CLAIM SUMMARY / DETERMINATION FORM

Date	: 2/12/2009
Claim Number	: N06008-001
Claimant	: K-Sea Operating Partnership L P
Type of Claimant	: Corporate (US)
Type of Claim	: Limit of Liability
Claim Manager	: [redacted]
Amount Requested	: $47,402,476.75

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 229A 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 station 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 of the surface of the water.[3] Targa asserted that Norwegian floats were attached to the submerged platform.

On 6/7 November 2005, the REBEL made a transit of the Gulf using "normal routes" westbound from Tampa to Galveston, with [redacted] as Second Mate.[4] At this time, according to the entries in the log book, Second Mate [redacted] passed within one-half mile to the north of the original charted location of the

[1] Claimant's letter to NPFC of 30 April 2007, page 7

[2] Deposition of [redacted] page 35 & requested Broadcast Notice to Mariner's dated 5 October 2005 (never 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

[4] [redacted] was the Second Mate, and mate on watch, and [redacted] was the Master on the vessel at the time of the incident.

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 en route to Tampa, FL on 10 November 2005. Second Mate [redacted] 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 [redacted] 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 [redacted] noticed that the ITB REBEL/DBL152, 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. [redacted] 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 [redacted] 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 with the claim and it showed that it had been corrected and annotated through October 2005 including published notice mariner updates along the vessel's intended track though the end of October 2005.

Early Situation Reports (SITREPs) from the Federal On-Scene Coordinator (FOSC), 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, SITREPs 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 the 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 incident, the claimant K-Sea submitted $47,402,746.75 as the amount claimed as removal costs associated with the oil pollution incident.

CLAIM

The claimant is K-Sea Operating Partnership, L.P. and its subrogated insurers. 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 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.

Under 33 U.S.C. § 2708,an RP of an oil spill incident may assert a claim for uncompensated removal costs and damages only if the RP demonstrates that it is entitled to an affirmative defense under 33 U.S.C. § 2703, or to a limitation of liability under 33 U.S.C. § 2704. In this matter, the claimant asserts that it is entitled to a third party affirmative defense to liability under 33 U.S.C. § 2703, or in the alternative that it is entitled to its limitation of liability pursuant to 33 U.S.C. § 2704.[11]

CLAIMANT

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[5] Deposition of [redacted] 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 [redacted]
[10] SITREP No, 8-22, 15-30 November 2005
[11] Claimant's Submission Letter of 26 January 2006.

The claimant has submitted the sum certain for removal costs totaling $47,402,746.75. 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 (See below). Since Targa's payment represented 40% of all damages related to this incident, the NPFC adjusted its claim by $18,894,477.44 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 [redacted], the Second Mate, had "intentionally" steered the REBEL on a course over the charted 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 [redacted] 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 that location. However, the court speculated that had the damaged platform been lit, Second Mate [redacted] 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 claim for uncompensated removal costs by Targa's contribution to K-Sea.

APPLICABLE LAW:

...each responsible party for a vessel or facility from which oil is discharged...is liable for the removal costs and damages...that result." (33 U.S.C. §2702(a)).

In the case of a vessel, responsible party means "any person owning, operating or demise chartering the vessel." (33 U.S.C. §2701(32)(A).

"A responsible party is not liable for removal costs or damages under section 1002 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by-...

> (3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party..., if the responsible party establishes, by a preponderance of the evidence, that the responsible party-
> (A) exercised due care with respect to the oil concerned, ... in light of all relevant facts and circumstances; and
> (B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions." (33 U.S.C. §2703(a))

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 U.S.C. §§ 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 U.S.C. §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 U.S.C. §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

OPA, 33 U.S.C. § 2701, *et seq.* (2006) provides, in relevant part, that "each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident." 33 U.S.C. § 2702(a).

OPA, however, allows certain responsible parties to limit their liability under certain conditions. OPA sets forth the limits on liability in pertinent part, at 33 U.S.C. § 2704(a), as follows:

> (a) General Rule.—
> Except as otherwise provided in this section, the total of the liability of a responsible party under section 2702 of this title and any removal cost incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed—
> (1) for a tank vessel, *the greater of*—
> (A) $1,200 per gross ton; or
> (B) (i) in the case of a vessel greater than 3,000 gross tons,$10,000,000; or
> (ii) in the case of a vessel of 3,000 gross tons or less, $2,000,000;
> (2) for any other vessel, $600 per gross ton or $500,000, whichever is greater;
> (3) for an offshore facility except a deepwater port, the total of all removal costs plus $75,000,000; and
> (4) for any onshore facility and a deepwater port, $350,000,000. (Emphasis added.).

OPA, at 33 U.S.C. § 2704(c), excepts the otherwise applicable statutory limits on liability as follows:

> (c) Exceptions—
> (1) Acts of Responsible Party.—
> Subsection (a) of this section does not apply if the incident was proximately caused by—
> (A) gross negligence or willful misconduct of, or
> (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party…
> (2) Failure or Refusal of Responsible Party.—
> Subsection (a) of this section does not apply if the responsible party fails or refuses—
> (A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;
> (B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or
> (C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

OPA further provides in relevant part, at 33 U.S.C. § 2708(a), that,

> (a) In general

The 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 under section 2713 of this title only if the responsible party demonstrates that –

(1) the responsible party is entitled to a defense of liability under section 2703 of this title; or

(2) the responsible party is entitled to a limitation of liability under section 2704 of this title.

