

CLAIM SUMMARY / DETERMINATION FORM

Date	: 2/12/2009
Claim Number	: N06008-002
Claimant	: K-Sea Operating Partnership L P
Type of Claimant	: Corporate (US)
Type of Claim	: Limit of Liability
Claim Manager	: [REDACTED]
Amount Requested	: \$4,584,444.79

BACKGROUND:

Below is the account leading up to the allision between the integrated Tug REBEL and Barge DBL 152 in the vicinity of the submerged wreckage of the WC 229A platform in the Gulf of Mexico on 11 November 2005 in the aftermath of Hurricane Rita.

The vessels in question were the integrated tug and barge namely the ITB REBEL/DBL 152 which was operated by the K-Sea Operating Partnership, L.P. (K-Sea). The integrated tug barge made regularly scheduled transits between Galveston, TX and Tampa, FL. These vessels have pre-established “normal routes” for this transit pre-loaded in their navigation systems and on their charts. These “normal routes” closely followed the ten fathom curve which improves the ride and shortens the distance between the ports. The routes bring the vessels in proximity with established/charted platforms and rigs.

Hurricane Rita was named on 18 September 2005 and was classified as a Category 5 with winds of 165 – 180 mph on 21 September 2005, affecting the Gulf of Mexico. The hurricane force winds and waves of Rita severely damaged the Pelican Platform WC 229A (WC 229A) which, at the time, was owned by Targa Midstream Services Limited Partnership (Targa). The WC 229 A platform was torn free from the sea floor and broke into pieces, which came to rest in the vicinity of the platform’s original location of 29 08’ 12.113” N, 093 17’25.199” W.

On 27 September 2005, Targa reported the platform missing when it notified both the Coast Guard and Minerals Management Service. Targa was required to report and immediately mark the missing platform with a lighted buoy, in accordance with applicable Federal Regulations. 30 CFR 250.1741(a) as incorporated into 33 CFR 64.11. These regulations also require that the Coast Guard District Commander be notified when structures are moved from prior locations. Targa, however, notified the Coast Guard Marine Safety Office, Port Arthur, TX and not the District Commander as was required by the regulations.¹

On or about 12 October 2005, Targa reported the location of the wreckage as 29 08’ 48”N 093 17’ 42”W in very shallow water of less than 50 feet.² Some of the debris was actually within fifteen (15) to twenty-six (26) feet from surface of the water.³ Targa asserted that Norwegian floats were attached to the submerged platform.

¹ Claimant’s letter to NPFC of 30 April 2007, page 7.

² Deposition of Sohrab Tafreshi page 35 & requested Broadcast Notice to Mariner’s dated 5 October 2005 (No broadcast due to communication problems).

³ E-mail from Targa to USCG regarding diver’s report on location of submerged wreckage, dated 12 October 2005.

On 6/7 November 2005, the REBEL made a transit of the Gulf using “normal routes” westbound from Tampa to Galveston, with **Mary Golden** as Second Mate.⁴ At this time, according to the entries in the log book, Second Mate **Golden** passed within one-half mile to the north of the original charted location of the WC 229A platform. The records show that **Golden** made no notation of the platform being missing from its original charted location.⁵

It was under these circumstances that the integrated Tug REBEL and Barge DBL 152 departed from Houston, TX in route to Tampa, FL on 10 November 2005. Second Mate **Golden** relieved the watch that evening and was at the helm of the Tug REBEL pushing the Barge DBL 152 at midnight ship’s time. Although Second Mate **Golden** had observed that the WC 229A platform was missing, she assumed this platform had been decommissioned and she intentionally navigated the vessel toward the charted position of the WC229A platform before it had been destroyed and toppled.

At about 0100 hours on 11 November 2005, Second Mate **Mary Golden** noticed that the ITB REBEL/DBL 152, carrying approximately 120,770.81 barrels of No. 6 fuel oil, while transiting the Gulf eastbound from Galveston to Tampa, the DBL 152 barge had developed a list. **Mary Golden** logged the ship’s position at the time as 29 08’ 30”N 093 18’ 12”W.⁶ At this time, the vessel was approximately 29NM south of Calcasieu Pass, Louisiana. The water depth was approximately 55 feet and the vessel’s deep draft was 30 feet 6 inches.⁷ Second Mate **Golden** noticed the barge listing and called the Master. Crewmembers boarded the barge and determined that the barge had been punctured and oil was discharging from the hull.⁸ Oil was observed in the surrounding waters near the barge. However no buoys or floats were observed on scene at the time of the allision.⁹ The actual chart used by the vessel was provided in claim# N06008-001 and it showed that it had been corrected and annotated through October 2005 including published Notice to Mariner updates along the vessel’s intended track though the end of October 2005.

Early Situation Reports (SITREPS) from the Federal On-Scene Coordinator suspected that the breach in the vessel’s hull had resulted from an allision with the platform WC229 A which had been reported toppled during Hurricane Rita. Later, SITREPSs confirmed this suspicion and indicated that the allision with the WC 229A platform resulted in the breach of the DBL 152’s outer and inner hulls and a discharge of fuel oil into the “waters of the United States” of the Gulf of Mexico.¹⁰ The Coast Guard acting as FOSC directed the clean-up of the oil spill which included the prompt deployment of pollution response vessels to contain the oil discharge from the barge and lighter the cargo. The DBL 152 subsequently capsized after a significant quantity had leaked from the barge’s breached tanks. As the result of the incident, the claimant K-Sea submitted, a non P&I, removal claim in the amount of \$4,584,444.79 as the amount claimed as removal costs associated with the oil pollution incident.

CLAIM:

The claimant is K-Sea Operating Partnership, L.P. K-Sea operates tugs and barges in the United States. The claimant is the Responsible Party (RP) for an oil pollution incident resulting from the allision of the ITB REBEL/DBL 152 with submerged debris of the WC 229A, oil platform

⁴ **Mary O’Brien Golden** was the Second Mate, and mate on watch, and **William McCracken** was the Master on the vessel at the time of the incident.

⁵ Deposition of **William McCracken** page 135.

⁶ Location reference: DBL-152 Navigational Logbook.

⁷ Claimant’s Submission Letter of 26 January 2006.

⁸ SITREP No. 8, 15 November 2005.

⁹ Vessel logs, Deposition of **W. McCracken, M. Golden and J. Hollinger**.

¹⁰ SITREP No, 8-22, 15-30 November 2005.

that was owned by Targa Midstream Limited Partnership on or about 10 November 2005. The area of the Gulf of Mexico affected by the oil discharge includes navigable waters of the United States.

CLAIMANT:

The claimant has submitted the sum certain for removal costs totaling \$4,584,444.79. This claim amount has been adjusted by the NPFC to reflect Targa's payment to K-Sea in full satisfaction of the litigation between parties. Since Targa's payment represented 40% of all damages related to this incident, the NPFC adjusted its claim by \$1,833,777.92 to account for Targa's contribution to the removal costs of the claim.

Regarding the litigation, Targa filed a complaint against K-Sea in the District Court for the Southern District of Texas for damages arising from the allision involving the parties. K-Sea responded by filing a counterclaim against Targa. On 10 December 2007, the District Court found that both parties, K-Sea and Targa, were negligent and concluded that K-Sea's negligence proximately caused 60% of the damages and Targa's negligence proximately caused 40% of the damages suffered by both parties.

With regard to K-Sea, the Court found that **Mary Golden**, the Second Mate, had "intentionally" steered the REBEL on a course over the chartered platform because she had thought it had been decommissioned or removed. The Court also noted the Second Mate failed to contact the Coast Guard regarding the missing platform, and it was unreasonable for her to assume that the platform, WC 229A had been decommissioned. Specifically, the Court determined that **Mary Golden** did not act as a reasonable navigator by steering over the position of the platform. A reasonable navigator, in the opinion of the Court, would have steered around the location. However, the court speculated that had the damaged platform been lit, Second Mate **Mary Golden** would have steered around it.

The facts indicate the incident was caused by the negligence of both K-Sea and Targa which was also the view of the Court in this litigation. While the NPFC is not bound by the District Court's findings or conclusions, we do recognize the degree of fault in the Court's opinion because of its effect to reduce K-Sea's claim for uncompensated removal costs by Targa's contribution to K-Sea.

In the RP's prior claim, N06008-001, the NPFC determined that K-Sea was in fact the RP and denied its defense to liability. In that same claim, the NPFC granted K-Sea's entitlement to its limit of liability. As a result of granting that entitlement, the NPFC considered and adjudicated the underlying removal cost claims as presented and documented by the RP. These costs were the costs that exceeded the RP's vessel limit, and compensation was made.

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. A responsible party's liability will include "removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan". 33 USC § 2702(b)(1)(B).

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages. Removal costs are defined as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident".

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

33 U.S.C. §2713(d) provides that "If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund."

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

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. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, "a claimant must establish -

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC."

Under 33 CFR 136.205 "the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC." [Emphasis added].

DETERMINATION OF LOSS:

A. Overview:

1. The FOOSC coordination was made with the Coast Guard Marine Safety Office, Port Arthur Texas.
2. The incident involved the discharge of “oil” as defined in OPA 90, 33 U.S.C. §2701(23), to navigable waters.
3. The claim was submitted on time.
4. The review of the actual costs, invoices and dailies focused on the evaluation of whether such costs qualify as “Compensation Allowable” under 33 CFR Section 136.205.
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that the majority of all removal costs presented were for actions in accordance with the NCP and that the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205 with the exception of the following: (See, Enclosure 1 – Summary of Vendors)

a. B&P International **Total Invoiced Amount: \$91,575.00**

These costs are for the adjustment of Pre CTL Expenditures and are therefore denied. The documentation submitted fails to demonstrate these services were directly related to the removal of oil as opposed to professional consultation services.

b. Blumar Offshore **Total Invoiced Amount: \$2,349.50**

The NPFC has determined **\$434.40** of the costs submitted is denied. These costs are for transporting attorneys, which are not removal costs or damages or costs paid for third party damages allowed under section 2708. Therefore they are not OPA compensable and must be denied.

c. Federal Express **Total Invoiced Amount: \$289.56**

The NPFC has determined costs associated with the delivery of draft documents are not OPA compensable.

d. International Marketing **Total Invoiced Amount: \$7,036.00**

The NPFC has determined costs associated with public relations services are not OPA compensable and were not for the primary purpose of removing oil.

B. Analysis:

In adjusting the underlying cost claim, the NPFC conducted a thorough review of all costs in the amount of \$4,584,444.79 submitted by K-Sea as the amount claimed as Non P&I removal costs. The NPFC has denied \$99,334.96 as Non-OPA compensable costs based upon documentation submitted.

To account for Targa’s contribution to the removal costs of the claim as part of the total removal costs of \$4,584,444.79 by 40% or by \$1,833,777.92. Since this amount reflects Targa’s compensation to K-Sea, the difference between \$4,584,444.79 and \$1,833,777.92 equals \$2,750,666.87.¹¹ This difference represents the 60% of the total removal costs of

¹¹ Letter from Freehill Hogan & Mahar LLP to Ms. **Hellberg** dated February 11, 2009, confirming that K-Sea had received compensation in line with Court’s decision.

the claim. When the non-OPA costs of \$99,334.96 are subtracted, the difference of \$2,691,065.89 represents the amount that shall be paid to the claimant as determined by the claim adjudication procedures.

The NPFC Claims Manager has reviewed the actual cost invoices and dailies to confirm that the claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable.

On that basis, the Claims Manager hereby determines that the claimant did in fact incur \$2,691,065.89 of uncompensated removal costs and that that amount is properly payable by the OSLTF as full compensation for the reimbursable removal costs incurred by the claimant and submitted to the NPFC under claim# N06008-002. The claimant states that all costs claimed are for uncompensated removal costs incurred by the claimant for this incident. The claimant represents that all costs paid by the claimant are compensable removal costs, payable by the OSLTF as presented by the claimant.

C. Determined Amount:

The NPFC determines that the OSLTF will pay \$2,691,065.89 as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim# N06008-002.

Claim Supervisor: **Thomas S. Morrison**

Date of Supervisor's review:

Supervisor Action:

Supervisor's Comments: