CLAIM SUMMARY / DETERMINATION FORM

Claim Number	:	B13013-0012
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 50013[redacted]
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.[1]

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.[2] 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.[3]

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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[1] *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.
[2] *See* tug logs submitted with claim dated December 9, 2015.
[3] *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, the 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).[4]

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 24, 2013, 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).

[4] *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.

<u>DETERMINATION:</u>

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.[5] 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"[6] 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.

This determination applies to the property damage claim of Mr. [redacted]. Mr. [redacted] sought compensation for damages to his fiberglass vessel; four fenders; three boat lines and one dock bumper guard. Based upon the assessment of vessel and dockside personal property damage by Mr. [redacted], GRS field agent on February 10, 2013, the RP/Claimants paid Mr. [redacted] a total of $3,404.69, which included $2,369.00 as vessel settlement and $1,035.69 as dockside property settlement for the replacement of four fenders; three boat lines and one dock bumper.

For this vessel, the valuation methodology produced a composite estimate of $2,369.00 for hauling and blocking; bottom painting; boot stripe painting and cleaning, waxing and buffing; which was more than the marine surveyor's estimate for repairs. Specifically, the marine surveyor assessed the vessel and estimated the repair cost to be $1,500.00, which included recommendations for the removal of oil staining from the starboard side of the vessel; bottom painting; lifting and blocking and cleaning. However, the marine surveyor noted there was no damage to the boot stripe.[7] GRS used his repair recommendation, but valued the repair based on their composite estimate methodology which included re-painting the boot stripe. 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

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[5] See survey conducted by Capt. [redacted], A.M.S. dated February 15, 2013, supplied with Claimant's file.
[6] See the May 17, 2016 email from [redacted].
[7] See survey conducted by Capt. [redacted], A.M.S. dated February 15, 2013, supplied with Claimant's file.

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. However, the NPFC objects to RP/Claimants decision to re-paint the boot stripe. The RP/Claimants state that the value of the boat before the incident was $8,340.00[8] and the value after the incident was $5,971.00,[9] leaving a $2,369.00 difference in value. Therefore, they paid him the difference between the value of the property before and after the injury, which they determined was $2,369.00. The NPFC agrees that the value of the vessel before the oil spill was $8,340.00 based upon NADA guidelines but finds the value of the vessel after the incident at $6,892.00[10], leaving a difference in value of $1,448.00. This is because the RP/Claimants paid $921.00 in boot stripe painting costs, even though the AMS marine surveyor they hired specifically stated in his report that the boot stripe had no damage from the oil spill. Therefore, the RP/Claimants have provided appropriate valuations to support a difference in value of $1,448.00 (after removing the $921.00 boot stripe cost) for the vessel as required by the applicable regulation.

Mr. [redacted] was also paid $1,035.69 for the dockside property which included the replacement of four fenders; three boat lines and one dock bumper with applicable sales tax. RP/Claimants state that their settlement was based upon a comparable average and condition of the dockside property at the time of the assessment but replaced the property "as new" even though Mr. [redacted] assessed the general condition of the fenders, lines and dock bumper as "good" during his assessment. 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.[11] Specific to this claim, the RP/Claimant never attempted to clean or repair the four fenders; three boat lines and one dock bumper but argued that repair costs were not cost effective and instead provided full replacement value for used equipment.[12] 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. Lastly, they argue that their dockside property valuations accounted for age and condition,[13] but did not provide the calculations showing any adjustments for age and condition when determining the payment amounts. 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.

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[8] Based on the NADA values provided via email November 17, 2016.

[9] 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.

[10] Total Composite Estimate for repairs - $2369.00 broken out as follows: Composite Estimate for Offload/Block - $500.00; Composite Estimate for bottom paint cost - $448.00.; Composite estimate for Clean, Wax & Buff - $500.00; and Composite Estimate for repainting the boot stripe - $921.00.. The NPFC agrees with the marine surveyor's recommendation of offload/block; bottom painting and cleaning, waxing & buffing which totals $1448.00. Subtracting $1448.00 for allowable repair costs from the NADA pre-incident vessel value of $8,340.00 leaves a vessel value after damages of $6,892.00. The $921.00 cost for painting the boot stripe is not an allowable charge as those repairs were not endorsed or recommended by the marine surveyor. See composite estimates provided by claimant with claim submission.

[11] See May 17, 2016 email from [redacted].

[12] See RP/Claimants submission claim tab 50013.

[13] See May 17, 2016 email from [redacted]

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.[14] The NPFC approves $1,448.00 of the costs paid for the vessel repairs that, according to the AMS marine surveyor, were attributable to the oil spill and correctly valued by the RP/Claimants on the Composite Estimate. The cost of these repairs were less than the replacement value of the vessel and before and after value of the vessel found by the RP/Claimants.

The NPFC determines that the RP/Claimants should be compensated $1,448.00 for the payment they made for oil spill damages to Mr. [redacted] vessel.

Claim Supervisor: [redacted] [redacted]
Date of Supervisor's Review: ***4/7/2017***
Supervisor Action: ***Approved***
Supervisor's Comments:

[14] 33 C.F.R. §136.217