

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: B13013-0046
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 50062 [REDACTED]
Claim Manager	: [REDACTED]
Amount Requested:	\$645.55

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

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.

liability. On March 23, 2017, the NPFC determined that the RP/Claimants were entitled to their 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).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.

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. 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"⁵ 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; three boat fenders, one buoy and three boat lines. Based upon the assessment of vessel and dockside personal property damage by Mr. [REDACTED] a GRS field agent, on February 04, 2013, the RP/Claimants paid Mr. [REDACTED] a total of \$645.55, which included \$150.00 as a vessel settlement and \$495.55 as a dockside property settlement for the replacement of three boat fenders (3 Fenders: 10.5" x 30"), one buoy and three boat lines (3 Lines: 25' x 5/8") that collectively totaled seventy five feet in length.

For this vessel, the RP/Claimant states the vessel owner had his vessel cleaned offsite and provided the NPFC with an invoice dated both December 26, 2012 and February 05, 2013, from True World Tackle for vessel clean up costs of \$150.00. The invoice does not identify any oil damage relevant to the vessel cleaning by True World Tackle, and provides no details of the cleaning. It also shows no payment, but only an amount due. Further, Mr. [REDACTED]'s boat has the "True World Tackle" name on it, so he obtained an invoice from a business associated with his boat. The RP/Claimants did not provide a composite estimate relative to a GRS assessment, nor did the RP/Claimants provide a marine surveyor assessment of the vessel and/or estimate of repair costs. And, the RP/Claimants did not calculate a value for the vessel before and after the incident. Additionally, the RP/Claimants did not provide the proper valuations of the vessel as required by the regulations and as such, their vessel repair costs are not OPA compensable.

⁵ See the 05/17/2016 email from [REDACTED].

Mr. [REDACTED] was also paid \$495.55 for the dockside property which included the replacement of three boat fenders, one buoy and three boat lines 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 approximately four-year-old boat fenders and boat lines as “average”, and the general condition of the approximately three-year-old buoy as “good” during his assessment. When reviewing this claim, the NPFC questioned the RP/Claimants rationale for paying full value for dockside property that was not new, as the applicable regulations are very clear about allowable compensable costs.⁶ Specific to this claim, the RP/Claimant never attempted to clean or repair the three boat fenders, one buoy and three boat lines, but argued that repair costs were not cost effective and instead provided full replacement value for used equipment.⁷ 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 condition⁸, 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.

The OSLTF may only reimburse the lesser of the cost of repair, replacement value, or the difference between the depreciated value of the property before and the value after the damage.⁹ As the RP/Claimants failed to provide an assessment of cost of repair, replacement value or the difference between depreciated value of the vessel before and the value after the damage, the NPFC cannot confirm if the vessel cleaning costs paid are appropriate for reimbursement. Furthermore, as the RP/Claimants failed to provide an assessment of cost of repair, replacement value or the difference between depreciated value of the three boat fenders, one buoy and three boat lines before and the value after the damage, the NPFC cannot confirm if the personal property replacement costs are appropriate for reimbursement. For this reason and for other reasons as stated above, this claim is denied.

Claim Supervisor: [REDACTED] [REDACTED]
Date of Supervisor’s Review: *4/17/2017*
Supervisor Action: *Denial Approved*
Supervisor’s Comments:

⁶ See May 17, 2016 email from [REDACTED].
⁷ See RP/Claimants submission claim tab 50062.
⁸ See May 17, 2016 email from [REDACTED].
⁹ 33 C.F.R. §136.217