

1. Claimant submitted a written narrative "Findings of Facts Relative to Athos I Claim." This document provides a narrative account of events and actions by Mr. [REDACTED] after observing the alleged damage to the seawall. Mr. [REDACTED] clarifies one comment he made to the NPFC that was referred to in the NPFC's initial claim determination of August 30, 2010. In his prelude to his "Findings" Mr. [REDACTED] writes, "I have attempted to either acquire what was necessary or find folks with firsthand knowledge that can provide their recollection of events." Mr. [REDACTED] submits emails from [REDACTED] of Shared Systems Technologies, Inc. of Pitman, NJ and [REDACTED] of Lighthouse Technical Consultants, Inc. of Rockport, MA. There are some other email copies between [REDACTED] of the NPFC and LTJG [REDACTED] USCG from 2005. In his narrative Mr. [REDACTED] tells us that [REDACTED] of Miller Environmental can attest to Claimant's numerous complaints to the Coast Guard about the damages to the seawall. He further states that [REDACTED] was another witness who can support Claimant's assertions about the damage to the seawall.
2. Engineering site plans for the renovation of the marina, without the seawall.

#### ***F. Reconsideration:***

On reconsideration the claimant seeks compensation of \$374,643.75 for estimated repairs to its seawall, \$25,000 to repair its sidewalk-promenade, \$28,019.25 to replace four pilings that held a wave damper, and related assessment costs of \$88,943.85.<sup>3</sup> The total sum certain for the claim is: **\$516,606.85.**<sup>4</sup>

The NPFC, on reconsideration, reviews the claim and the administrative record *de novo*. The initial determination to partially deny the claim submitted March 4, 2008 is incorporated into this analysis. The NPFC will address each of Claimant's arguments below.

## **II. APPLICABLE LAW:**

Damages include damages for injury to natural resources, injury to or economic losses from the destruction of real or personal property, loss of subsistence use of natural resources, Government loss of revenues, loss of profits or earning capacity as a result of loss or destruction of real or personal property or natural resources, and costs of increased public services. 33 U.S.C. §2702(b). Damages are further defined in OPA to include the costs of assessing the damages. 33 U.S.C. §2701(5).

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. Further, a claim presented to the Fund should include, as applicable:

"[T]he reasonable costs incurred by the claimant in assessing the damages claimed. This includes the reasonable costs of estimating the damages claimed, but not attorney's fees or other administrative costs associated with preparation of the claim." 33 CFR 136.105(e)(8).

<sup>3</sup> Sum certain on reconsideration is:  $\$374,643.75 + 28,019.25 + 25000 + \$88,943.85 = \$516,606.85$

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.

### **III. NPFC RECONSIDERATION ANALYSIS:**

#### ***A. Analysis of Claimant's documentation upon Reconsideration***

1. Review of the claimant's evidence submitted December 30, 2011 and January 4, 2012 are summarized below:
  - a. We requested the Claimant find evidence of the condition of the seawall prior to the spill. In reconsideration Claimant fails to submit any witness accounts on the condition of the seawall prior to the spill. Claimant submitted two informed but speculative post-spill accounts regarding how the damage could have happened. One account was from Claimant's engineer that it hired to assess its claim and the other was Claimant's only contractor to bid on the repair of the seawall. Neither of these emails show that these people witnessed the damage when it was happening. Neither of these people witnessed the condition of the seawall prior to the spill. Claimant tells us that [REDACTED] of Miller Environmental Group will support Claimant's assertions that it complained about the pressure washings when they occurred. But, Claimant fails to provide a statement from Mr. [REDACTED]. Claimant mentions a Mr. [REDACTED] who would support Claimant's contentions about the amount of pressure used on the seawall. But, Claimant fails to provide a statement from Mr. [REDACTED]. Claimant's attached emails to its "Findings" do not prove Claimant's allegation that contractors using pressure-washers damaged the seawall.
  - b. The NPFC requested Claimant provide evidence by documentation that someone periodically inspected the seawall or that Claimant maintained the mortar and concrete in the seawall. Claimant failed to provide any periodic inspection or repair or maintenance record for the seawall. Review of Claimant's engineering blueprints for the marina does not include the seawall. The NPFC finds that the blueprints fail to prove the condition of the seawall prior to the spill. No other documentation was provided to support our request.
  - c. The NPFC requested the Claimant provide pre-incident photos of the seawall. The Claimant has not submitted any pre-incident photos. Claimant fails to establish what damage was actually attributable to pressure-washing and what damage is the result of tides and seasonal temperatures. The NPFC could not compare the alleged property damage to the pre-incident condition of the seawall. Additionally, Claimant fails to demonstrate that its alleged damages were solely due to the oil removal process. The NPFC finds no means, by comparison, to measure the alleged damages according to the requirements of the applicable regulations.
  - d. The claimant failed to mitigate its alleged damages. Claimant fails to show that it made any attempt to repair or mitigate further damage to the seawall after its alleged damage to the concrete (Gunite) and mortar were removed. Claimant tells us that the deterioration to the seawall has increased rapidly since the oil was removed. Claimant bears a duty under OPA to show that it mitigated its damages after they became apparent.

#### ***NPFC's Additional Analysis:***

The City's marina was within the spill zone (FOSC NJ-Zone #2) and it was contaminated by residual oil from the ATHOS I. Additionally, cleanup contractors did use hot water pressure-washers to remove residual oil from the seawall. Claimant asserted that it complained about the pressure washings at the time damage was occurring. However, Claimant has been unable to submit any statement or evidence of this. Claimant provided two other names in support of its assertion but, Claimant fails to submit their statements supporting its complaints at that time.

The NPFC requested Claimant submit documentation that it maintained or periodically repaired the mortar between the stones on the seawall, prior to the spill. Claimant did not provide a means by which someone could measure or compare the condition of the seawall prior to the oil spill to its condition after the spill. The NPFC cannot measure the alleged damages given that the seawall has not record of periodic maintenance or upkeep or inspections.

Claimant alleges that its seawall's mortar and concrete base was blown away by pressure-washers during the oil removal process. The NPFC requested Claimant submit photos of the seawall that would demonstrate its condition *before* the oil spill occurred. Claimant's failed to submit photos taken before the spill. All of the Claimant's photos show that the seawall is weathered and discolored below the mean high-tide water-mark. Additionally, on behalf of the Claimant, the NPFC contacted Mr. [REDACTED] with Claimant's insurance administrator (Birdsall Companies) to request any evidence of the seawalls condition prior to November 26, 2004. Mr. [REDACTED] confirmed that [REDACTED] had no photos of the seawall. Also, Claimant had no claim with its insurance company that could prove the condition of the seawall prior to the spill.

The NPFC continues to find that its statement from the supervisor ([REDACTED] with The O'Brien Group) who oversaw the pressure washings remains the only witness on-scene at the time except for Mr. [REDACTED]. Mr. [REDACTED] stated that any pressure-washer at pressure above 55(psi) could damage property if applied incorrectly. However, Mr. [REDACTED] was clear that his crews could not have damaged the entire seawall without him seeing it. He explained that hot water is used to remove residual oil because it requires less pressure. The NPFC also spoke with two Coast Guard personnel who were on-scene who recalled the condition of the seawall before and after the pressure-washings. Both Coast Guard witnesses related to the NPFC that prior to the washings the seawall appeared weathered by tides and contaminated by oil. After the pressure washings the seawall appeared to be in the same condition but without oil and cleaner after the pressure washings. In addition, they stated that after each oil spill removal operation is concluded and before spill cleanup organizations demobilize, the FOSC inspects each property in the cleanup zone and signs-off on the record indicating any complaints or problems by the property owner or manager. In this case, the FOSC's report on Claimant's property fails to reveal any substantive evidence that the Claimant complained about the damage to the seawall. While it is clear that there were damages to the docks and other marina property, there is no evidence that the seawall mortar and concrete base (Gunite) was identified as damaged by pressure-washers.

The NPFC requested that the Claimant provide any third party witness statements on the condition of the mortar prior to the spill. Claimant references some witnesses but, none of Claimant's "eyewitnesses" state that they saw the damage or saw the seawall prior to the spill. The NPFC contacted Claimant's self-insurance administrator but it did not have anyone who saw the seawall prior to the spill and it did not have photos of the seawall.

Claimant provided the name and address of [REDACTED] with Miller Environmental but fails to provide a statement by Mr. [REDACTED] supporting Claimant's allegations. Claimant clarified in its "Findings" that it did not have the name of any supervisor that it complained to about the pressure-washings. Claimant refers to numerous complaints but fails to show any evidence of such a complaint or provide a name of who he spoke to at the time the alleged damage was being done. The NPFC finds that the claimant lacks evidence that it reported any alleged damages to the seawall as it occurred.

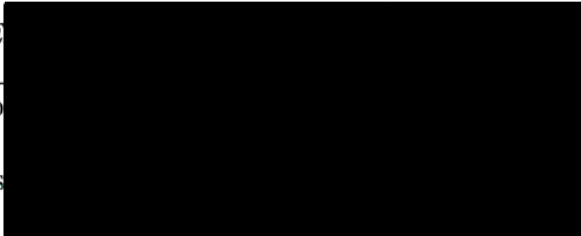
The NPFC has determined that the claimant failed to prove its allegation that the damage to the mortar in the seawall was due to the oil removal actions taken and more specifically due to pressure washing. The NPFC finds that Claimant lacks photographic evidence, or evidence of periodic inspection or routine maintenance or repairs to demonstrate the condition of the mortar prior to pressure washing.

The NPFC finds that the Claimant's engineering advisor provided speculative accounts regarding the damage to the seawall during cleaning. Claimant's engineering report did not prove that the hot water pressure washers caused the damage, but only speculated that such damage could happen.

Claimant was aware of or should have been aware that mortar within a tidal zone should have periodic maintenance to reach its anticipated durable lifetime.

The NPFC finds that the Claimant cannot prove the cause of the damage to the seawall. The NPFC finds that Claimant fails to show the damage was solely caused by pressure washing, as required under OPA and its guiding regulations. However, the NPFC re-confirms compensable costs offered in our initial Claim Determination, which included \$25,000.00 for sidewalk repairs and \$26,685.00 for piling replacement. We also offered \$3,112.00 for assessment costs, which was in error. The actual assessment costs approved on the spreadsheet attached to the original claim determination total \$ 3,611.12; \$500.12 more than originally offered. Therefore, upon reconsideration of this claim, the NPFC offers \$55,296.12 (\$25,000.00 for sidewalk repairs, \$26,685.00 for piling replacement and \$3,611.12 for assessment costs).

*AMOUNT OFFERED*



Claim Supervisor

Date of Supervision

Supervisor Action: Offer Approved

Supervisor's Comments: