

## CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: B13013-0005
Claimants	: Boston Marine Transport/Great American Insurance Company of New York/The American Steamship Owners Mutual Protection and Indemnity Association
Type of Claimant	: Corporate
Type of Claim	: Third Party Property damage claim #50004: Atlas Yacht Club
Claim Manager	: [REDACTED]

### **INCIDENT DETAILS**

On December 13, 2012, at 2055, the tank barge BOSTON No. 30 (BOSTON 30) arrived at the New York Terminal, Elizabeth, NJ, to load 20,164.93 barrels of No. 6 fuel oil. Loading from the facility began at 2310 and was completed on December 14, 2012, at 1115. At 1330, the BOSTON 30 departed New York Terminal under tow of the Tug QUENAMES through the Arthur Kill and Kill Van Kull along the south side of Shooter's Island to the Mayship Repair in Staten Island, NY. The BOSTON 30 arrived at the Mayship Repair at 1525.<sup>1</sup>

At 2000, the Kirby tank barge DBL 25 (DBL 25) arrived alongside the BOSTON 30 to lighter the barge. Lightering of the BOSTON 30 began at 2035.<sup>2</sup> At 2215, the tankerman onboard the DBL 25 noticed oil in the water between the BOSTON 30 and DBL 25. Transfer of oil was stopped and sorbent boom was placed around both barges. The National Response Center was notified and Miller's Launch was contacted to respond to the oil spill. Tank soundings onboard the BOSTON 30 and DBL 25 didn't immediately reveal the source of the spill so the transfer of oil from the BOSTON 30 to the DBL 25 resumed on December 15, 2012, at 0001. This transfer continued until 0120 when it was stopped for a second time as more oil was discovered in the water between the two barges. Approximately 30,000 gallons of oil were released from the BOSTON 30.<sup>3</sup>

CG Sector New York provided oversight of the pollution removal activities and conducted the investigation.

### **THE CLAIMANTS AND THE CLAIM:**

The Claimants are Boston Marine Transport as the owner, operator and responsible party (RP) of the BOSTON 30; Great American Insurance Company of New York (Great American) as the subrogated primary insurer of the BOSTON 30 and the American Steamship Owners Mutual Protection and Indemnity Association (The American Club) as the subrogated excess insurer of the BOSTON 30. On December 11, 2015, the RP/Claimants submitted to the Oil Spill Liability Trust Fund (OSLTF or the Fund) a claim based on an assertion of entitlement to an act of God and sole fault of a third party defense or, in the alternative, entitlement to their applicable limit of liability. On March 23, 2017, the NPFC determined that the RP/Claimants were entitled to their

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<sup>1</sup> See tug logs submitted with claim dated December 9, 2015. See also CG Sector NY VTS clip submitted with claim dated December 9, 2015. See page 3 of claim submission dated December 9, 2015.

<sup>2</sup> See tug logs submitted with claim dated December 9, 2015.

<sup>3</sup> See Clean Waters of New York Invoice 01419 dated December 31, 2012.

limit of liability, but not entitled to either of the asserted defenses. Therefore, RP/Claimants will be reimbursed compensable costs exceeding their applicable liability limit and incurred as a result of the oil-pollution incident under the Oil Pollution Act of 1990 (OPA).<sup>4</sup>

The RP/Claimants seek reimbursement for amounts paid to third party claimants for property damages sustained. This determination pertains to the property damage claim payment made by the RP/Claimants to the Claimant listed in the Determination section below.

The RP/Claimants and the third party claimant named below executed a release dated March 31, 2014, whereby the third party damage claimant acknowledged receipt of compensation and released the RP/Claimants from all further liability. Thus, in compensating the third party damage claimant for his losses due to the incident, the RP/Claimants are subrogated to the claim for damages and are eligible to present this claim for damages to the Fund for reimbursement, following the same standards as required for any third party damage claimant.

**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.

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.