A responsible party may present a claim directly to the Oil Spill Liability Trust Fund. 33 U.S.C. 2713.

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.

33 U.S.C. 2701 (31): "'removal costs" means 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 discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident."

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

33 CFR 136.105(e)(6) each claim must include at least evidence to support the claim

The Oil Spill Liability Trust Fund is "available…for…the payment of claims in accordance with section 1013 for uncompensated removal costs…or uncompensated damages;" (33 U.S.C. §2712(a)(4).

ANALYSIS:

ENTITLEMENT TO A DEFENSE TO LIABILITY

The claimant, K-Sea has asserted an entitlement to a third party defense under the provisions of OPA. As an RP, the claimant may be entitled to a third party defense where the RP establishes, by preponderance of evidence, that the oil discharge incident was caused solely by an act or omission of a third party and the RP demonstrates that it exercised due care with respect to the oil concerned and took precautions against foreseeable acts or omissions of any such third party. 33 U.S.C. § 2703.

K-Sea is not entitled to this third party defense because of the acts and omissions which caused or contributed to this incident. Prior to the incident, Second Mate [redacted] failed to properly update the chart to indicate the missing platform and to contact The Coast Guard District Commander regarding the missing platform. Her neglect of duties contributed to her erroneous assumption that the charted platform had been removed. This led to the decision of Second Mate [redacted] to vary from the Master's voyage plan and to steer claimant's vessels course toward the damaged WC 229A platform's charted location. These acts and omissions of K-Sea's employee caused or contributed to the incident. As a result, the NPFC finds that Targa was not the sole cause of the incident and thus K-Sea is not entitled to its defense to liability. In addition the same evidence indicates that K-Sea failed to exercise due care with respect to the oil, and to take precautions against foreseeable acts or omissions of any such third party.

ENTITLEMENT TO LIMITATION OF LIABILITY

Under OPA, an RP may limit their liability as specified by certain conditions. At 33 U.S.C. § 2704, the RP of a vessel which is liable under 33 U.S.C. § 2702(a) for removal costs and damages resulting from an oil spill incident, may limit its liability based on the limits of the gross tonnage of the vessel involved in the incident. Under 33 U.S.C. § 2704, the RP is permitted this entitlement, provided that, the incident

was not proximately caused by: "gross negligence" or "willful misconduct;" or violation of an applicable Federal safety, construction or operating regulations.

In this matter, Second Mate [redacted] failed to properly mark the chart for the missing platform and report this matter to the Coast Guard, and on her return voyage, she intentionally steered the vessel in the direction of this missing platform. These acts and omissions lack the degree of care, caution and prudence required under the circumstances, but we find that they do not amount to "gross negligence" or "willful misconduct" or to a the violation of Federal safety, construction, or operating regulations that was a proximate cause of the incident. Nor was there evidence of claimant's failure to report or its failure to cooperate as required under 33 U.S.C. § 2704 (c).

Given the evidence and analysis, the NPFC finds that the claim for entitlement to a limitation of liability shall be granted. Accordingly, the DBL 152 is a double hulled tanker weighing 9,741 gross tons operating under a COFR issued on 14 January 2004[12]. The applicable limit of liability for the DBL 152 is $11,689,200.00 based on the provisions of 33 U.S.C. § 2704 which calculated the limit of liability based on the gross tonnage of a vessel.

ANALYSIS OF QUANTUM

In adjudicating the underlying cost claim, the NPFC conducted a thorough review of all $47,402,746.75 submitted by K-Sea as the amount claimed as removal costs Appendix A, (attached), itemizes $161,890.12 that have been denied as not OPA compensable based upon documentation submitted. Thus reducing the removal cost total claimed to $47,240,856.63.

To account for Targa's contribution to the removal costs of the claim as part of the litigation, we reduced the "adjusted removal cost total" of $47,240,856.63 by 40% or by $18,961,098.70. Since this amount reflects Targa's compensation to K-Sea, the difference between $47,240,856.63 and $18,961,098.70 equals $28,441,648.05.[13] This difference represents the "uncompensated sum certain removal costs" of the claim. When this amount is reduced by the limitation of liability of the DBL 152 of $11,689,200.00, the difference of $16,590,557.93 represents the amount in excess to the claimant's limitation of liability and shall be paid to the claimant as determined by the claim adjudication procedures.

CONCLUSION & RECOMMENDATION

The NPFC has reviewed the record submitted in support of claimant's assertion that it is entitled to an affirmative defense to liability under 33 U.S.C. § 2703 and finds that claimant has not met its burden of proof as required under the provisions of the law and therefore this request is denied.

The NPFC has also reviewed the evidence submitted in support of claimant's assertion of its entitlement of the limitation of liability and has determined that claimant is entitled to have its limits upheld.

The NPFC determines that the claim should be paid as compensation to the claimant, K-Sea Operating Partnership L.P. in the amount of $16,590,557.93.

Claim Supervisor: [redacted]

Date of Supervisor's Review: 2/12/09 2/12/09

Supervisor Action: Approved Approved

Supervisor's Comments:

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[12] Copy of referenced COFR attached.

[13] E-mail from [redacted] K-Sea's Counsel to [redacted] NPFC claims manager, dated 20 November 2008, confirming that K-Sea had received compensation in line with Court's decision.