

## CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: B13013-0065
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 #50108 [REDACTED]
Claim Manager	: [REDACTED]
Amount Requested:	\$1,569.83

### **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

<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.

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).<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 25, 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).

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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.

The RP/Claimants calculated a replacement value for dockside personal property using a comparative average of prices from four different marine suppliers. They determined that the dockside property could not be cleaned or repaired<sup>5</sup> and made no attempt to do so. GRS concluded that these items were worthless post incident. They also specifically stated that they didn't feel it was necessary to determine the value of the property before and after the injury occurred because the difference between the pre and post-incident values was reasonably approximated by the repair costs 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.<sup>6</sup>

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 six boat fenders, two buoys, twelve boat lines, one water hose, two tide minder kits and two jet ski leisure lifts. Based upon the assessment of dockside personal property damage by Mr. [REDACTED], GRS field agent, on February 5, 2013, and follow-up assessments on February 7, February 14 and February 27, 2013, the RP/Claimants acknowledged damage to Mr. [REDACTED] three boat fenders, one buoy, eight boat lines, one water hose, one tide minder and one jet ski leisure lift. The RP/Claimants paid Mr. [REDACTED] a total of \$1,569.83 on March 23, 2013 as the dockside property settlement.

Specifically, Mr. [REDACTED] was paid \$1,569.83 for the dockside property, which included the "as new" replacement of three boat fenders (2 Fenders: 10.5" x 30"), (1 Fender: 6.5" x 23"), one buoy, eight boat lines (6 Lines: 25' x 1"), (2 Lines: 15' x 1"), (4 Lines: 10' x 1"), one water hose, one tide minder kit and the replacement value of one jet ski leisure lift. 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 boat fenders, boat lines and water hose as "good", and the general condition of the buoy, and tide minder kit as "average" during his assessment.<sup>7</sup> When reviewing this claim, the NPFC questioned the RP/Claimant's rationale for paying full value for dockside property which was not new, as the applicable regulations are very clear about allowable compensable costs.<sup>8</sup> RP/Claimants did not prove their conclusion that the property was "worthless" post incident. Specific to this claim, the RP/Claimants never attempted to clean or repair the boat fenders, buoy, boat lines, water hose or tide minder kit, but argued that repair costs were not cost effective and instead provided full replacement value for used equipment.<sup>9</sup> They also did not calculate a value for the dockside property before and after the incident citing

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<sup>5</sup> See May 17, 2016 email from [REDACTED].

<sup>6</sup> See May 17, 2016 email from [REDACTED].

<sup>7</sup> See vessel and dockside valuations spreadsheet 2.0 submitted by Claimant on November 9, 2016.

<sup>8</sup> See May 17, 2016 email from [REDACTED].

<sup>9</sup> See RP/Claimants submission claim tab 50108.

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,<sup>10</sup> 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 regulations and as such, their dockside property costs are not OPA compensable.

Regarding the jet ski leisure lift, Mr. [REDACTED] identified the replacement value (new) as \$1099.00 but offered Mr. [REDACTED] \$659.40 based upon his assessment of the jet ski leisure lift at the time of the incident. However, as with the boat fenders, boat lines, water hose and tide minder kit, the RP/Claimants never attempted to clean or repair the jet ski leisure lift. And while the RP/Claimant provided a value for the jet ski leisure lift before the incident, it's unclear to the NPFC how they calculated that amount specific to the 5 year old age and average condition of the lift. As the RP/Claimants did not provide the proper valuations (with applicable calculations) of the jet ski leisure lift as required by the regulations, the dockside property costs associated with the jet ski leisure lift are not OPA compensable.

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.<sup>11</sup> As the RP/Claimants failed to provide both a cost for cleaning (repair) and the depreciated value of the dockside property before and value after the spill, the NPFC cannot confirm if the replacement value of the boat fenders, buoy, boat lines, water hose, tide minder kit and jet ski leisure lift were appropriate for reimbursement. For this reason and for other reasons as stated above, this claim is denied.

Claim Supervisor: [REDACTED]

Date of Supervisor's Review: *April 17, 2017*

Supervisor Action: *Denial Approved*

Supervisor's Comments:

<sup>10</sup> See May 17, 2016 email from [REDACTED]

<sup>11</sup> 33 C.F.R. §136.217