33 USC 2713 allows a responsible party to submit a claim directly to the Oil Spill Liability Trust Fund.

Under 33 USC 2708, a responsible party who is entitled to a limitation of liability may assert a claim under [section 2713 of this title](#) only to the extent that the sum of the removal costs and damages incurred by the responsible party plus the amounts paid by the responsible party, or by the guarantor on behalf of the responsible party, for claims asserted under [section 2713 of this title](#) exceeds the amount to which the total of the liability under [section 2702 of this title](#) and removal costs and damages incurred by, or on behalf of, the responsible party is limited under [section 2704 of this title](#).

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).

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<sup>4</sup> See OSLTF Claim Form dated December 9, 2015. Total removal/damage costs paid by claimant was \$18,626,072.35 (CG costs of \$305,618.01 are not included in this figure as they were never billed to the Claimant). The vessel's gross tonnage is 1634. At the time of the incident the statutory limit on liability for this vessel was \$3,200.00 per gross ton (\$5,228,800.00) or \$6,408,000.00 whichever is greater. 33 C.F.R. 138.230(a)(3).

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 U.S.C. §2712(h)(2).

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).

The pertinent provisions of the regulations relating to property damage claims follow:

**33 CFR §136.213 Authorized claimants.**

(a) A claim for injury to, or economic losses resulting from the destruction of, real or personal property may be presented only by a claimant either owning or leasing the property.

(b) Any claim for loss of profits or impairment of earning capacity due to injury to, destruction of, or loss of real or personal property must be included as subpart of the claim under this section and must include the proof required under §136.233.

**33 CFR §136.215 Proof.**

(a) In addition to the requirements of subparts A and B of this part, 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.

**33 CFR §136.217 Compensation allowable.**

(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 value of the property before and after the damage; or
- (3) The replacement value.

**DETERMINATION:**

The RP/Claimants argue that they are entitled to reimbursement of amounts paid for damages to boats and other personal property of third party claimants. They provided individual files records for each of the claims paid. The files contain information reported by the damage adjuster, photographs of the damaged property, the marine surveyor’s estimate, statement of loss by each third party claimant, proof of identity and ownership, details of the amount paid and proof of payment.

The RP/Claimants hired Global Risk Solutions (GRS) to assess the damages and settle the damage claims. The GRS adjusters personally visited local marinas to inspect each claimant's property. After visually inspecting the claimed damaged property, the GRS representatives valued each claimant's damages using a standardized methodology for boats and separate standardized methodology for dockside personal property.

For vessels, an accredited marine surveyor appraised the condition of the vessel and provided an estimate for restoring the boat to its condition prior to the spill.<sup>5</sup> GRS states that the repair estimates from seven local repair facilities were used to corroborate the repair estimates. They supplied the repair cost estimate, replacement value, and pre- and post-spill values for the vessels. They utilized National Automobile Dealers Association (NADA) guidelines for valuing the vessels. They state that the repair costs equaled the difference between the vessel before and after the injury; meaning that the vessel lost value in the amount equal to the repair cost. If the vessel was worth less than the repair estimate, the value of the boat was the compensation paid.

For dockside personal property, they calculated a value using a comparative average of prices from four different marine suppliers. They assumed the dockside property could not be cleaned or repaired. They specifically stated that they didn't feel it was necessary to make the valuation because they state that the difference between the pre and post-incident values in most cases was "necessarily equal to the repair costs"<sup>6</sup> and was not practical or cost-effective to evaluate. They state that they factored in the age and condition of the property when settling the claims.

The RP/Claimants argue that their methodology is sufficient to satisfy the requirements set forth in 33 CFR §136.215 of the regulations.

The OSLTF may only reimburse the lesser of the cost of repair, replacement value, or the difference between the value of the property before and after the injury.<sup>7</sup>

This determination applies to the property damage claim of Atlas Yacht Club. Atlas Yacht Club sought compensation for damages to three boats, 1,660 feet of PVC water supply lines, three water hoses, one grated walkway, four dock bumper guards, two gangways, one gasoline hose, two pole lights and 25 PVC piling covers. Based upon the assessment of [REDACTED], a GRS field agent, on February 26 and March 15, 2013, the RP/Claimants paid Atlas Yacht Club a total of \$9,000.00, which included \$3,150.00 as a vessel settlement total with \$797 as "Payment for adjustment to resolve vessel portion of claim." The \$797 was an adjustment to allow Atlas Yacht Club to rent a crane for haul out.<sup>8</sup> Atlas Yacht Club insisted that it needed to rent a crane to haul out the three vessels because taking them to a repair yard was cost prohibitive, so Atlas Yacht Club wanted \$1,800 for a crane rental. GRS adjusted the offer to include the \$1,800, but deducted from their composite estimates the haul-out costs for all three vessels, which resulted in the \$797 adjustment. Atlas Yacht Club was paid \$5,850.00 for the dockside property including replacement of some items and additional cleaning of others, and a \$196.42 "adjustment to resolve claim."

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<sup>5</sup>See surveys conducted by Capt. [REDACTED], A.M.S. dated March 30, 2013, supplied with Claimant's file.

<sup>6</sup> See the 05/17/2016 email from [REDACTED]

<sup>7</sup> 33 C.F.R. §136.217

<sup>8</sup> Bates 50004.000009, Damage Claim Report p. 3.

The marine surveyor stated that all three vessels were in “poor” condition, and estimated the repair cost to be \$250 to sand and paint the bottom of the utility barge, \$250 to sand and paint the bottom of the pile driver, and \$500 to clean the sides and sand and paint the bottom of the work boat/skiff. GRS used his repair recommendation, but valued the repair based on their composite estimate methodology. The NPFC accepts the use of the marine surveyor for obtaining an opinion as to the condition of the boat and recommendation for repair. Further, the fact that GRS used their own methodology for calculating repair costs with a contemporaneous objective composite estimate rather than using the marine surveyor’s estimate is more reliable because it is backed up by documentation of actual prices for the work in that area.

For the utility barge, the GRS valuation methodology produced a composite estimate of \$688.00 to offload and block, sand and paint the bottom, and clean the vessel. For the pile driver, the GRS valuation methodology produced a composite estimate of \$805.00 to offload and block, sand and paint the bottom, and clean the vessel. For the work boat/skiff, the GRS valuation methodology produced a composite estimate of \$1,216.00 to offload and block, paint the hull and bottom, and clean, wax and buff the vessel. The RP/Claimants stated that the value of the utility barge was \$1,850.00<sup>9</sup> before the damage and \$1,162.00<sup>10</sup> after the damage, leaving a \$688.00 difference in value. The RP/Claimants valued the pile driver barge at \$2,900.00<sup>11</sup> before the damage and \$2,095.00<sup>12</sup> after the damage, leaving an \$805.00 difference in value. The RP/Claimants stated that the value of the work boat was \$860.00<sup>13</sup> before the damage and \$0.00<sup>14</sup> after the damage, leaving an \$860.00 difference in value.

GRS paid \$805.00 for the repair costs on the pile driver, \$688.00 for the repair costs on the utility barge, and \$860 for the value of the work boat/skiff prior to the damage, as it was less than the estimated repair cost. They then added the \$797 adjustment for the crane rental as discussed previously.<sup>15</sup>

The OSLTF may only reimburse the lesser of the cost of repair, replacement value, or the difference between the value of the property before and after the damage, when properly documented.<sup>16</sup> As calculated and paid by the RP/Claimants, the NPFC approves \$3,066.00 of costs paid for the vessel repairs on the pile driver barge and work boat/skiff value including the \$1,800 for the crane rental. As did GRS, NPFC includes the crane rental, but reduces the pile

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<sup>9</sup> No valuation source was provided for this vessel.

<sup>10</sup> The residual value was based on deducting the repair cost from the pre-incident value of the boat. Objectively, the boat loses value in an amount equal to what it costs to bring it back to its condition prior to the incident. See Vessel and Dockside Property Valuation Spreadsheet 2.0 obtained from Mr. [REDACTED] on November 9, 2016.

<sup>11</sup> See Sun Machinery Corp. pile driver barge sale listing value provided in November 17, 2016 email from [REDACTED]

<sup>12</sup> The residual value was based on deducting the repair cost from the pre-incident value of the boat. Objectively, the boat loses value in an amount equal to what it costs to bring it back to its condition prior to the incident. See Vessel and Dockside Property Valuation Spreadsheet 2.0 obtained from Mr. [REDACTED] on November 9, 2016.

<sup>13</sup> See NADA value provided in November 17, 2016 email from [REDACTED].

<sup>14</sup> The residual value was based on deducting the repair cost from the pre-incident value of the boat. Objectively, the boat loses value in an amount equal to what it costs to bring it back to its condition prior to the incident. See Vessel and Dockside Property Valuation Spreadsheet 2.0 obtained from Mr. [REDACTED] on November 9, 2016.

<sup>15</sup> NPFC believes that GRS erred in deducting the \$253 for the haul out estimate on the work boat/skiff, since they paid based on the vessel value rather than the composite repair estimate. Therefore, haul out was not included in the amount paid GRS recommended for the vessel.

<sup>16</sup> 33 C.F.R. §136.217

driver estimate by its estimated haul-out and block amount. The approved amount includes \$406 for sanding, painting and cleaning the pile driver, \$860 for the value of the work boat/skiff, and \$1,800 for the crane rental to lift the pile driver out of the water. These costs were the lowest of the values provided in accordance with the regulations. NPFC must deny the claimed costs related to the utility barge, since the Claimant did not provide documentation of the pre-spill vessel value, making it impossible for the NPFC to determine what the lowest cost alternative was. The NPFC determines that the RP/Claimants should be paid \$3,066.00 for the payment made to Atlas Yacht Club for damage to its vessels.

Atlas Yacht Club was paid \$5,850.00 for its dockside personal property, which included “as new” replacement of 830 feet of PVC water supply lines, the three water hoses, and the four dock bumper guards with \$369.86 in applicable sales tax. The paid amount also included an additional cleaning allowance for the grated walkway, two gangways, a gasoline hose, two pole lights and 25 PVC piling covers, along with the \$196.42 adjustment to resolve the dockside property portion of the claim. The RP/Claimants state that their settlement was based upon a comparable average and condition of the dockside property at the time of the assessment. However, they paid to replace certain items of property “as new” even though Mr. ██████████ assessed the general condition of the 1-year-old water hose in “good” condition, 6-year-old PVC water supply lines as “average” condition, and 4-year-old dock bumper guards as “average” condition. Further, it is unclear to the NPFC how the RP/Claimants determined the amount of compensation provided to Atlas Yacht Club for the cleaning of the other items.

When reviewing this claim, the NPFC questioned the Claimant/RP’s rationale for paying full value for dockside property that was not new, as the applicable regulations are very clear about allowable compensable costs.<sup>17</sup> They argue that their dockside property valuations accounted for age and condition<sup>18</sup>, but did not provide the calculations showing any adjustments for age and condition when determining the payment amounts. Additionally, the RP/Claimant never attempted to clean or repair the dockside property, but instead provided full replacement value or an unsupported cleaning allowance for used equipment.<sup>19</sup> They also did not calculate a value to the dockside property before and after the incident citing that in most cases, those costs were equal to the repair costs and were not practical nor cost effective to evaluate. Regarding the money paid to Atlas Yacht Club for the cleaning allowance for certain items, the RP/Claimants’ rationale for determining the amount of reimbursement was never disclosed. As such, it is impossible for the NPFC to properly evaluate if those costs were less than the replacement costs or difference between the depreciated value of the property before and after the damage. Thus, the RP/Claimants did not provide the proper valuations of the dockside personal property as required by the regulation and as such, their dockside property costs are not a valid for compensation under OPA.

The NPFC determines that the RP/Claimants should be paid the \$3,066.00 for the boat damage paid to Atlas Yacht Club. The NPFC denies the costs related to the dockside personal property as the RP/Claimants have not presented proper documentation of the values of the property as required by the regulations. Should the RP/Claimants seek reconsideration of this claim, they must provide documentation demonstrating the required valuations consistent with the

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<sup>17</sup> See May 17, 2016 email from ██████████.

<sup>18</sup> See May 17, 2016 email from ██████████.

<sup>19</sup> See RP/Claimants submission claim tab 50004.

regulations and showing the calculations demonstrating that the amounts paid were the appropriate amounts of compensation allowable in accordance with 33 C.F.R. §136.217.

Claim Supervisor:



Date of Supervisor's Review: 4/05/2017

Supervisor Action: Determination Approved.

Supervisor's Comments: