

## CLAIM SUMMARY / DETERMINATION FORM

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| Claim Number     | : B13013-0080  |
| 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- Global Risk Solutions, Inc.  |
| Claim Manager    | : (b) (6)  |
| Amount Requested | : \$2,680,611.19   |

### **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 (collectively referred to as the RP/Claimants). 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

<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.

alternative, entitlement to their applicable limit of 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 applicable liability limit for the RP/Claimants is \$6,408,000.00

This claim is for \$2,680,611.19 of which the RP/Claimants paid \$1,296,924.32<sup>5</sup> to Global Risk Solutions, Inc. (GRS) to manage and handle third party claims, but also claimed the same \$1,296,924.32 within their removal costs portion of their overall claim. This amounts to duplicative claims for the same amounts.<sup>6</sup> The claim for GRS costs should have been presented as only \$1,296,924.32.

**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).

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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).

<sup>5</sup> See Invoice Control sheet at Bates #2608-025.000002

<sup>6</sup> Via letter dated February 8, 2017, the RP/Claimants acknowledged the error in its submission.

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).

**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.<sup>7</sup> The RP/Claimants seek reimbursement of the costs associated with handling claims for damages. The RP/Claimants provided no explanation or argument as to why these administrative and adjudicative costs would be compensable from the Fund.

The NPFC separately adjudicated the third party damage claims, determining that a majority of the claims for damages to boats were compensable under OPA, but that none of the claims for damages to dockside personal property were compensable and that the claim for lost profits of a third party was not compensable.

““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).<sup>8</sup> Under OPA, the assessment costs are the reasonable costs of estimating the damages claimed.<sup>9</sup>

The RP/Claimants hired GRS to “[p]rovide personnel, equipment and materials to administer third-party claims as directed by [the] Meredith/GA-ERT and the American Club.”<sup>10</sup> Their responsibilities were further clarified 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

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<sup>7</sup> 33 U.S.C. § 2708

<sup>8</sup> OPA damages include damage to: natural resources, real or personal property, profits and earning capacity, subsistence use, government revenues, and public services. 33 U.S.C. §2702(b)(2)(A)-(F).

<sup>9</sup> See 33 CFR 136.105(e)(8)

<sup>10</sup> See Purchase Order at Bates #2608-025.000003.

agency representatives.”<sup>11</sup> These descriptions do not support reimbursement of the RP/Claimants’ claimed costs.

For the reasons discussed below this claim is denied.

Administrative costs are not a damage that is payable from the Fund.

While the costs of damage assessment may be reimbursable for valid, paid claims under OPA, there is no authority for reimbursing costs associated with administering a claims process and adjudicating claims. The term “damage assessment” does not include administrative costs and is not so broad as to include collective costs related to all claims presented to the responsible party or costs for administering a claims program.

The costs for administering a third-party claims program, including travel and living expenses for employees to manage the claims process are administrative costs. Administrative costs and expenses are not OPA-compensable damages. 33 U.S.C. § 2702(b)(A)-(F). 33 CFR 136.105(d)(8). The claimed costs are expenses incurred by the responsible parties when they retained GRS for establishing a claims program. They are not a damage that is reimbursable from the Fund. To the extent that the claimed costs are for administrative and adjudication costs, they must be denied.

Even if GRS employees had performed some form of damage assessment in estimating the damages in the reimbursable claims, the NPFC has not been able to determine what costs would have been reasonable damage assessment. The GRS project team included 10 employees.<sup>12</sup> Their job titles include Home Office Executive, Project Manager, Office Supervisor, Business Interruption Expert, Technical/IT Supervisor, 3 Adjusters/Assessors, and 2 hotline Operators. While it is possible that the adjusters/assessors and the business interruption expert could have performed damage assessments, the other positions clearly did not. The costs must be the “reasonable” costs of assessing the damages claimed. This means the reasonable costs to value the damages. The NPFC does not find the costs related to running an entire program to assess potential liability for an RP and handle all potential claims and actual claims to be the reasonable costs of assessing “claimed” damages.

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.<sup>13</sup> In visiting and inspecting the property, the adjusters were verifying the existence or non-existence of damages already assessed by the Accredited Marine Surveyor hired by the RP.<sup>14</sup><sup>15</sup> They were collecting evidence and information to document their files in support

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<sup>11</sup> See Payment Recommendation Form for Invoice TBB-12-001 at Bates #2608-025.000010.

<sup>12</sup> See GRS invoices; and Affidavit of (b) (6) attached to April 27, 2017 email from (b) (6)

<sup>13</sup> The affidavit of (b) (6) states that (b) (6) 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.

<sup>14</sup> Most of the oiled equipment and some non-vessel types of structures etc. were not assessed by Captain (b) (6). However, all of the vessel damages found compensable by the NPFC were assessed by Captain (b) (6). None of the vessels, structures or equipment assessed solely by GRS adjusters was found compensable by the NPFC. Therefore, the assessment costs relating to those damages are also not compensable.

of paying or denying claims. The surveyor actually performed the damage assessments to assist GRS in valuing the claims. GRS took his assessment into consideration when settling claims. GRS 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.

The record also indicates that a business interruption expert worked on the lost profits claim of Mayship Repair, but his activity is not fully detailed. Even without details, the daily activity report descriptions of his duties performed clearly show that he was handling and analyzing claims. The affidavit of (b) (6) Office Supervisor for GRS, stated that the business interruption expert was responsible for all business interruption claims submitted due to the spill. His job was to adjudicate lost profits claims by businesses. Furthermore, the RP/Claimants only submitted one single business lost profits claim to the Fund, which was denied by the NPFC.

The RP/Claimants provided GRS employee daily activity reports that accompanied the invoices in the claim. They are very general and provide few details of the work performed. Some examples of the work descriptions follow. For the property damage adjusters, they state the following as the description of work: “Resume Assessment of Potential Liability exposure in the vicinity as a result of the Oil Spill. Report to Command Post located at Marriott – Newark Airport;” followed by the daily hours worked.<sup>16</sup> Or, for the lost profits claims adjuster, the following is an example description: “Business Interruption claims handling and analysis, use of TrackVia system, business interruption model review & file organization, review and analysis of property damage claims summary and reconciliation of payment status summaries;” followed by the daily hours worked.<sup>17</sup>

The NPFC requested additional information detailing hours worked such as field notes for the two property damage adjusters. In return, via email from (b) (6) on April 27, 2017, the NPFC received partial Daily Activity Reports, identified as field notes, for (b) (6) and (b) (6), Adjusters, and an affidavit of (b) (6), the Office Supervisor, with a spreadsheet of activities attached. The RP/Claimants admit that the field notes are incomplete, but the NPFC was able glean some information from them. The notes describe work that did not appear to be damage assessment. Some examples of the content of (b) (6) notes include: meeting with claimants, taking photos, explaining the claims process, running reports, printing documents, helping in a boardroom move, verifying claims, discussing procedures for documenting and conversing with claimants (stressing not saying the wrong thing, to avoid litigation), documenting oil on shacks<sup>18</sup>, and statements discussing oil removal operations for boats and piers.<sup>19</sup> Some examples of the content of (b) (6) notes include: creating folders for pictures, scanning boat questionnaire, meeting with claimants, attending meeting with supervisor, inspecting property, performing TrackVia entries and verification, establishing

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<sup>15</sup> The NPFC offered the RP/Claimants some reimbursement of Captain (b) (6)'s costs as assessment costs incurred as a component of damages, as defined under OPA. The NPFC only offered his costs relating to damage claims that the NPFC determined were reimbursable.

<sup>16</sup> Invoice TBB-12-003, (b) (6) Daily Activity Report, Bates #2608-025.000112.

<sup>17</sup> Invoice TBB-12-027, (b) (6) Daily Activity Report, Bates #2608-025.001124

<sup>18</sup> NPFC points out that only one claim for an oiled shack was submitted to the NPFC, but none were determined to be reimbursable to the RP/Claimants.

<sup>19</sup> (b) (6) Daily Activity Logs for random dates between 1/13/13 and 2/7/13, attached to email from (b) (6) on April 27, 2017.

reserves for property claims, meeting with boat repair companies to get paint repair costs, completing boat matrix, meetings regarding claims procedures, inspecting shanties, and statements discussing oil removal operations.<sup>20</sup> The documents do not show how much time was spent on each activity, and most of the notes represent work related to claims administration or reports of oil removal operations. Some notes represent work related to potential claims that were not submitted to the NPFC for reimbursement.

Further, though the spreadsheet provides better details of work performed, it does not provide time spent on each activity. It also shows that GRS employees performed predominantly claims administration activities. The NPFC cannot determine at what point this spreadsheet was created or from what source the contents were derived.

Based on the foregoing discussion and the broad statements that GRS was hired for claims management services, the record indicates to the NPFC that the vast majority, if not all, of the GRS costs were claims administration costs. They were scoping the RPs' potential liability, dealing with claimants and adjudicating claims.

Even if any of the GRS costs were to qualify as damage assessment within the definition of damages, the record is insufficient for the NPFC to determine to what extent the GRS services were attributable to damage assessment for properly paid claims versus other non-compensable activities, such as claims administration, adjudication, management and settlement, which are not compensable.

OPA does not provide that all assessment costs associated with all claims are payable from the Fund.

Even though it appears that the GRS costs are claims administration costs and are not compensable, assessment of damages related to reimbursable damage claims could be compensable under OPA, if demonstrated. While GRS adjusters may have assessed damages there is no specific information about the specific costs to assess the damages for each claim. The record also indicates that the GRS business interruption expert analyzed business interruption claims.<sup>21</sup> Further, it is not clear which of the claimed GRS costs were related to claims that were denied or closed without adjudication. Additionally, if the NPFC denies a third-party claim, even though the RP paid it, the assessment costs associated with that claim would not be compensable from the Fund. 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. If the damages do not exist or if they were the result of some other cause, such as a storm, there is nothing to assess under OPA, and thus, nothing to be reimbursed.

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<sup>20</sup> (b) (6) Daily Activity Logs for random dates between 1/21/13 and 2/10/13, attached to email from (b) (6) on April 27, 2017.

<sup>21</sup> As the NPFC denied the only business interruption claim submitted to the Fund, the Mayship Repair lost profit claim, the issue regarding assessment costs related to the claim is moot.

The RP/Claimants apparently seek their collective costs relating to the claims program and claims process, whether the claims were presented, paid or denied. To the extent that the claimed costs are for the assessment of invalid, denied or unpaid claims these costs must also be denied.

Conclusion

There are no provisions either in OPA or the Claims Regulations that can be interpreted to mean that a responsible party's collective costs incurred for a claims program including, but not limited to, all its costs related to liability scoping, potential claims or adjudicated claims, paid or not, are reimbursable from the Fund. The claim for costs paid to GRS must be denied.

Claim Supervisor: (b) (6)

Date of Supervisor's Review: 5/05/2017

(b) (6)

Supervisor Action: Denial Approved.

Supervisor's Comments: