

CLAIM SUMMARY / DETERMINATION

Claim Number: J05003-0013
Claimant: IMC Shipping Co. Pte. Ltd. et al
Type of Claimant: Corporate
Type of Claim: Loss of Profits and Earning Capacity
Claim Manager: [REDACTED]
Amount Requested: \$23,800.23

Incident:

The M/V SELENDANG AYU was on a voyage from Seattle to China when on the morning of December 6, 2004 while operating in adverse heavy weather conditions, the crew shut down the main engine as a result of a casualty to the No. 3 cylinder. The crew initially intended to repair the cylinder by changing the liner but determined to only isolate the cylinder. After some hours spent isolating the cylinder, the crew could not restart the engine. It was then decided to renew the piston rings in the No. 6 cylinder, which required removal of the cylinder head. While attempting to renew the piston rings, 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 gallons of bunkers into the waters off Unalaska Island.

Claimant and the Claim

Claimant

The claimant is 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), the members of the International Group of Protection and indemnity Clubs ("International Group"), and the International Group's re-insurers were their subrogated underwriters.¹

Claim

Claimant sent a letter to the National Pollution Funds Center (NPFC) dated December 6, 2007 outlining their claims for reimbursement for third-party damage claims, which were paid for by the responsible party as a result of the oil spill from the M/V SELENDANG AYU.²

This claim is one of several third-party claims submitted to the NPFC and is identified as J05003-0013. Claimant seeks reimbursement of \$23,800.23 for a payment it made to UniSea Processors for installation of silt screens on two seawater intake structures to prevent loss of product at UniSea's seafood plant. UniSea is one of the world's leading seafood processors that

¹ See J05003-001. Claimants seek reimbursement of removal costs and damages exceeding the applicable limit on liability.

² See letter dated March 21, 2012 to the NPFC from Keesal, Young, & Logan.

produce a variety of seafood products that are distributed throughout the world.³ Unisea operates its principal seafood processing facility on southeast Amaknak Island, in Unalaska, Alaska.

Applicable Law:

Loss of Profits under OPA 90

The uses of the OSTLF are described at 33 USC 2712(a). It provides in relevant part that:

“The Fund shall be available to the President for the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to consistent with the National Contingency Plan or uncompensated damages.”

Damages include damages for loss of profits or earnings capacity as a result of loss or destruction of real or personal property or natural resources. 33 USC 2702(b)(E) Damages are further defined to include the costs of assessing the damages. 33 USC 2701(5)

Damage claims must be presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care. 33 USC 2717 (h)(2)

In any case in which the president has paid an amount from the Fund for any removal costs or damages specified under subsection (a), no other claim may be paid from the Fund for the same removal costs or damages. 33 USC 2712 (i)

Congress directed the President to promulgate regulations “for the presentation, filing, processing, settlement, and adjudication of claims...” 33 USC 2713 (e). These regulations are found at 33 CFR Part 136.

Under 33 CFR 136.105(a) & 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:

“the 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 the preparation of the claim.” 33 CFR 136.105(e)(8).”

With regard to claims for loss profits and impairment of earning capacity, the NPFC must independently determine that the proof criteria in OPA and the implementing regulations, at 33 CFR Part 136, are met, including the general provisions of 33 CFR 136.105, and the specific requirements for loss of profits and earning capacity claims in Subpart C, 33 CFR 136.231, et seq.

³ [www/unisea.us](http://www.unisea.us)

Pursuant to the provisions of 33 CFR 136.231, claims for loss of profits or impairment of earning capacity due to injury to, destruction of, or loss of real or personal property or natural resources may be presented to the Fund by the claimant sustaining the loss or impairment.

“In addition to the requirements of Subparts A and B of this part, a claimant must establish the following—

- (a) That real or personal property or natural resources have been injured, destroyed, or lost.
- (b) That the claimant’s income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.
- (c) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant receives as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.” 33 CFR 136.233 (a) – (d)

If a third party claimant or an RP is able to establish an entitlement to lost profits, then compensation may be provided from the OSLTF. But the compensable amount is limited to the actual net reduction or loss of earnings and profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for the following: all income resulting from the incident; all income from alternative employment or business undertaken; potential income from alternative employment or business not undertaken, but reasonably available; any saved overhead or normal business expenses not incurred as a result of the incident; and state, local, and Federal tax savings. 33 CFR 136. 235 (a) – (e).

Under 33 CFR 136.115(d), the Director, NPFC, will, upon written request of the claimant or the claimant's representative, reconsider any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request for reconsideration must be received by the NPFC within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier.

Analysis

The Selendang Ayu oil spill affected Unalaska, AK which is where UniSea processes large amounts of seafood. The RP and UniSea proactively mitigated a loss of business operations which would have resulted in a loss of profits by installing silt screens over UniSea’s sea-water intakes at its processing facility. The installation of the silt screens prevented oil and other oil related particulates from entering the production facility which would have caused contamination of the product. The installation of the silt screens allowed UniSea to continue uninterrupted operations, thereby avoiding a loss of profits or earning capacity. The expense of the silt screen filtration was clearly required because of the oil spill and directly reduced income for the entity.

Claimant provided cancelled checks that prove that UniSea paid for the costs related to installing the silt screens. Claimant reimbursed most of the costs incurred. Claimant also provided a check

from MR & Associates, LLC showing that they reimbursed UniSea, Inc. for the silt screen installation costs. Because of these joint mitigation efforts, no known impact to UniSea's revenue stream was documented.⁴

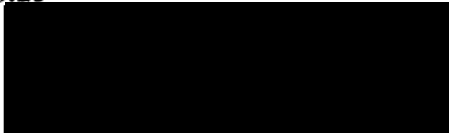
The NPFC finds the costs incurred for the installation of the silt screens are an actual net reduction of earnings for UniSea due to the oil spill. Had these mitigation efforts not been performed, the loss of profits or earning capacity for UniSea would have been much greater.

Conclusion

In summary, through a cooperative effort, the Claimant and UniSea mitigated any losses to UniSea's seafood processing plant. It is clear that the installation of silt screens were a necessary mitigation effort to avoid any business interruption and loss of profits to UniSea. Claimant's compensation was appropriate.

The NPFC hereby determines that the OSLTF will pay \$23,800.23 as full compensation for the costs incurred by the Claimant while reimbursing UniSea's mitigation efforts. All costs claimed are for charges paid for by the Claimant for damages as that term is defined in OPA and are compensable costs payable by the OSLTF as presented by the claimant.

AMOUNT: \$23,800.23

Claim Supervisor: 

Date of Supervisor's review: 5/9/2013

Supervisor Action: *Approved*

Supervisor's Comments:

⁴ See UniSea letter dated April 28, 2005, from Operations Development Manager to MR & Associates, LLC