

## CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: P05005-124
Claimant	: Federal Insurance Company
Type of Claimant	: Corporate (US)
Type of Claim	: Property Damage with one small Removal Cost component
Amount Requested	: \$4,554,314.05

### **BACKGROUND**

#### ***Incident***

On 26 November 2004, the Cypriot-flagged tank vessel ATHOS I 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 discharge of Venezuelan crude oil into the Delaware River. The U.S. Coast Guard Federal On-Scene Coordinator (FOSC) directed the incident response, which included decontamination and oil removal upriver and downriver from the discharge location.

#### ***Responsible Party***

The 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). On February 16, 2005, the National Pollution Funds Center (NPFC) advertised procedures by which claims may be presented to the Oil Spill Liability Trust Fund (Fund).

#### ***Claimant***

The Claimant, Federal Insurance Company (FIC or Claimant),<sup>1</sup> is a subrogated insurer of the Philadelphia Marine Center (PMC), a Delaware River waterfront complex leased to, and operated by Brandywine Realty Trust (Brandywine). PMC's property is located just upriver from the Ben Franklin Bridge and is in an area that received light to medium oiling from the spill.<sup>2</sup> According to the *Athos I Incident Response Shoreline Sign-Off Inspection Form* dated May 6, 2005, the FOSC and the Pennsylvania State On-Scene Coordinator (SOSC) determined that Philadelphia Marine Center Piers 12-24 met cleanup endpoint criteria.<sup>3</sup> The inspection form noted that "only stains remain."

The PMC property occupies approximately 17.37 acres<sup>4</sup> identified as piers 12, 13/15, 19, and 24, including a marina, and facilities on, and adjacent to, the piers.<sup>5</sup> Pier 12 houses the marina

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<sup>1</sup> Federal Insurance Company is a subsidiary of the Chubb Group of Insurance Companies. See [www.chubb.com/corporate/chubb11887.html](http://www.chubb.com/corporate/chubb11887.html)

<sup>2</sup> Pennoni Associates report January 2005 and USCG Memo 16465 dated 21 Nov 2005.

<sup>3</sup> Athos I Incident Response, Shoreline Sign-off Inspection Form 5/6/2005. We note that piers "12-24" are wholly comprised of piers 12, 13/15, 19 and 24.

<sup>4</sup> Integra Realty Resources Coastal New Jersey Consulting Appraisal Report, Summary of Salient Facts and Conclusions. Land area varies among 9.87 acres, 15.38 acres and 17.37 acres depending on which record is referenced.

services office and storage; Pier 13/15 was subleased to, and occupied by, a seasonal restaurant; Pier 19 was subleased to, and occupied by, two restaurants, and Pier 24 was subleased to a parking lot operator. The piers account for 5.45 acres of the 17.37 acres.

## **PROCEDURAL HISTORY**

### ***Initial Claim***

On August 15, 2006, FIC presented its claim to the Fund, initially seeking reimbursement of **\$3,196,391.05** for alleged damage to real or personal property at PMC caused by the incident. This amount was based on a May 6, 2005 report produced by Pennoni Associates, in which Pennoni provided a revised cost estimate for removing, decontaminating and replacing oiled property at the PMC.<sup>6</sup> The property is described as a 308-slip marina, including floating docks and a floating wave attenuator (breakwater).<sup>7</sup> Three breakwater systems were replaced. Costs related to fixtures installed on the breakwaters and dock/pier system were also claimed. Pennoni's May 6, 2005 cost estimate allegedly reflects the oil-impacted condition of the marina property after the cleanup conducted by the O'Brien's Group, which was contracted by the U.S. Coast Guard to conduct removal activities. The following list reflects the different parts of the property allegedly injured or destroyed by the oil and for which FIC sought reimbursement:

1. Floating Dock System
2. Gauges
3. Water Supply Line
4. Breakwaters
5. Satellite TV Cable
6. Plumbing Line
7. Fuel Dispensing Equipment
8. Petroleum Piping
9. Card Access System
10. Wireless Phone Network
11. Electric Lines
12. Pilings
13. Power Posts

In its initial determination dated August 4, 2008, the NPFC offered Claimant \$38,521.30, noting that \$38,521.30 was the compensable amount for dredge decontamination,<sup>8</sup> emergency repairs to

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<sup>5</sup> Number of slips varies between 308 and 337 depending on document referenced. Integra Realty Resources Coastal New Jersey Consulting Appraisal Report states 337 whereas claimant states 308.

<sup>6</sup> Pennoni Associates, Inc. was hired by Claimant and its original *November 2004 Athos I Crude Oil Spill Site Inspection and Evaluation, Philadelphia Marine Center, January 2005*, was prepared by Pennoni Associates, Inc. prior to the decontamination and FOSC/SOSC inspection signoff on May 6, 2005. The original report noted that 3 breakwater systems, floating docks, piers and seawalls were oiled and would require removal, decontamination and replacement, totaling \$4,150,748.60. The report also noted that "[T]here are no anticipated long or short-term effects."

<sup>7</sup> Claim narrative submitted with initial claim 8/14/06.

<sup>8</sup> On reconsideration NPFC found that a portion of this amount included removal costs paid by Great American Insurance (GAI) and reimbursed to GAI by the NPFC under GAI's own separate claim to the Fund. When informed of this, Claimant verified that the costs had been paid (excluding \$3,363.30 for the crane rental) and subsequently withdrew its claim for all but \$3,363.30 of the amounts initially offered by the NPFC for removal costs related to the dredge.

broken parts of the floating dock system, replacement of broken gauges, and emergency repairs to a broken potable water line. The rest of the claim was denied.

### ***Request for Reconsideration***

On October 3, 2008, the NPFC received a fax letter requesting reconsideration of the initial determination. Via a letter dated July 23, 2009, the Claimant amended its claim amount upward to **\$4,554,214.05**. With the July 2009 letter, the Claimant submitted five additional documents to support its request for reconsideration: 1) Integra Realty Resources, Coastal New Jersey Consulting Appraisal dated April 5, 2009 (Integra appraisal report); 2) An opinion letter dated February 12, 2009, by Haley & Aldrich on the environmental consequences of the remaining oil contamination; 3) An opinion memo from former NPFC director, [REDACTED], dated February 23, 2009, stating that PMC acted in good faith and took steps to mitigate the damages and their actions prevented further contamination; 4) A declaration by [REDACTED], Director of Operations at the marina, dated January 16, 2009, asserting that disassembling, removing and reinstalling the property would be more expensive and would cause additional damage, and 5) A summary dated either October 8, 2006 or 2007,<sup>9</sup> by Young Adjustment Company giving the rationale for the replacement of the property.

The Claimant seeks reimbursement of replacement costs for the floating breakwaters, floating dock system and fixtures attached to them<sup>10</sup> along with removing or wrapping pilings.

### ***Claimant's Arguments on Reconsideration***

The Claimant increased its sum certain to \$4,554,315.04 in its request for reconsideration seeking additional costs paid since the initial claim was submitted. The Claimant seeks to recover all the costs relating to the dismantling and replacement of the marina's entire breakwater, pier and dock system along with the attached support systems and extraction of some old pilings that were deemed unnecessary<sup>11</sup> or wrapping pilings that were to remain in place to prevent possible leaching of oil into the river. The following is the updated list of claimed property in the request for reconsideration:<sup>12</sup>

1. Breakwaters
2. Floating dock system
3. Satellite TV Cabling
4. Plumbing Line
5. Relocating Fuel Dispensing Equipment
6. Petroleum Piping
7. Card Access System
8. Wireless Phone Network
9. Electric Lines
10. Timber Pilings

<sup>9</sup> Both years are written on the document.

<sup>10</sup> Fixtures include: electrical wiring, satellite TV cables, plumbing lines, a security card access system, a wireless telephone system and petroleum piping.

<sup>11</sup> The Claimant determined that these old pilings were not necessary so wrapping was not needed and cleaning was impractical. The Claimant made a business decision to remove them from the water but provided no evidence that the removed pilings were leaching oil or posed a substantial threat.

<sup>12</sup> Blank Rome letter dated 07/23/2009

## 11. Power Posts

Claimant argues that the oil spill caused physical damage to the PMC marina property and that Brandywine chose replacement because it was less expensive than removing, decontaminating and reinstalling the property.

Claimant also argues that the replacement of the oiled property was to prevent further pollution to the river and that a failure to expend monies for complete remediation (i.e., replacement of all the oiled marina property at PMC) would have resulted in risks to Brandywine's lease. Thus, "the replacement of all the items within [the] claim was the most feasible decision on many levels, including cost, efficiency and dependability,"<sup>13</sup> and total replacement was "not only prudent, but necessary to preserve the real property and surrounding environment."<sup>14</sup>

Claimant's request for reconsideration relies on the Integra appraisal report. "The purpose of the report is to evaluate the compensability of monies expended as a result of the Athos I spill which were necessary to secure the property interest and maintain the marketability of the ownership interest in the real estate (protection from damages)."<sup>15</sup> According to Integra, the report was "prepared to specifically consider the reasonableness of the owner's costs expended in light of the long-term consequences of **not completing any further remediation following the gross decontamination by the U.S. Coast Guard.**"<sup>16</sup>

In order to complete this task Integra was asked to determine the market value<sup>17</sup> of the leasehold property on November 25, 2004, just before the incident (unimpaired value), the leasehold market value on November 27, 2004 (impaired value prior to remediation), and the leasehold market value of the property on April 30, 2007, the date remediation was complete (value upon restoration).<sup>18</sup> "Integra concluded that (1) PMC was required to expend the monies used for complete remediation of the contamination, or it otherwise risked the potential loss of its lease on the property; (2) the use and expenditure of the monies was consistent and reasonable to protect the value of the leasehold and was reasonable considering the long-term economic value of the property; and (3) PMC's leasehold position would have been significantly impaired and essentially unmarketable absent the expenditure of these monies in the remediation, inclusive of the replacement of the docks, breakwater, and other improvements undertaken by the PMC."<sup>19</sup>

FIC also provided two opinion letters. A February 12, 2009 letter by [REDACTED] senior engineer at [REDACTED], discussed the remaining oil contamination and stated that without action to address it, pollution to the river would continue. A second letter dated February 23, 2009 from Daniel Sheehan discussed in very general terms whether PMC's actions were removal actions or property damage; and stating that PMC acted in good faith, took steps to mitigate the damages, and if their actions prevented further contamination, "so much the better". Two other documents, a summary dated October 8, 2006 (or 2007 - as both years are stated)

<sup>13</sup> See Blank Rome letter dated April 12, 2010.

<sup>14</sup> Blank Rome LLP Request for Reconsideration letter dated July 23, 2009.

<sup>15</sup> Integra Appraisal Report, p. 3

<sup>16</sup> Integra Appraisal Report, p. 32.

<sup>17</sup> According to the Integra appraisal report "market value" is defined as "the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assume the price is not affected by undue stimulus."

<sup>18</sup> Integra Appraisal Report, p. 37

<sup>19</sup> Blank Rome letter dated July 23, 2009.

from ██████████ Young Adjustment Company, and a January 16, 2009 declaration by ██████████ (PMC's Director of Operations), state that the decision to replace all the marina components was the most feasible decision.

### *Applicable Claims Regulations*

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. Claimant asserts real and personal property damages and seeks reimbursement of its damages; therefore, the claimant must submit the information as required by 33 CFR § 136.215(a). Allowable compensation payable from the Fund is governed by 33 CFR § 136.217(a) (1) – (3).

33 CFR §136.215(a) provides the specific proof requirements for property damage claims. A claimant must establish --

- (1) An ownership or leasehold interest in the property;
- (2) That the property was injured or destroyed;
- (3) The cost of repair or replacement; and
- (4) The value of the property both before and after injury occurred.

Under 33 CFR §136.217(a), the "amount of compensation allowable 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."

### *NPFC ANALYSIS on RECONSIDERATION*

The NPFC's adjudication on reconsideration includes a **de novo** review of the administrative record and the initial determination dated August 4, 2008,<sup>20</sup> and a review of the information submitted with the request for reconsideration.

The Claimant argues that it replaced the breakwaters, floating dock system, seawalls and associated fixtures because a failure to do so would (1) result in risks to Brandywine's leasehold interest and (2) could have resulted in further pollution of the river; therefore, total replacement was the most feasible decision on many levels, including cost, efficiency and dependability and it was not only prudent, but necessary to preserve the real property and surrounding environment.

Based on the administrative record the Claimant has not provided the documentation, information and valuations needed to establish entitlement to compensation of its claim for property replacement costs in the amount of \$4,554,214.05 and the claim is denied. The analysis is detailed below.

33 CFR §136.215(a)

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<sup>20</sup> NPFC's previous offer was rejected by the Claimant and the offer is void.

Under Subpart 136.215(a) a claimant is required to provide evidence of (1) ownership/leasehold interest in the property, (2) injury to or destruction of the property, (3) the cost of repair or replacement, and (4) the value of the property both before and after the injury occurred.

The Claimant must provide documentation to support each element of the provision. The documentation must address the relevant property that is damaged and for which the Claimant seeks compensation. In this claim, the Claimant seeks compensation for the timber pilings, breakwaters, floating dock system and the attached fixtures. It is not clear from the administrative record provided by the Claimant that all the replaced docks and breakwaters were injured by the Athos oil. The Coast Guard cleanup sheets reflect that as of May 6, 2005 the piers met cleanup standards and only staining remained; the Pennoni Report states that no anticipated long or short-term damages were anticipated. The Claimant provided some pictures but there are no pictures of the breakwaters or piers after the CG decontamination showing that they were still contaminated with Athos oil.

While the Claimant provided replacement costs for the claimed property it did not provide repair costs or the before spill and after spill value of the claimed property. The NPFC notified the Claimant several times of the requirements to provide additional information as required in the regulations.<sup>21</sup> Via emails and a letter, the NPFC requested that the Claimant provide an objective repair estimate and the before spill and after spill values of the damaged property. NPFC also requested the cost of the property when it was originally purchased, which would have allowed the NPFC to determine the depreciated replacement value.<sup>22</sup> The Claimant informed the NPFC that it did not have objective repair pricing and that it did not have purchase prices for the items when they were originally installed.<sup>23</sup> Claimant refused to provide tax records for 2003-2007 showing the effect of the spill on the property, claiming business confidentiality.<sup>24</sup> Claimant stated that no adjuster's report valuing the damage is available; therefore, it provided no actual appraised value of the damages to the property.<sup>25</sup> The Claimant stated that there is no appraiser's report valuing the damage to the claimed property.<sup>26</sup> Claimant stated that invoices and receipts are not available to show the price of property at installation or before the spill.<sup>27</sup> Claimant stated that no report, estimates or other documents showing the objective pricing for repair of the damage to the property are available.<sup>28</sup> Further, Claimant states that there is no insurance risk analysis for the property before the spill.<sup>29</sup>

In summary the Claimant refused to provide the before and after value of the damaged property items. Instead the Claimant insisted that the before and after value of the entire leasehold was the appropriate measure.

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<sup>21</sup> See NPFC e-mail to Claimant dated August 21, 2009; NPFC email to Claimant dated December 1, 2009, and NPFC letter to Claimant dated February 18, 2010.

<sup>22</sup> Depreciated replacement value is a well-known measure in the insurance industry. Policyholders generally are compensated for the depreciated replacement value of destroyed property. They generally don't receive new for old.

<sup>23</sup> See Blank Rome letter dated April 12, 2010.

<sup>24</sup> See April 12, 2010 letter. The NPFC believes tax records might contain depreciation tables for the components, which would show either the purchase price for the property or the depreciated value at the time of the spill, or both.

<sup>25</sup> Blank Rome letter dated April 12, 2010.

<sup>26</sup> See April 12, 2010 letter.

<sup>27</sup> See April 12, 2010 letter.

<sup>28</sup> See April 12, 2010 letter.

<sup>29</sup> See April 12, 2010 letter. The NPFC sought this information hoping that it would provide the valuation of the marina components prior to the spill.

On reconsideration Claimant attempted to provide pre-and post- values by providing a pre- and post- spill valuation of the entire leasehold, but the leasehold valuations are irrelevant because only the marina's floating dock system and breakwaters and various related equipment and fixtures were the property that was allegedly injured or destroyed, not the leasehold itself. These leasehold values do not support the Claimant's replacement costs claim.

While 33 CFR §136.215(a) provides that the claimant must establish the cost of repair **or** replacement of injured or destroyed property, the magnitude of the replacement costs sought here for injured and/or destroyed property and the claimant's arguments as to cost effectiveness of replacement, make it particularly important that the record have sufficient information on repair and replacement costs and values in order to determine the allowable compensation as provided at 33 CFR § 136.217(a).

*33 CFR §136.217(a)*

The evidence required in Subpart 136.215(a) is critical in determining the amount of damages that may be payable from the Fund because Subpart 136.217(a) provides that the Fund is only available to pay a claimant **the lesser** of 1) the cost to repair, 2) the difference between the value of the property before and after the damage, or 3) the replacement value. This provision does not state that the Claimant may recover replacement costs; it states "replacement value." Stated another way the Fund is not available to pay the full cost of replacement but only the depreciated replacement value if that is the lesser value.

According to the Integra appraisal report, substantial portions of the marina were installed in 1986-1987, which means they may have been at least 17 years old when the incident occurred.<sup>30</sup> Integra's assessment of the property value showed that PMC was generally found to be in fair condition with "below average" construction quality and with 5 years of economic life remaining.<sup>31</sup> Physical property generally depreciates as it ages, making it less valuable as it gets older. Given the age of the marina components and their depreciated replacement value, the difference between the pre- and post-injury values or the repair cost are more likely less than the replacement costs that the Claimant seeks because Claimant seeks the cost of new property to replace its older depreciated property. The Fund may be available to compensate property owners for damage from oil discharges with the goal of placing them in the same position they were in prior to the spill, but it is not available to place an owner in a better position. In this instance the Fund is not available to pay the replacement costs sought by the Claimant.

Claimant also seems to argue that replacement of the claimed property constituted a removal action because if the components had not been replaced they would have continued to discharge oil to the environment.<sup>32</sup> Mr. [REDACTED], in his opinion letter, explains that if oil remained on the components it could cause sheening on the Delaware River and that the definition of "reportable discharge" includes sheening.<sup>33</sup>

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<sup>30</sup> See Claimant's March 7, 2007 response to NPFC query.

<sup>31</sup> Integra report p.21. Integra omitted a discussion of the condition and remaining economic life of the marina section of the property. Since the marina section and its improvements are the focus of the claim, that portion should have been addressed by Integra appraisal report.

<sup>32</sup> July 23, 2009 Blank Rome letter p.1.

<sup>33</sup> February 12, 2009 Haley & Aldrich letter p.3.

In this case, the replacement of the marina components does not constitute a compensable removal action. The discharge occurred when the ATHOS I discharged oil into the river. Sheening from Athos I oil that remained on Claimant's property does not constitute a new discharge. If PMC personnel had observed sheening, they should have reported it to the Coast Guard for further decontamination as part of the response. To be compensable from the Fund, a removal operation must be performed at the direction of the FOSC or determined by the FOSC to be consistent with the National Contingency Plan (NCP). See 33 CFR § 136.203(c). The record does not establish that replacement of the marina components was conducted at the direction of the FOSC or that replacement was otherwise a removal activity consistent with the NCP.

#### Conclusion on Property Damages

Claimant only provided the costs to replace the breakwaters, the floating dock system and their fixtures with brand new ones. Claimant did not provide, and the record does not otherwise include, evidence sufficient to establish the costs of repair, depreciated replacement value, or the difference between the value of the property before and after the damage, required to determine the lesser amount allowable as compensation. 33 CFR §136.217(a).

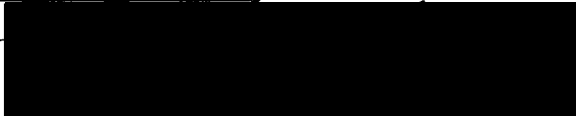
#### *Other costs*

Damages include the reasonable cost of assessing damages; however, assessment costs are not payable from the Fund if the alleged damages are not also payable. In this case Claimant has not provided evidence to establish that the underlying damages, that are the subject of the assessment activities, are payable from the Fund.

#### *Removal Costs Related to Dredge*

The Claimant seeks \$3,363.30 for the cost to rent a crane from Sautter Crane Rental. The crane was used to lift the Claimant's dredge from the water for cleaning. The NPFC previously found that the dredge had been cleaned in accordance with spill response procedures and compensated another claimant for the costs to clean it because NFPC determined that they were compensable OPA removal costs. Consequently, as a component of that same removal activity, the costs of the crane used to facilitate the oil removal is OPA compensable; therefore, the full \$3,363.30 is compensable.

**DETERMINED AMOUNT: \$3,363.30**

Claim Supervisor: 

Date of Supervisor's review: September 11, 2013

Supervisor Action: *Approved*

Supervisor's Comments: