

CLAIM SUMMARY / DETERMINATION

Claim Number:	B13013-0080
Claimant:	Boston Marine Transport/Great American Insurance Company of New York/The American Steamship Owners Mutual Protection and Indemnity Association
Type of Claimant:	Responsible Party
Type of Claim:	RP Costs Paid for Claims- Global Risk Solutions, Inc.
Claim Manager:	██████████
Amount Requested:	\$2,680,611.19, amended to \$1,296,924.32

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 Contracting Corp. shipyard in Staten Island, NY. The BOSTON 30 arrived at the Mayship Repair shipyard 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

THE CLAIMANTS:

The Claimants are Boston Marine Transport as the owner and operator of the BOSTON 30 (the responsible party (RP)); 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 (collectively referred to as the RP/Claimants).

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.

CLAIM HISTORY (B13013-0002)

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 statutory limit of liability. On March 23, 2017, the NPFC determined that the RP/Claimants demonstrated entitlement to their statutory limitation on liability, \$6,408,000.00, but denied their request for an absolute defense. As a result the NPFC adjudicated the RP/Claimants' removal costs and damages and determined that the Fund would reimburse the RP/Claimants in accordance with 33 U.S.C. § 2708(b) and the OSLTF Claims Regulations.⁴

The December 11, 2015 claim submission included documentation and information to support the RP/Claimants' assertions of entitlement for a complete defense or limitation on liability. It also included a December 9, 2015 letter from their counsel, Freehill Hogan & Mahar LLP (RP/Claimants' Counsel) noting that it was submitting electronic documents to support reimbursement for incurred removal costs and third party claims in excess of its \$6,408,000 statutory limitation on liability. After the March 23, 2017 NPFC determination the NPFC continued adjudicating the removal costs and damages claims submitted to the Fund for reimbursement.

GLOBAL RISK SOLUTIONS, INC. (B13003-0080)

One component of the claim sought reimbursement of Global Risk Solutions, Inc. (GRS) third party claim costs. Initially, the RP/Claimants claimed \$2,680,611.19 in costs, but after NPFC review and discussion with the RP/Claimants' Counsel, the RP/Claimants' Counsel admitted that certain costs had been inadvertently duplicated in the GRS claim⁵ as removal costs and that the RP/Claimants actually only paid \$1,296,924.32 to GRS for which they now seek reimbursement.⁶ The RP/Claimants included these costs as part of their third-party claim because GRS assisted the RP/Claimants with adjudicating claims made by third-parties against the RP as a result of the oil spill. The GRS costs at issue here represent GRS charges to the RP/Claimants for those services.

The NPFC began review of the GRS electronic folder, "Third Party Claim Documentation," provided with the December 9, 2015 letter. In support of the GRS claimed costs the RP/Claimants' Counsel submitted 78 invoices totaling \$1,296,924.32. Each weekly invoice listed the 10 staff members of GRS, their hours worked and total personnel charges. The weekly invoices also listed GRS equipment and expense charges. As previously identified by the NPFC in its initial determination, the RP/Claimants provided a copy of the purchase order used when they hired GRS. It stated that GRS was to "[p]rovide personnel, and materials to administer third-party claims as directed by [the] Meredith/GA-ERT and the American Club."⁷ A Payment

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).

⁵ Via letter dated February 8, 2017, the RP/Claimants acknowledged the error in its submission.

⁶ See Invoice Control sheet at Bates #2608-025.000002

⁷ See Purchase Order at Bates #2608-025.000003.

Recommendation Form attached to each invoice further clarified GRS's responsibilities to include, "[p]rovide personnel, equipment and materials to handle third-party damage claims and management as directed by [the] Meredith/GA-ERT representative and to [the] satisfaction of vessel representatives and federal, state and local agency representatives."⁸

After its initial review of the initially submitted documents the NPFC, on or about March 15, 2017, requested additional information from RP/Claimants' Counsel. They specifically sought details of the work performed by each GRS employee, including an hourly breakdown of activities and field notes, if available. As an example, the NPFC requested that "if an adjuster was inspecting a particular claimant's vessel on a specific day, you should provide documentation that shows the times he started and finished that inspection along with other activities he performed that day." The NPFC also requested the justification and calculation for overtime hours noted on the weekly invoices.

In a letter dated April 27, 2017, RP/Claimants' Counsel, in response to the request for additional information, submitted the following information:

- (1) [REDACTED] Affidavit in Support;
- (2) A list of claimants, claim numbers, and field agents associated with each claim;
- (3) Activity Log, and
- (4) Certain field notes for [REDACTED] and [REDACTED].

The [REDACTED] Affidavit in Support discussed that GRS was contracted by Meredith Management Group, Inc. (Meredith Management) to provide personnel, equipment and materials to assess third-party damage claims. [REDACTED], Office Supervisor for GRS, explained a two-phase approach to the project: the initial phase was to determine the area impacted by the discharge and to investigate and estimate the type and quantity of damage claims that could be expected. This phase also was used to determine how to staff and organize the GRS team. The initial phase began on December 15, 2012, the day after the incident, and ended the beginning of February 2013. When the GRS team was in place the second phase involved the assessment of individual damage claims and the amicable settlement of claims began.

In his affidavit Mr. [REDACTED] explained that as the Team office manager he was responsible for supervising daily field operations and quality control of field work. Other team members were:

[REDACTED], Home Office Executive (responsible for the initial development of the team and overall approach and delivery of GRS services);

[REDACTED], Project Manager (responsible for overall management and direction of the Project Team, was involved in the initial phase, and coordinated with Meredith Management on a daily basis);

[REDACTED], Technical/IT Supervisor (responsible for development of project-specific databases and providing technical and IT support);

[REDACTED] and [REDACTED], Operators (responsible for answering toll-free calls and information line, to log the calls into a database and then forward actionable items to others);

[REDACTED], Adjuster/Assessor (responsible for completing field assessments, meeting with claimants, assessing pre- and post-incident property values);

⁸ See Payment Recommendation Form for Invoice TBB-12-001 at Bates #2608-025.000010.

██████████ and ██████████, Adjusters/Assessors (responsible for completing field assessments of third party claims).

The additional information also included a list of claimant names and associated claims numbers. The Activity Log listed the claim number, claimant name, activity, a brief description of the activity performed by one of the field agents or GRS staff and the date of the activity. Finally, there were some field notes prepared by ██████████ and ██████████, that discussed their review and monitoring of removal activities associated with boats and vessels at several marinas impacted by the oil spill.

Based on the information submitted to the NPFC the claimed costs of \$1,296,924.32 were for **all** costs incurred and/or charged by GRS related to the management of its third party claims program.

INITIAL DENIAL

The NPFC denied the GRS claim on May 5, 2017, on the grounds that (1) the costs to administer and manage a claims process are not a damage that is payable from the Fund and (2) not all assessment costs associated with all claims are payable from the Fund. The NPFC noted in the initial determination that assessment costs associated with an OPA-compensable claim paid by the responsible party might be reimbursable from the Fund if sufficient information for specific claims had been provided.

REQUEST FOR RECONSIDERATION

On June 2, 2017, the RP/Claimants' Counsel timely requested reconsideration, presenting arguments, and asked for an extension of time to submit supporting documentation, which they then provided with a July 18, 2017 letter. The letter included (1) Declaration of ██████████; (2) Declaration of Captain ██████████; (3) Declaration of ██████████, and (4) a line by line review of the NPFC's May 5 denial letter. The June 18 letter also included several legal arguments summarized as follow:

- (1) The NPFC incorrectly concluded that the GRS work was administrative in nature, rather than damage assessment;
- (2) The NPFC misinterpreted the Claims Regulations concerning damage assessment and administrative costs;
- (3) Even if the administrative costs associated with damage assessments are not recoverable, the NPFC erred in denying the entire GRS claim, and
- 4) The NPFC erred when it denied all costs for claims denied by the RP/Claimants because it is illogical and inequitable, and imposes an overly burdensome evidentiary standard.

NPFC Role in Adjudication of Claims against the OSLTF

When adjudicating claims against the Oil Spill Liability Trust Fund (the Fund), the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.⁹ As a result, 5 U.S.C. § 555(e) requires

⁹ The Court in *Bean Dredging, LLC v. United States* characterized the informal adjudication process for OSLTF claims with the following: “[W]hile the OPA allows responsible parties to present a claim for reimbursement to the

the NPFC to provide a brief statement explaining the basis for a denial. This determination on reconsideration is issued to satisfy that requirement. This determination is based upon the unique facts giving rise to this claim and should not be viewed as precedent controlling other NPFC claims determinations.

During the adjudication of claims against the Fund, the NPFC acts as the finder of fact. In this role the NPFC considers all relevant evidence and weighs its probative value when determining the facts of the claim. If there is conflicting evidence in the record, the NPFC will make a determination as to what evidence is more credible or deserves greater weight, and finds facts based on the preponderance of the credible evidence.

The NPFC's initial determination dated May 5, 2017 is hereby incorporated by reference. A request for reconsideration of an initial determination must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim.¹⁰ When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including new information provided by the claimant in support of the request for reconsideration.

In this determination, NPFC considers whether the RP/Claimants have shown that the fees paid to GRS satisfy OPA's requirements for damages. Unless the RP/Claimants have shown that the GRS fees are damages within the definition of damages under OPA, the OSLTF is not authorized to reimburse this portion of the claim. They cannot be merely the costs to adjudicate claims and administer a claims program. During the adjudication of this claim on reconsideration the NPFC considered the initial submissions provided by the RP/Claimants' Counsel along with the submissions and the legal arguments submitted in support of the request for reconsideration.

ANALYSIS ON RECONSIDERATION

Executive Summary: The claim is denied on reconsideration on the grounds that RP/Claimants failed to provide sufficient evidence to support reimbursement of damage assessment costs associated with the third party claims submitted to GRS. The record is insufficient for the NPFC to determine to what extent the GRS services were attributable to damage assessment activities for OPA-compensable damage claims rather than non-damage assessment activities. As discussed below the costs must be the "reasonable" costs of assessing the damages claimed, i.e., the reasonable costs to value the damages claimed, but not the costs of all activities related to claims. While it is likely that GRS performed some activities that would qualify as compensable assessment costs for the 43 damage claims that the NPFC reimbursed to RP/Claimants, the record remains insufficient to allow the NPFC to determine what amounts would be payable.

The RP/Claimants made several legal arguments in its request for reconsideration and the NPFC addresses these arguments below.

NPFC, they do not confer upon such parties a right to a formal hearing, a right to present rebuttal evidence or argument, or really any procedural rights at all, see 33 U.S.C. §§2704, 2708, 2713, an entirely unremarkable fact given that Congress' overarching intent in enacting OPA was to 'streamline' the claims adjudication process ..."

¹⁰ 33 CFR § 136.115(d).

As background, when the President receives information of an incident, the President shall, whenever possible and appropriate, designate the source or sources of the discharge or threat. 33 U.S.C. § 2714(a). The responsible party and the guarantor, if known, are notified of the designation. 33 CFR § 136.305(a). Within five days after notice of the designation, the responsible party may accept or deny the designation. 33 CFR §136.307. If accepted the responsible party shall advertise its contact information and persons to whom claims are to be presented and the procedures by which a claim may be presented. 33 CFR §136.313. If a responsible party does not accept designation the NPFC will advertise for claims and adjudicate claims.

Beyond the requirements provided by OPA an RP/Claimant who accepts designation may establish a claims process and manage claims at his or her discretion.

In this case the RP/Claimants accepted the designation and retained Meredith Management to provide personnel, equipment and material for incident management, including cleanup response and claims management. Meredith Management contracted with 19 vendors, including GRS, which was retained to provide the necessary technical expertise and field activities to assess and evaluate the third party damage claims resulting from the BOSTON 30 oil spill.

RP Argument 1: The NPFC incorrectly concluded that the GRS work was administrative in nature, rather than damage assessment.

The RP/Claimants seem to argue that all costs associated with their GRS claim for third party claims management are reimbursable from the Fund. They argue that there is no provision in the Claims Regulations prohibiting an RP/Claimant from obtaining reimbursement of costs incurred in utilizing the services of a company like GRS that performs damage assessments, and adjudicates and resolves third party damages claims.

The NPFC acknowledges that an RP/Claimant might choose to contract with a company to organize and manage a third party claims program that includes review and adjudication of claims. The NPFC's initial denial may not have been clear on this point; however, the costs to manage the third-party claims program are not an OPA damage that may be reimbursable from the Fund.

An RP/Claimant may resolve and settle third party claims in any manner it sees fit. It may settle and pay a claim for any reason or no reason; however, it may only be reimbursed from the Fund for valid claims for damages as defined in 33 U.S.C. § 2702(b)(2)(A)-(F).

In this case there is evidence in the administrative record, provided by the RP/Claimants' Counsel, that the GRS staff included three adjusters/assessors who may have performed damage assessment activities, but the record indicates that they performed other duties that were not related to valuing damages. In addition, there is evidence that the GRS staff included personnel whose responsibilities were not associated with conducting damage assessment activities related to individual third party claims.

As stated in the Damage Claim Report provided in each third party Property Damage Claim File, two GRS adjusters personally visited local marinas to inspect claimants' boats and dockside

personal property.¹¹ In visiting and inspecting the property, the adjusters were verifying the existence or non-existence of damages.¹² They were collecting evidence and information to document their files in support of paying or denying claims. GRS employees also produced composite estimates for repairing vessels, researched fair market values of the vessels, and prepared replacement value estimates for dockside property based on a composite average. Some of this work likely qualifies as assessment costs within the definition of damages payable to claimants under OPA.

While it is likely that GRS performed some work that would qualify as compensable assessment costs, the record remains insufficient to allow the NPFC to determine what amounts would be payable. For example, there are no records showing personnel hours or expenses specifically related to individual claims. In response to the NPFC's requests for documentation detailing work descriptions, time and expenses for individual claims, the RP/Claimants provided partial field notes, affidavits, and an Activity Log spreadsheet¹³ attempting to show work performed.¹⁴ The RP/Claimants also submitted weekly invoices attached to which were GRS daily reports that reflected hours worked and rates charged. While these invoices show the time and rates for [REDACTED], [REDACTED], [REDACTED] and [REDACTED],¹⁵ they do not establish the amount of time spent on each of the paid claims or activities performed; therefore there is no way to calculate the damage assessment costs. The documents did not show time spent on each activity, but did clearly show that much of the work performed was not "assessment" of damages for valid, payable claims.

On reconsideration the RP/Claimants' Counsel submitted the [REDACTED] and Captain [REDACTED] Declarations in Support. These Declarations clearly establish that GRS-incurred costs were not solely for the assessment of individual claims' damages. Captain [REDACTED] explains in his Declaration that the GRS Incident Assessment Team's initial responsibility was to review the impact of the spill on private and commercial property and provide a more detailed plan for assessing and estimating the damages.¹⁶ Mr. [REDACTED] explains in his Declaration that the initial investigations and assessments were used to determine how to staff and organize the GRS team that would be working on the damage assessment project.¹⁷ These initial costs were not associated with conducting assessment for specific claims but to determine how to organize the claims management program. While they may not have been administrative costs associated with specific claims – Mr. [REDACTED] states that administrative costs for individual claims were conducted by Meredith Management – they were costs to administer the claims management program itself.

¹¹ The April 27, 2017 affidavit of [REDACTED] states that [REDACTED] was another adjuster/assessor who participated in damage assessment. His name did appear as a signature having verified the checklist of file documents in damage claim files. The documents did not show him as having been on site inspecting property or assessing damage.

¹² None of the structures or equipment assessed by GRS adjusters were found compensable by the NPFC. Therefore, the assessment costs relating to those damages are also not compensable.

¹³ The spreadsheet was unsupported. The NPFC does not know when the spreadsheet was created or from what source its contents were derived.

¹⁴ Documents provided with [REDACTED] email April 27, 2017 providing additional information to the NPFC.

¹⁵ According to the [REDACTED] affidavit dated April 27, 2017, Mr. [REDACTED] was an adjuster/assessor responsible for adjudicating business interruption claims for lost profits. There was only one such claim, the Mayship repair claim that is currently under adjudication by the NPFC.

¹⁶ Captain [REDACTED] Declaration in Support, dated July 18, 2017, paragraph 5.

¹⁷ [REDACTED] Declaration in Support dated July 17, 2017, paragraph 4.

NPFC finds that Mr. ██████ statements conflict with records previously provided with the claim. Mr. ██████ states that administrative support for GRS was provided by the Boston 30 Incident Management Team, Finance Section, which was staffed by Meredith Management. Yet the purchase order for GRS's services states that GRS was to "[p]rovide personnel, and materials to administer third-party claims as directed by [the] Meredith/GA-ERT and the American Club."¹⁸ Further, the Payment Recommendation Form attached to each invoice further clarified GRS's responsibilities to include, "[p]rovide personnel, equipment and materials to handle third-party damage claims and management as directed by [the] Meredith/GA-ERT representative and to [the] satisfaction of vessel representatives and federal, state and local agency representatives."¹⁹ Both the purchase order and the Payment Recommendation Form show that GRS was to administer the claims process.

Furthermore, Mr. ██████ states that the GRS Incident Assessment Team's "initial responsibility was to review the impact of the spilled oil on private and commercial property and then to provide a more detailed plan for assessing and estimating damages."²⁰ Mr. ██████ agreed that these initial investigations and assessments were "to determine how to staff and organize the GRS team that would be working on the damage assessment project."²¹ Thus, the RP/Claimants admit that GRS's work started with scoping/canvassing the area to determine which third parties might be impacted to verify whether they would be meritorious claimants against the RP.²² These activities encompass pre-adjudication to determine the RP's potential liability and to develop a plan to deal with them. These activities by GRS cannot be considered damage assessment activities for specific claims. The record is clear that the RP/Claimants seek reimbursement for all of GRS's charges, which include all their costs to administer the third party claims program beginning with scoping potential liability, developing a plan for dealing with third party claims and then adjudicating them. The RP/Claimants are not entitled to recover every GRS cost claimed.

Under a preponderance of the evidence standard, the RP/Claimants must show that the costs were more likely than not OPA compensable. In this case the record is insufficient for the NPFC to determine to what extent the GRS services were attributable to damage assessment for properly paid damage claims versus other non-compensable activities, such as claims administration, adjudication, management and settlement, which are not compensable. The Claims Regulations require that the costs must be the "reasonable" costs of assessing the damages claimed. This means the reasonable costs to value the valid damages claimed by each claimant who properly presented a valid claim, but not the costs of all activities related to claims.

Argument 2: *The NPFC misinterpreted the Claims Regulations concerning damage assessment and administrative costs.*

The RP/Claimants cite to 33 CFR 136.105(e)(8), which states that "[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

¹⁸ See Purchase Order at Bates #2608-025.000003.

¹⁹ See Payment Recommendation Form for Invoice TBB-12-001 at Bates #2608-025.000010.

²⁰ Freehill, Hogan & Mahar letter brief dated July 18, 2017, p.11.

²¹ ██████ Affidavit in Support, paragraph 4.

²² Freehill, Hogan & Mahar letter brief dated July 18, 2017, p.11.

with preparation of the claim.” They argue that the only administrative costs not recoverable are those costs associated with preparation of the claim. They note that all administrative costs associated with preparation of the claim and submitted to the Fund were performed by Meredith Management.²³

They acknowledge that there would be costs associated with damage assessments that could be considered as administrative costs in a traditional sense, i.e., preparing reports, printing or scanning documents, uploading data, maintaining a database, scheduling meetings and meeting with clients. However, they argue that these activities are essential components of damage assessment because damage assessments cannot be completed without somehow recording them and scheduling meetings with claimants.

Mr. ██████, in his Declaration in Support, agrees that some of the GRS staff were not directly involved in damage assessments but provided work that was in furtherance of the task of assessing third party damages.²⁴ For instance, the two GRS operators, ██████ and ██████, were responsible for answering the toll-free claims and information line as required by OPA. ██████ developed the project-specific databases and supported the team with IT support. Thus, there is evidence that some of the GRS staff costs were associated with managing and supporting the claims program and not damage assessment activities.

The Fund can reimburse the costs that a third party claimant incurred for estimating his own damages and for which the RP reimbursed the claimant.²⁵ The RP/Claimants rely on the Fourth Circuit Court of Appeals decision in Gatlin Oil Co. v. United States, 169 F. 3d 207 (4th Cir. 1999). Under Gatlin, they argue, an RP is entitled to the costs of assessing third party claims. Gatlin is distinguishable from the instant claim for two reasons. First, Gatlin Oil was determined to be entitled to a complete defense when a vandal was solely liable for the discharge of oil; therefore Gatlin Oil was no longer a responsible party. Second, Gatlin Oil was assessing damages to its own facility, not the damages of third party claimants.

The NPFC acknowledges that an RP can recover certain damage assessment costs, and it acknowledges that the regulations specifically exclude administrative costs associated with preparation of the claim. However, it is not correct to state that the only administrative costs that are not recoverable are those associated with claim preparation and that all other administrative costs are therefore recoverable as argued by the RP/Claimants. The costs associated with administering a claims process are not assessment costs. They are another category of administrative costs that are not recoverable under OPA.

Argument 3: Even if administrative costs are not recoverable the NPFC erred in denying the entire GRS claim.

The RP/Claimants argue that even if certain GRS costs are not recoverable the NPFC erred in denying the entire GRS claim because a significant percentage of the work performed by GRS personnel was for damage assessments.

²³ See Captain ██████ Declaration in Support, paragraph 7.

²⁴ ██████ Declaration in Support, paragraph 16.

²⁵ NPFC notes that it does not compensate damage claimants for assessment costs when it denies the damage claim.

They state that they performed 79 damage assessments for boats and other personal property and where precise numbers are not available, through the declaration of [REDACTED], they provide apportioned estimates of the GRS costs that are associated with direct damage assessment activities and estimates of “other type of damage assessment-related work” by the GRS staff.²⁶ The “other type of damage assessment-related work” is claimed because the office staff provided logical and technical support in furtherance of the “overarching task of performing damage assessment.”²⁷

The RP/Claimants provide no documentary basis for the estimated apportionment of either category of the work. Further, there is no authority in OPA or the Claims Regulations for the Fund to reimburse a claimant for an unsupported estimated percentage of costs incurred by the RP/Claimants to assess damages for the claims submitted to the RP for adjudication.

Claims to the Fund are based on individual, singular claims. The Oil Pollution Act (OPA) provides that a “claim” means “a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident.” 33 U.S.C. § 2701(3). “Damages” means “damages specified in section 2702(b) and includes the cost of assessing those damages.” 33 U.S.C. § 2701(5). Covered damages are natural resources, real or personal property, subsistence use, revenues, profits and earning capacity and public services. 33 U.S.C. § 2702(b)(2)(A)-(F). The Fund is available to pay claims for uncompensated removal costs and damages. 33 U.S.C. § 2712(a)(4).

The Claims Regulations, found at 33 CFR Part 136, provide that the claims process is based on single claims. For instance the regulations at 33 CFR 136.105, provide the “General requirements for a claim.” And, each claim must be in writing for a sum certain; and each claim must be signed in ink by the claimant. 33 CFR 136.105(b) and (c). Further, a claimant has the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC to support the claim. 33 CFR 136.105(a). Under 33 CFR Part 136.107, each third party claim is subject to subrogation to the party who paid the third party claimant. Only after the third party is paid, will the payer have potential rights to the claimed amount. If the RP pays a valid OPA claim it may become entitled to the damages within that single claim and the costs associated with assessing the damages within that one claim.

It appears that GRS created and maintained individual claim files on each claim. They provided an Activity Log spreadsheet with the April 27, 2017 additional information email from [REDACTED], which listed the claims presented to GRS, claims numbers and a general description of the GRS personnel activities associated with the claim. Many of these activities were performed by the three adjusters/assessors. However, they provided no specific personnel time and expense information relating to damage assessment activities, which would document their calculation of their costs to assess damages. Without this information the NPFC cannot calculate the damage assessment costs associated with the properly paid OPA-compensable damage claims.

The claimant has the burden of providing information to support its claim. In its request for additional information the NPFC requested specific details of the work performed for each GRS

²⁶ Freehill Hogan & Mahar letter dated July 18, 2017, p. 3 and attached declaration of [REDACTED].

²⁷ Mr. [REDACTED], in his Declaration, argues that no more than 8% of the initial phase activities – where the GRS staff assessed the nature and scope of damages on a “macro” level – were conducted as a collateral effort and that 92% were devoted exclusively to damage assessments.

employee for each day. As an example the NPFC stated, “if an adjuster was inspecting a particular claimant’s vessel on a specific day, you should provide documentation that shows the time he started and finished that inspection along with the other activities he performed that day.” Despite this explicit instruction, the RP/Claimants failed to produce any evidence showing how much of their costs were attributable to assessing OPA damages. If they had provided more specific information or documentation, some of the assessment costs may have been reimbursable.

The Fund is available to pay properly documented costs of assessing damages. In fact, the NPFC paid to these same RP/Claimants for some assessment costs paid to Capt. [REDACTED], the marine surveyor who assessed and valued damages to boats.²⁸ Capt. [REDACTED]’s work was supported by documentation of hours worked and invoiced for each boat. Thus, the connection between specific costs and specific damages was demonstrated. The NPFC was able to determine costs associated with assessing damages related to each individual damage claim. The NPFC denied his costs related to the property damage claims that the NPFC did not reimburse. The RP/Claimants accepted this determination and offer.

Regarding GRS’s costs, the RP/Claimants did not provide sufficient documentation to allow the NPFC to determine the costs associated with assessing compensable damages claimed by third parties and paid by the RP/Claimants, leaving the NPFC with no choice but to deny all of GRS’s costs. Because we cannot objectively determine what work was done specifically to estimate the damages claimed for properly paid claims, we cannot pay GRS’s costs. To properly demonstrate work performed, the RP/Claimants should have provided contemporaneous objective records produced at the time the work was performed and invoiced.

Argument 4: The NPFC erred when it denied assessment costs for claims denied by the RP/Claimants or denied by the NPFC and the denial is illogical and inequitable and imposes an overly burdensome evidentiary standard.

As previously mentioned, the RP/Claimants stated that they performed 79 damage assessments related to third party claimants. The Fund has paid the RP/Claimants for 43 of them. 32 damage claims were initially denied by the NPFC. The NPFC specifically denied reimbursement of damage assessment costs on the denied claims. The RP/Claimants argue that in order to determine to deny the claim, they first had to assess the damage and these costs should be reimbursable. This argument fails.

OPA provides the payment of any claim by the Fund shall be subject to the United States government acquiring by subrogation all rights of the claimant to recover from the responsible party. 33 U.S.C. § 2712(f).

When the NPFC adjudicates and pays a claim to a claimant, the NPFC then seeks recovery from the responsible party for the costs and claims paid from the Fund.

In the same manner the Fund may reimburse an RP, who has been subrogated to third party claimants’ valid and properly paid claims, for costs of assessing the damages for that claim if

²⁸ See Claim B13013-0079.

they are costs that the third party claimants would have incurred.²⁹ If an RP/Claimant denies a claim to a third party claimant there are no rights acquired and that claimant could come to the Fund with its claim. This comports with the regulations under 33 CFR 136.105, which state a claim should include, “[T]he reasonable costs incurred by *the claimant* in assessing the damages claimed.” 33 CFR 136.105(e)(8), emphasis added.

Section 2715(c) of OPA states that the Attorney General shall commence an action on behalf of the Fund to recover compensation **paid** by the Fund to any claimant and all costs incurred by the Fund by reason of the claim, including interest, administrative and adjudicative costs, and attorney’s fees. Stated another way, the Fund may only recover costs associated with a claim paid by the Fund. If the claim was denied by the NPFC the Fund is not to be compensated for the costs, including administrative and adjudicative costs associated with the denied claim. This means that an RP is not liable to the Fund for claims the NPFC denies, including those costs associated with adjudicating those denied claims. The Fund cannot pay an RP for costs related to a third party claim that the RP denied or didn’t pay because the third party retains its subrogable rights to present a claim to the Fund for his damages and costs of assessment.

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. If the damages do not exist or if they were the result of some other cause, such as Super Storm Sandy, there is nothing to assess under OPA, and thus, nothing to be reimbursed. Thus, the assessment costs associated with the third party claims denied by either the RP/Claimants or the NPFC are not reimbursable from the Fund or to the Fund.

Conclusion

For the reasons stated above, this claim for costs paid to GRS is denied on reconsideration.

Claim Supervisor:	[REDACTED]
Date of Supervisor’s review:	10/21/2017
Supervisor Action:	<i>Denial Approved</i>
Supervisor’s Comments:	

²⁹ When RPs have either been exonerated from liability or have proven entitlement to limit their liability under OPA, the RPs step into the shoes of the third party claimants they have paid, so they are only the “claimant” insomuch as they have the same rights as the third party would have, and have done the assessment on behalf of the third party claimant.