

CLAIM SUMMARY / RECONSIDERATION DETERMINATION
5/25/2016

Claim Number:	J05003-0011
Claimant:	IMC Shipping Co. Pte. Ltd., Ayu Navigation Sdn Bhd, et al.
Type of Claimant:	Responsible Party
Type of Claim:	RP Third Party Claims Management Company charges
Claim Manager:	██████████
Amount Requested:	\$285,753.83

BACKGROUND

The Incident

The M/V SELENDANG AYU (SELENDANG or vessel) was on a voyage from Seattle to China on December 06, 2004. The vessel grounded on December 08, 2004 on a rocky shelf on the north shore of Unalaska Island, northeast of Spray Cape. The vessel discharged approximately 330,000 gallons of bunker oil into the waters of the United States off Unalaska Island.

The responsible parties for the incident are Ayu Navigation Sdn Bhd (Ayu) and IMC Shipping Co. Pte. Ltd. (IMC), respectively the owner and operator of the M/V SELENDANG AYU. Sveriges Angfartygs Assurans Forening (The Swedish Club) and International Group of Protection and Indemnity Clubs (International Group) were the responsible parties' subrogated insurers.

RP Claims to the Fund

In a letter dated December 6, 2007, the responsible parties (now RP/Claimants), through their attorneys Keesal, Young and Logan (KYL), presented a claim for reimbursement of removal costs and damages paid, or to be paid, by the responsible parties.¹ The letter, asserting that the responsible parties were entitled to their statutory limitation on liability (\$23,853,000), focused on the facts associated with the incident. It was agreed between the NPFC and the responsible parties that the NPFC would first determine if the responsible parties demonstrated entitlement to the statutory limit on liability. If the limit was upheld RP/Claimants would submit documentation to support its claimed removal costs and damages.

The letter noted that removal costs and damages to date totaled \$148,651,185.13. Specifically, removal costs were \$117,628,386.10; natural resource damage assessment costs were \$5,021,890.42, and third party claims (settled and paid to date) were \$26,000,908.61. The responsible parties retained MR and Associates (MRA) in part to establish a claims office in Dutch Harbor to respond to the third party claims, especially the commercial fishermen. MRA adjusted and settled third party claims and assumed responsibility for publication and dissemination of claims advertising. MRA travelled to Dutch Harbor to set up the office, which

¹ Keesal Young & Logan dated December 6, 2007.

was manned through August 2005, at which time the office was moved to Houston, Texas, where claims continued to be adjusted and settled.

Attached to the December 6, 2007 letter was a November 27, 2007, letter to KYL from [REDACTED], president of MRA.² According to the letter MRA was retained by the responsible parties to provide claims management and cost auditing services and the letter detailed these services. It noted that MRA published the advertisement of the claims process and established a claims office in Dutch Harbor, Alaska. Associated with the claims management activities were services that "encompassed claim receipt/review through settlement negotiations and execution of Release documents."³ Attached to this letter was a Registered File List, which itemized each claim presented to the responsible parties, the claimed damages, a status description and the settlement amount. According to this list claims presented to the responsible parties as of December 6, 2007 totaled \$3,795,011.47; the total settlement amount paid to claimants was \$419,899.53.⁴

The NPFC and the responsible parties agreed that this letter, together with an attached Claims Summary, constituted presentment of all claims on the list and was submitted within the three-year period of limitations for presenting damage claims to the Fund.

On January 27, 2012, the NPFC determined that the Claimants were entitled to their statutory limit of liability, \$23,853,000.

The Instant Claim

RP/Claimants seek reimbursement for MRA costs to (1) advertise the responsible parties' claims process; (2) administer the responsible parties' claims process, and (3) conduct damage assessment, settle and pay third party claims. The claimed amount is \$ 285,753.83.

The RP/Claimants, in a March 21, 2012 follow up letter to the NPFC, submitted 17 invoices to support the \$285,753.83 claimed amount. It included a spreadsheet for each invoice that stated the MRA employee name, date, time spent, a brief description of the activities conducted and the rate, and daily cost for the listed activities. The activities included participating in teleconferences with KYL and some named claimants or potential claimants, attending meetings and visiting areas impacted by the oil spill. The invoices include travel costs, i.e., airline fares, hotel, meals and laundry expenses incurred by [REDACTED] and his employees when they were manning the claims office in Dutch Harbor. In support of its assessment costs claim MRA submitted a February 29, 2012 letter to KYL that included a document updating the third party claims paid to claimants. Entitled "Third Party Claim Detail," it listed 43 fishermen claimants whose total claimed amounts were \$1,157,259.52 and settled amounts totaling \$378,938.62. The document listed four fisheries claims totaling \$34,562.95 and settled amounts of \$31,143.23.⁵

² MRA coordinated its services to the responsible parties with KYL.

³ MR & Associates letter to KYL dated November 27, 2007.

⁴ See Registered File List, dated November 27, 2007.

⁵ The list identifies each fisherman by name but provides no additional information, i.e., whether the settlement was supported by evidence of the loss of profits or the cost of the assessment associated with each claim. Similarly, there is no information for the fisheries claims except for the named claimants.

The NPFC denied the claim on August 22, 2014, on the grounds that general administrative and adjudicative costs associated with advertising and the administration of a claims process to compensate third parties for their removal costs and damages are not OPA damages that can be reimbursed by the Fund. The Claims Division reviewed the 17 invoices, providing a spreadsheet that listed each invoice and a line-by-line review of each invoice. According to the spreadsheet the MRA invoices did not provide sufficient information to aid the NPFC in understanding the activities associated with the costs. This spreadsheet was attached to the determination denying the claim.

RP/Claimants' Request for Reconsideration

The RP/Claimants, in a letter dated October 16, 2014, requested reconsideration of the denial of the claim. They requested a 60-day extension of time in which to submit additional and supplemental information to answer questions raised by the NPFC in its spreadsheet that listed the line-by-line review of the MRA invoices. The NPFC granted the 60-day extension of time and on December 15, 2014, RP/Claimants submitted additional information, including Notes Related to Invoices and detailed expense categories and charges included in each category. This information sought to answer the NPFC queries noted on the spreadsheet. These sheets only added "damages assessment language" to each of the line items in the spreadsheet.⁶

The request for reconsideration included the following arguments: (1) the cost of a responsible party's efforts to review, assess and pay claims for damages is a recoverable expense under OPA; (2) allowing a limitation claimant to recover its third party damage assessment costs is consistent with the language of OPA and the claims regulations, and (3) allowing a limitation claimant to recover its damage assessment costs is consistent with the intent of Congress.

In support of its argument that the MRA costs were assessment costs RP/Claimants attached an MRA letter to KYL dated February 22, 2005, which described in detail Mr. [REDACTED] strategy for processing and adjudicating claims. He identified fishermen and processors as potential claimants, citing that the claims would be for lost profits and revenues for fishermen in Makushin/Scan Bay and Unalaska Bay. He explained that the responsible parties "were committed to honoring the monetary value (the fund) of the 171,000 pound quota established for the Makushin/Scan Bay areas and compensating the fishermen who would have fished those areas had it not been for the spill."⁷

Along with the additional information RP/Claimants included a Declaration of [REDACTED].⁸ He asserted that OPA 90 provides that the Fund is available for the payment of damages and includes the costs of assessing these damages. He stated that Congress in enacting OPA intended that "assessing the damages" included all costs from A-Z and that OPA 90

⁶ The language included "conducting damages assessment," "on site conducting damages assessment," "conducting damages assessment including attending ICS meetings relative to damages," "meeting/speaking with claimants relative to damages and reviewing loss data relative to damages," and "preparing damages assessment documents to send to MRA."

⁷ The incident resulted in the closure of the Makushin/Scan fishing areas. MRA based the monetary value of the fund on the 171,000 pound State of Alaska quota established for the Makushin/Scan areas and the \$2.75 per pound or a fund value of \$470,250.

⁸ Declaration of [REDACTED], dated December 12, 2014.

specifically contemplated that the Fund would be available for payment of all costs (as long as they met the requisite provisions of the Act) and included, but was not limited to “travel, living, office, and labor expenses for the persons and entities assessing claim damages resulting from the spill, adjuster charges, and any and all other costs associated with assessing and paying damages.”⁹ He believed that the term “damage assessment” as it relates to third party claims includes obtaining as much information as possible and that damage assessment “is continuous, fluid, and subject to changes ...”¹⁰ He attended public meetings, participated in the Unified Command and met with response contractors and consultants regarding the impact of the fishing industry.¹¹ He met with claimants to discuss their claimed losses of profit, prepared loss calculations, prepared settlement documents and concluded settlements.

NPFC Analysis

OPA provides that a responsible party for a vessel or facility from which oil is discharged or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages only if the responsible party demonstrates that it is entitled to a defense to liability under section 2703 of this title or demonstrates that it is entitled to a limitation on liability under section 2704 of this title. 33 U.S.C. § 2708(a)(1) and (2).

“Damages” means damages specified in section 2702(b) of this title, and includes the costs of assessing these damages.” 33 U.S.C. § 2701(5). Damages specified in section 2702(b) include, for purposes of this claim, “damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.” 33 U.S.C. § 2702(b)(2) (E).¹²

Relying on the OPA definition of “damages,” which includes the cost of assessing the damages, RP/Claimants broadly interpret OPA to mean that all expenses associated with “the costs of assessment” are reimbursable from the Fund. In total they seek \$285,753.83. This claimed amount is based on the 17 invoices and the accompanying spreadsheets that list activities as “damages assessment.” The OPA definition of “damage assessment” does not include administrative costs and is not so broad as to include collective assessment costs for all claims presented to the responsible party. For the reasons discussed below this claim is denied on reconsideration.

Administrative costs are not a damage that is payable from the Fund.

RP/Claimants first argue that a responsible party’s efforts to review, assess and pay claims for damages is a recoverable expense under OPA. This includes all costs associated with assessment of claims. According to Mr. [REDACTED] November 27, 2007 letter, he established the claims office in Dutch Harbor, advertised the claims process as required by 33 U.S.C. § 2714 and reviewed and settled claims. He maintained a Registered File List dated December 8, 2004 with the names of all claimants and potential claimants that included their damages claimed, status

⁹ Id., Paragraphs 9 and 10.

¹⁰ Id., Paragraph 14e.

¹¹ Id. Paragraph 14x.

¹² OPA damages also include: natural resources, real or personal property, subsistence use, revenues, and public services. 33 U.S.C. §2702(b)(2)(A)-(F).

description¹³ and settlement amounts. He identified types of claimants and potential issues. He determined that a fund totaling \$470,250 (based on the State of Alaska 171,000-pound quota and \$2.75 per pound for Makushin/Scan Bay fish) would be created and used to reimburse fishermen for their claimed lost profits.¹⁴

Further, according to Mr. [REDACTED], all costs associated with all "assessment" activities are reimbursable from the Fund. This is evidenced by the December 14, 2014 [REDACTED] Declaration in which he states that "... OPA 90 specifically contemplated that the Fund would be available for payment of any and all costs (as long as they meet the requisite provision of the Act) associated with assessing of the damages including but not limited to, travel, living, office and labor expenses for the person and entities assessing claims for damages resulting from the spill, adjuster costs, and any and all other costs associated with assessing and paying damages."¹⁵

Establishing a claims office and a claims process, including advertising for claims and the costs associated with the office and the process are administrative costs. Expenses for renting office space, setting up telephone and computer lines, maintaining files lists along with travel and living expenses for employees to manage the claims process are administrative costs. While RP/Claimants depict these as assessment costs they are more correctly defined as costs and expenses to support the claims process and therefore are administrative costs. Administrative costs or expenses are not an OPA-compensable damage. 33 U.S.C. § 2702(b)(A)-(F). 33 CFR 136.105(d)(8). While these are expenses incurred by the responsible parties when they retained MRA for establishing a claims office and a claims process, they are not a damage that is reimbursable from the Fund. To the extent that some of the \$285,753.83 claimed costs are for administrative costs, these costs are denied.

OPA does not provide that all assessment costs associated with all claims are payable from the Fund.

Second, RP/Claimants argue that allowing a limitation claimant to recover its third party damage assessment costs is consistent with the language of OPA, the Claims Regulations and the intent of Congress.¹⁶

While it is clear from the administrative record that MRA assessed and paid some claims there is no specific information about each claim and the costs to assess the damages for that claim. To evidence that they assessed and paid claims they provided their Third Party Claim Detail that listed 43 fishermen claimants, a total claimed amount of approximately \$1,157,259.52 and total claims paid amount of \$378,938.62. Interestingly, RP/Claimants presented the 43 claims to the Fund for review; but they were denied by the NPFC because there was insufficient information about each claim paid by the RP. The settled amounts were not supported by evidence, and there

¹³ Status descriptions were "Settled." "Closed subject to reopening, No claim submitted."

¹⁴ See [REDACTED] letter dated February 22, 2005.

¹⁵ [REDACTED] Declaration, Paragraph 10.

¹⁶ RP/Claimants' argument that the NPFC denial of their assessment costs is contrary to Congressional intent is without merit. They argue that a denial of the assessment costs is a disincentive for a responsible party to assess and pay claims and a claimant would seek reimbursement from the Fund. However, if a responsible party fails to settle a claim a claimant may commence an action in court against the responsible party for those costs or present its claim to the Fund. If the Fund pays those costs it then seeks reimbursement from the responsible party for those costs and if the responsible party fails to pay, the United States will file suit against the responsible party for those costs.

weren't any documents showing the reasonable costs to assess each claim. Further, it is not clear whether the claimed MRA costs were related to claims that were denied or closed without adjudication. Since there is no breakdown of MRA's costs associated with each claim or the time spent in assessing damages within that claim, it is not known if the assessment costs associated with each claim are compensable under OPA. RP/Claimants apparently seek their collective costs relating to all claims presented to them, whether the claims were paid or denied.

OPA provides a claims process for individual claimants and their individual claims. With certain exceptions individual claimants must first present their claims to the responsible party or guarantor of the source designated in section 2714(c). 33 U.S.C. 2713(a). If a claim is presented in accordance with subsection (a) of this section and " ... *the claim* is not settled by any person by payment within 90 days after the date upon which the claim was presented..., *the claimant* may elect to commence an action in court against the responsible party or guarantor or to present *the claim* to the Fund." 33 USC 2713(c).

OPA authorized the promulgation of regulations for a claims process. 33 USC 2713(e). The Claims Regulations provide the process and requirements for individual claims and claimants. For instance "[T]he *claimant* bears the burden of providing all evidence, information and documentation deemed necessary by the Director, NPFC, to support the claim." 33 CFR 136.105(a). "*Each claim* must be in writing for a sum certain for compensation for each category of uncompensated damages..." 33 CFR 136.105(b). "*Each claim* must be signed in ink by the *claimant* ..." 33 CFR 136.105(c). "*Each claim* must include the following, as applicable: ...(6) Evidence to support the claim." 33 CFR 136.105(d)(6). Also, "*A claim for loss of profits or impairment of earning capacity* due to the injury to, destruction of, or loss of real or personal property may be presented by a *claimant* sustaining the loss or impairment." 33 CFR 136.231(a). In addition, a *claimant* must establish the following: ...(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 the reduction." 33 CFR 136.233(b). Finally, "[T]he reasonable costs incurred by the *claimant* in assessing the damages claimed." 33 CFR 136.105(e)(8). Importantly, if the NPFC denies the claim, the assessment costs associated with that claim are not payable.

There are no provisions either in OPA or the Claims Regulations that can be interpreted to mean that a responsible party's collective assessment costs incurred for all its adjudicated claims, paid or not, are reimbursable from the Fund. RP/Claimants argue that limitation claimants are no different from third party claimants and that as limitation claimants they are entitled to their assessment costs because that is consistent with the language of OPA and the Claims Regulations. The NPFC agrees that there is no differentiation between a third party claimant and a limitation claimant as it relates to assessment costs. As discussed above any claimant presenting a claim to the Fund must provide evidence to support its claim. 33 CFR 136.105. A claimant may submit its costs of assessing the damages that are the subject of that claim. 33 CFR 136.105(e)(8). If the claim is an OPA-compensable claim and reimbursable and payable from the Fund, the reasonable assessment costs associated with estimating the damages within that claim are also reimbursable. In this case MRA has not provided evidence for each claim or the assessment costs associated with damages within each claim as required by the Claims Regulations. Much of its claimed costs appear to be the collective costs of "assessment" of claims reviewed by MRA. To the extent that some of the claimed \$285,753.83 costs are for the assessment of claims these costs are denied.

Finally, RP/Claimants rely on Gatlin Oil Company v. United States,¹⁷ in their argument that an RP/Claimant is entitled to its assessment costs associated with a damage claim. Gatlin Oil is inapposite for two reasons. First, the discharge of oil at the Gatlin Oil facility was solely caused by a vandal and it was subsequently determined that Gatlin Oil was entitled to a sole fault third party defense; therefore, it was no longer a responsible party. Second, Gatlin Oil was assessing damages to its *own facility* and was not assessing damage claims of a third party claimant.

For the reasons discussed above this claim is denied on reconsideration.

Claim Supervisor:

Date of Supervisor's review: [REVIEW DATE]

6/2/16

Supervisor Action: *Approved*

Supervisor's Comments:

¹⁷ 169 F. 3d 2007 (4th Cir. 1999).