

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: B13013-0079
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	: RP Costs Paid for Claims- Captain [REDACTED], A.M.S.
Claim Manager	: [REDACTED]
Amount Requested	: \$14,670.50

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 applicable liability limit for the RP/Claimants is \$6,408,000.00

This claim is for the \$14,670.50 the RP/Claimants paid to a marine surveyor hired to assess the damages to third party claimants' vessels, and to provide an opinion regarding their condition and an estimate for restoring the vessels to their condition prior to the oil spill.

APPLICABLE LAW:

Under OPA 90, at 33 U.S.C. § 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 C.F.R. §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 U.S.C. § 2713 allows a responsible party to submit a claim directly to the Oil Spill Liability Trust Fund.

33 U.S.C. § 2715 provides that any person who pays compensation, pursuant to OPA, to any claimant for removal costs or damages is subrogated to all the claimant's rights.

Under 33 U.S.C. § 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).

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).

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).

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, NPFCA, 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).

DETERMINATION:

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). As a responsible party who has demonstrated entitlement to a limit of liability under OPA, the RP/Claimants are also entitled to reimbursement of amounts paid for claims for damages to third party claimants.⁵

Under OPA, the definition of “damages” includes the reasonable costs incurred to assess the damages. ““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).⁶ Under OPA, the assessment costs are the reasonable costs of estimating the damages claimed.⁷

The RP/Claimants hired Global Risk Solutions (GRS) to assess the damages and settle the damage claims. To assist in the valuation of damages to the vessels, the RP/Claimants also hired a marine surveyor, Captain [REDACTED], A.M.S.,⁸ to assess the vessel damages and determine vessel restoration/repair costs. Specifically, the RP/Claimants hired Capt. [REDACTED] to “[p]rovide damage inspections, reporting and photo documentation on vessels associated with the spill from the subject vessel as directed [by] the GRS and/or Meredith/GA-ERT representative and in accordance with A.M.S. guidelines.”⁹ The RP/Claimants paid Capt. [REDACTED] \$14,670.50, which included a payment of \$9,270.50 on March 21, 2013, and a second payment of \$5,400.00 on May 8, 2013.

As stated in the Damage Claim Report provided in each third party Property Damage Claim File, Capt. [REDACTED] personally visited local marinas to inspect each claimant’s boat and assess the damage. He provided an opinion as to the extent of the oil damage and an estimate of the repair

⁵ 33 U.S.C. § 2708

⁶ 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).

⁷ See 33 CFR 136.105(e)(8)

⁸ A.M.S. is the acronym for Accredited Marine Surveyor.

⁹ See Purchase Order at Bates #2608-033.000002

costs to restore it to its pre-spill condition. If the boat had damages that were not caused by the oil spill, he reported them, recommending nonpayment for those damages. The RP/Claimants seek reimbursement of the fees paid to Captain [REDACTED] to appraise the condition of third party claimants' vessels and to estimate the costs of restoring the boats to their condition prior to the spill.

The RP/Claimants provided individual file records for each of the damage claims paid. In general, the files contain information reported by the damage adjuster, photographs of the damaged property, the marine surveyor's report and estimate, statement of loss by each third party claimant, proof of identity and ownership, details of the amount paid and proof of payment. The NPFC separately adjudicated the third party damage claims, determining that a majority of the claims for damages to boats are compensable under OPA.

Normally, the NPFC would provide a separate determination for each claim for damages including any costs for assessment of damages. In this case, the NPFC performed the analysis of each damage claim and the costs associated with assessing the damages in each claim together. However, the NPFC is not presenting each damage analysis and its correlating claimed assessment costs in the same, single determination. Rather, the NPFC is providing individual determinations for each damage claim, but the adjudication of the services of Capt. [REDACTED] is being presented in this one determination, even though each of his invoiced cost amounts directly correlates to each individual claim for damages.

Capt. [REDACTED] inspected 47 third party claimants' boats.¹⁰ He provided a report on his assessment and repair estimate for each vessel he inspected. GRS generally used his repair recommendation, but then valued the repair based on a composite estimate methodology that they developed or based on estimates provided by some of the claimants. The use of the marine surveyor for obtaining an opinion as to the condition of the boat and recommendation for repair is a reasonable cost of assessing the damages, as the OPA section 2701 definition of "damages" includes the costs of assessing the damages in accordance with section 2702 (b) of OPA¹¹. The regulations further clarify assessment costs to be the reasonable costs of estimating the damages claimed.¹²

However, the definition of damages under OPA section 2701(5) implies a presumption that assessment costs are only included for valid, compensable damage claims. Because the definition of damages includes the costs of assessing the damages, if there are no compensable damages, by deduction, there are no reasonable costs of assessing them. So, when a claimant cannot be paid for damages for one reason or another, the assessment costs related to that claim also cannot be paid.

The record indicates that Capt. [REDACTED] job was damage assessment. The NPFC finds his costs correlate directly to estimating the damages to vessels owned by third-party claimants. Specifically, he inspected vessels for damages and provided a report of those inspections, which

¹⁰ See Invoice Control Sheets for Claims, Bates #2608-033.000001

¹¹ See 33 U.S. Code §2701, and 33 U.S. Code §2702(b).

¹² 33 CFR 136.105(e)(8)

included identification of the damages, repair valuations and photographs of the damages.¹³ So, the costs paid to Capt. [REDACTED] for any assessments of boat damages resulting in payment of valid damage claims would be compensable by the Fund under OPA for any claims the NPFC finds reimbursable. 45 of the 47¹⁴ vessel repair estimates/damage assessments he performed supported the RP/Claimants' decision to pay for the damages to the vessels under OPA. The RP/Claimants presented the NPFC with evidence of damages and valuations as required by the regulations on those 45 damaged boats. In accordance with the regulations, the NPFC was able to recommend reimbursement of the RP's payments relating to the claims on those 45 damaged boats.

The RP/Claimants included Capt. [REDACTED] costs for one boat damage claim, that of [REDACTED], which they did not pay.¹⁵ Because the RP/Claimants did not pay the claim, there is no OPA damage claim for Mr. [REDACTED] property; thus, Capt. [REDACTED] costs related to Mr. [REDACTED] boat also cannot be paid by the Fund. Additionally, the NPFC's adjudication resulted in a denial of part of the claim for damages to three vessels, that of Atlas Yacht Club.¹⁶ The NPFC denied the RP/Claimants' claim for costs paid for damages to a utility barge owned by Atlas Yacht Club because of missing valuation documentation. Because the damages for Atlas Yacht Club's utility barge cannot be paid, Capt. [REDACTED] costs related to Atlas' barge also cannot be paid by the Fund. The RP/Claimants paid Capt. [REDACTED] \$427.50 for his work related to Mr. [REDACTED] claim and \$337.50 for his work related to the Atlas utility barge. These amounts totaling \$765.00 must be denied.

Additionally, the RP's Spill Management Team, Meredith Management (Meredith), audited Capt. [REDACTED] invoices and made adjustments resulting in a \$13.00 reduction in the payment to him.¹⁷ The adjustments were noted on their Payment Recommendation forms for each invoice, which specifically listed each claim for which they were applicable. These adjustments are generally reflected in Meredith's Invoice Control Sheet.¹⁸ The claimed associated assessment costs for Capt. [REDACTED] services for the reimbursable boat damage claims totals \$13,905.50. Upon review of Capt. [REDACTED]'s invoices, the NPFC agrees with the Meredith audit generally, but found that Meredith identified an adjustment relating to Capt. [REDACTED] time and rate calculation on invoice #50055-01. Meredith recommended a payment of \$337.50 for invoice 50055-01, but ended up paying \$338.00.¹⁹ This overpayment of \$0.50 appears to be an oversight after the adjustment was identified. NPFC must deny the \$0.50 overpayment. The remaining costs of \$13,905.00 are compensable to the RP/Claimants in accordance with OPA claims regulations.

¹³ See Purchase Order at Bates #2608-033.000002, Rate Sheet at Bates #2608-033.000003, and individual invoices submitted for each third-party vessel damage claim file.

¹⁴ There were 45 claims with claimed vessel damages. All but one contained a single vessel within the claim. The claim from Atlas Yacht Club #50004 claimed damages to three vessels. The determination accounts for assessments of each boat within the claims.

¹⁵ See 2017 04 04 email from [REDACTED].

¹⁶ See Claim Summary/Determination Form for Atlas Yacht Club Claim 50004.

¹⁷ See Invoice Control Sheets for Claims, Bates #2608-033.000001

¹⁸ See Invoice Control Sheets for Claims, Bates #2608-033.000001

¹⁹ See Invoice Control Sheets for Claims, Bates #2608-033.000001, audit documents and copy of check 1001 at Bates #2608-033.000303-.000306.

The NPFC determined that the RP/Claimants should be paid \$13,905.00 for the payment made to Capt. [REDACTED] for his services in assessing oil damages to third party claimants' vessels.

Claim Supervisor: [REDACTED] [REDACTED]

Date of Supervisor's Review: 4/17/2017

Supervisor Action: Approved.

Supervisor's Comments: