

**CLAIM SUMMARY / RECONSIDERATION DETERMINATION**  
**5/26/2016**

<b>Claim Number:</b>	J05003-0035
<b>Claimant:</b>	IMC Shipping Co. Pte. Ltd., Ayu Navigation Sdn Bhd
<b>Type of Claimant:</b>	Responsible Party
<b>Type of Claim:</b>	Attorney's fees related to third party claims and litigation
<b>Claim Manager:</b>	██████████
<b>Amount Requested:</b>	\$257,484.07

**BACKGROUND**

**The incident**

On December 8, 2004, during a voyage from Seattle to China, the M/V SELENDANG AYU (SELENDANG or vessel) grounded on the north shore of Alaska's Unalaska Island, northeast of Spray Cape. The vessel discharged approximately 330,000 gallons of bunker oil into the waters of the United States off Unalaska Island, a navigable waterway of the United States.

The responsible parties for the incident were the owner of the vessel, Ayu Navigation Sdn Bhd (Ayu), and its operator, IMC Shipping Co. Pte. Ltd. (IMC). Sveriges Angfartygs Assurans Forening (The Swedish Club) and International Group of Protection and Indemnity Clubs (International Group) are the responsible parties' subrogated insurers.

**RP Claims to the Fund**

In a letter dated December 6, 2007, the responsible parties (now RP/Claimants), through their attorneys Keesal, Young and Logan (KYL), asserted entitlement to their statutory limitation on liability, which if granted was \$23,853,000. The letter also presented a claim for reimbursement of removal costs and damages paid, or to be paid, by the responsible parties.<sup>1</sup> The letter noted that removal costs and damages to date totaled \$148,651,185.13. The letter noted that the responsible parties received claims and in order to process, settle and pay these claims the responsible parties retained MR and Associates (MRA) to establish a claims office in Dutch Harbor. Attached to this letter was a Claims Summary List, which itemized each claim presented to the responsible party, the amount of the claim and the amount paid to the claimant. This letter constituted the claim for all third party claims listed in the summary and met the three-year period of limitations for presenting damages claims to the Oil Spill Liability Trust Fund (OSLTF or the Fund).

The NPFC and KYL agreed that the NPFC would first determine if the responsible parties demonstrated entitlement to the statutory limitation on liability. If the limit was granted RP/Claimants would submit documentation supporting its claimed removal costs and damages.

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<sup>1</sup> Keesal Young & Logan letter dated December 6, 2007.

On January 27, 2012, the NPFC determined that the responsible parties had demonstrated entitlement to their statutory limitation on liability, \$23,853,000.<sup>2</sup>

### **THE INSTANT CLAIM**

KYL provided various legal services to the responsible parties: (1) response; (2) natural resource damage assessment, and (3) third party claims adjudication. This claim is solely for reimbursement of KYL's legal fees and costs associated with the legal representation for assessment and resolution of third party claims for damages and defending the responsible parties in a \$12 million class action law suit filed by commercial fishermen. This included KYL's assistance to MRA with the legal evaluation and assessment of third party claims presented to the claims office established by MRA.

A March 21, 2012 letter from KYL to the NPFC was a follow up to the December 6, 2007 claim to the Fund and included documentation in support of KYL's claimed legal fees and costs. The letter noted that KYL had negotiated settlements with four Native Alaskan Corporations: the Ounalashka Corporation, Atxam Corporation, Saint George Tanaq Corporation and the Tanadgusix Corporation totaling \$5,810,000. According to this letter KYL entered into settlement discussions with attorneys for the Corporations, participated in mediations, prepared mediation briefs and prepared settlement documents. It supervised and reviewed MRA's assessment of damages. The class action law suit required that KYL further investigate and assess the damages claimed by the plaintiffs and justified the assessment to the court.

KYL provided Summary Sheets that listed each invoice and itemized the fee allocation among the three types of legal services provide to the responsible parties. There was no explanation or argument asserting that these legal fees and costs were reimbursable from the Fund.

On October 9, 2014, the NPFC denied the claim on the grounds that the claimed costs were not clearly explained but appeared to be adjudicative or administrative costs incurred for third party claims presented to the claims office, mediation and settlement of the Native Alaskan Corporations and defense of the class action law suit. These costs are not damages as defined by OPA and are not payable from the Fund.

### **RP/Claimants' Request for Reconsideration**

On December 3, 2014, RP/Claimants submitted a request for reconsideration. RP/Claimants provided additional information and clarified that their claimed costs were assessment costs. They also presented two legal arguments: (1) legal fees and costs incurred in assessing third party claims are reimbursable under OPA by responsible parties, and (2) allowing a limitation claimant to recover its damage assessment costs is consistent with the intent of Congress in enacting OPA.

KYL explains that the fees and costs incurred were incurred by the RP/Claimants to assess third party claims for damages and that the documentation and invoices establish the detailed description of the assessment activities. KYL provided review and oversight of the MRA

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<sup>2</sup> To date the NPFC has reimbursed the RP/Claimants approximately \$92 million in removal costs from the Fund.

evaluation, assessment, and settlement of claims. They explain that MRA's primary purpose was to "perform the day-to-day function of reviewing and assessing claims for damages submitted to the responsible parties by those injured by the oil spill, and to assess and determine whether and to what extent claims should be compensated."<sup>3</sup> Similarly, they argue that they incurred legal fees when they cooperated with Polaris Applies Sciences, a consulting firm hired in part to scientifically assess damages claimed by the Native Alaskan Corporation claims. KYL also negotiated and settled the Native Alaskan Corporation claims directly with the attorneys representing the Corporations. This included attending mediation, preparing mediation briefs and settlement documentation executed by the Corporations and the responsible parties.

KYL also incurred legal fees when it defended the responsible parties in a class action lawsuit filed by fishermen asserting that they suffered more than \$12 million in lost profits resulting from the incident. KYL argues that in the defense of this lawsuit it incurred costs to investigate and assess the claims in the lawsuit and that the lawsuit could not have been successful without the assessment of the claims. They argue that these legal costs are in fact assessment costs and are reimbursable from the Fund.

RP/Claimants argue that the KYL legal fees and costs incurred to assess third party damage claims are recoverable under OPA because they were in fact "assessment costs" and the OPA definition of damages includes assessment costs. Further, they argue that OPA does not distinguish between "damages" for third party claimants and responsible party claimants. Nor is there a distinction between assessment costs that may be recovered by third party claimants and responsible party claimants. They cite to the Gatlin Oil Co. v. United States case as evidence that responsible parties may be reimbursed assessment costs associated with damages claims.

### **NPFC ANALYSIS**

The NPFC notes that certain legal fees and costs may be reimbursed by the Fund. For instance legal costs incurred by a responsible party associated with response actions may be reimbursable. In fact the NPFC reimbursed the RP/Claimants \$419,546.06 for its KYL legal fees incurred for response action associated with this incident.<sup>4</sup> KYL's legal services were for participation in the Unified Command where they reviewed and signed daily incident action plans and audited and paid certain vendors performing removal actions.

However, in this claim RP/Claimants seek reimbursement of legal costs associated with the assessment of third party claims that were presented to the responsible parties. The NPFC denies this claim on two grounds. Its analysis is fully explained below.

When the primary purpose of the legal actions and associated fees and costs are in connection with negotiations and settlement to protect the responsible party's litigation risks the legal fees are not payable from the Fund. Key Tronic Corp. v. United States, 511 U.S. 809, 820-821, 114 S. Ct. 1960 (1994).

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<sup>3</sup> KYL letter to the NPFC dated December 3, 2014.

<sup>4</sup> Claim Number J05003-0037 dated September 23, 2015.

The primary purpose of the KYL legal costs related to third party damage claims is to avoid or lessen the responsible parties' litigation risks.

In this claim the RP/Claimants seek reimbursement of their legal costs associated with the assessment of third party damage claims. They acknowledge that the claimed costs are legal costs but depict them as assessment costs that are reimbursable from the Fund. They assert that Section 2708 of OPA provides that a responsible party that demonstrates entitlement to a limitation on liability may present a claim to the Fund for its removal costs and damages. 33 U.S.C. § 2708(b). They argue that the definition of "damages" under OPA includes "the cost of assessing the damages;"<sup>5</sup> therefore their legal costs are OPA costs and payable from the Fund.

OPA is a strict liability statute and a responsible party is liable for the removal costs and damages resulting from an incident. 33 U.S.C. § 2702(a).<sup>6</sup> OPA also provides that the President designates the source of the discharge of oil. If the source is a vessel or facility, the President shall notify the responsible party of that designation. 33 U.S.C. § 2714(a). If the responsible party accepts the designation he shall advertise the designation and the procedure by which claims may be presented. 33 U.S.C. § 2714(b).<sup>7</sup>

Consistent with the advertisement and claims process provided in Section 2714, OPA provides that with certain exceptions, a person who has incurred removal costs or suffered damages from an OPA incident must first present its claims for removal costs and/or damages to the responsible party or guarantor of the source of the discharge.<sup>8</sup> 33 U.S.C. §2713(a). (The presentment requirement.) If each person to whom the claim is presented denies all liability for the claim or the claim is not settled by payment within 90 days after presentation of the claim to the RP, the claimant may elect to present its claim to the Fund or commence an action in court against the responsible party. 33 U.S.C. §2713(c) (the election clause).

Section 2713(a)'s presentment procedure requiring claims to be presented to a responsible party before commencing an action in court against the responsible party is to allow the responsible party and the claimant an opportunity to settle the claim and avoid litigation. Johnson v. Colonial Pipeline Co., 830 F.Supp. 309, 310 (E.D. Va. 1993) ("The purpose of the claim presentation procedure is to promote settlement and avoid litigation.") The Johnson court expanded its reasoning by stating, "the purpose of OPA's claim presentation requirement is to enable the parties to negotiate, if possible, a settlement of potential claims resulting from an oil spill without having to resort to litigation." *Id.* at 311. See also Gabarick v. Laurin Maritime (America) Inc., 2009 WL 102549 \*3 (E.D.La. 2009), Turner v. Murphy Oil USA, Inc., 2007 WL 4208986 \*2 (E.D.La. 2007), Abundiz v. Explorer Pipeline Co., 2003 WL 23096018 \*3 (N.D.Tex. 2003).

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<sup>5</sup> 33 U.S.C. 2701(5).

<sup>6</sup> In the case of a vessel the responsible party is the owner or operator of the vessel. 33 U.S.C. § 2701(32)(A).

<sup>7</sup> The claims regulations provide further that the advertisement shall include the name, address, phone number, office hours, work days and further procedures the responsible party may require. 33 CFR 136.313.

<sup>8</sup> In this case the owner and operator of the M/V SELENDANG AYU, were the responsible parties and they established a claims office and advertised the procedure whereby claimants could present their claims for removal costs and damages. The responsible parties contracted with MRA to process, review, negotiate, settle and pay claims.



Thus, when a responsible party incurs legal fees and costs to review, evaluate, negotiate, settle and pay claims presented to it under OPA these fees and costs are in fact legal fees associated with actions taken to avoid litigation and to limit the extent of the responsible party's liability. Importantly, a responsible party who fails to settle claims with claimants risks litigation with a claimant because the claimant may file an action in court against the responsible party. In this case that is exactly what happened. When the responsible parties failed to settle claims with certain commercial fishermen, they commenced a class action in the federal district of Alaska.<sup>9</sup>

Alternatively, under the election clause a claimant may, instead of filing suit against the responsible party, elect to present its claim to the Fund for reimbursement. If the Fund adjudicates and pays the claim, the claimant must release all its rights under any theory of law to the United States. The NPFC will seek recovery of the claims payment, including the adjudicative and administrative costs, from the responsible party.<sup>10</sup> If the responsible party does not reimburse the Fund, it faces a second litigation risk because the United States will file suit against the responsible party to recover the costs paid from the Fund.

Thus, when a responsible party evaluates, negotiates and settles claims the associated costs are to avoid or limit its litigation risks<sup>11</sup> – either an action commenced in court by a claimant or by the United States when it seeks recovery of costs paid from the Fund. These costs are legal fees to protect the RP's interests. Key Tronic Corp. v. United States, 511 U.S. at 820-821. (Legal services performed in connection with negotiations between Petitioner and EPA that culminated in a consent decree and studies prepared by Petitioner's counsel was primarily to protect Petitioner's extent of liability.) Legal fees incurred by a responsible party in dealing with third party claims are not an OPA damage payable from the Fund.

Further, the RP/Claimants argue that the KYL legal fees to defend the lawsuit are assessment costs because they had "to further investigate and assess the claims made by the Plaintiffs in defending the lawsuit and that the lawsuit could not have been defended without such an assessment of Plaintiffs' damages and thereafter justifying the assessment to the court."<sup>12</sup> These costs to defend the litigation are clearly the type of legal fees that are not payable from the Fund.

RP/Claimants argue that their establishment of a claims process and the prompt payment of claims was consistent with Congressional intent that claimants may avoid litigation.<sup>13</sup> They cite to 135 Cong.Rec. at H7965, 101<sup>st</sup> Congress (1<sup>st</sup> Sess. November 2, 1989) (statement of Rep. Hammerschmidt) ("The polluter should pay and the victim should receive full compensation for direct, proven damages. And when the polluter cannot or will not pay, a Federal fund should be

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<sup>9</sup> David Carson Haines, and Crab Fishermen Affected in the Crew Lists of the Alaska Crab Coalition, et al v. M/V SELENDANG AYU et al., Case No. C07-1963 (W.D. Wash.). Plaintiffs lost the case on jurisdictional grounds and appealed to the 9<sup>th</sup> Circuit Court of Appeals, The appellate court affirmed the district court's ruling.

<sup>10</sup> See 33 U.S.C. 2715(c). The NPFC notes that while OPA provides that the Fund may seek adjudicative and administrative costs associated with the assessment and payment of claims there is no such provision in OPA providing that a responsible party may be reimbursed for these costs.

<sup>11</sup> The RP/Claimants, citing to In re DEEPWATER HORIZON, 808 F.Supp.2d 943, 959 (E.D.La. 2011), agree that the purpose of presentment is to avoid litigation. (The purpose of OPA was to set up a scheme where the responsible party is strictly liable, where claimants present their claims to the RP, and where the intent is to encourage settlement and reduce the need for litigation.).

<sup>12</sup> KYL reconsideration letter dated December 3, 2014, p.6.

<sup>13</sup> December 3, 2014 KYL letter, p. 8.

available for prompt, adequate compensation to oil spill victims without having to endure endless and costly litigation.”), 135 Cong.Rec. at H7962, 101<sup>st</sup> Congress (1<sup>st</sup> Sess. November 2, 1989)(statement of Rep. Lent)(“The thrust of this legislation is to eliminate, to the extent possible, the need for an injured person to seek recourse through the litigation process, which--as we all know--can take years. It also sets up a good system of determining the liability of those persons causing oil spills to make sure that they are not allowed to shirk their responsibility.”). Thus, they argue that OPA provides that allowing a limitation claimant, i.e., an RP/Claimant, to recover its damage assessment costs associated with the payment of third party claims is consistent with the intent of Congress because it has made prompt payment to the third parties in order that the third parties avoid litigation.

KYL misinterprets the Congressional intent because it applies to prompt payment from responsible parties to claimants in order that claimants may avoid litigation. In this case the RP/Claimants, by settling claims with third parties, are seeking avoidance or limitation of their own litigation risks and costs.

Finally, as a matter of policy, RP/Claimants argue that if the NPFC were to deny a responsible party's costs of assessing and settling claims from third parties, that denial would create “a disincentive for the responsible party to incur the cost of hiring claims experts to assess and evaluate damage claims”<sup>14</sup> and to resolve and settle claims. This argument is without merit. OPA provides that if a responsible party denies designation, the United States will advertise for claims and adjudicate those claims. 33 U.S.C. § 2714(c). In that case, the Fund will adjudicate, settle and pay claims. The United States will seek the recovery of the Fund's claims payments of those claims and as noted above, the adjudicative and administrative costs incurred by the Fund to assess and pay the claims.

KYL has not established that its assessment costs are associated with OPA compensable damage claims or that its assessment costs are reasonable and associated with a specific claim.

The NPFC also denies this claim because the RP/Claimants misconstrue the OPA and claims regulations when they argue that assessment costs incurred by RP/Claimants for third party damage claims are no different from assessment costs associated with a third party claimant who presents its claim to the Fund. RP/Claimants attempt to argue that their “damages” include all the third party damage claims and thus would include all “assessment costs” associated with all the damage claims.

OPA and the Claims Regulations are not read so broadly. The Claims Regulations provide that a claimant bears the burden of providing all information, evidence and documentation to support the claim. 33 CFR 136.105(a). Each claim must be for a sum certain for compensation for each category of uncompensated damages or removal costs. 33 CFR 136.105(b). A claimant may include the reasonable costs incurred to assess the damages, including the reasonable costs of estimating the damage claimed, but not attorneys' fees or other administrative costs associated with preparation of the claim. 33 CFR 136.105(e)(8).

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<sup>14</sup> Id., p. 9.

Typically a claimant presenting a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) is seeking reimbursement for its damages and may include reasonable assessment costs associated with the damages in that claim. If the damage in the claim is an OPA-compensable damage, i.e., , lost profit or real or personal property damage, and the claim is approved by the NPFC, claimant is reimbursed its damages and the reasonable costs to assess the damages. On the other hand if the claim is not payable from the Fund neither are the assessment costs payable from the Fund.

In this case KYL interprets the “damages” collectively as all damage claims and the “assessment costs” as all costs associated with all the damage claims. Along with the KYL legal costs associated with the evaluation, settlement and payment of the four Native Alaskan Corporations and the class action law suit (discussed and denied above), KYL seeks all assessment costs incurred for their legal evaluation and assessment of third party claims presented to MRA. According to MRA it reviewed and evaluated 86 claims totaling \$3,795,011.47. Claimants were paid a total of \$419,899.53 in settlements.<sup>15</sup> Presumably these 86 damage claims are the “damages” and KYL seeks the “assessment costs” associated with the 86 claims. There is no evidence that each of the claims settled and reimbursed by the responsible parties were for OPA compensable damages; nor is it known the reasonable assessment costs associated with each compensable claim. While an RP/Claimant may be entitled to reimbursement of third party damage claims it paid to third parties it must provide evidence that each of its payments were for OPA compensable damages or removal costs and it must provide evidence of the costs associated with the assessment of those damages.

RP/Claimants cite to Gatlin Oil Company, Inc. v. United States, 169 F.3d 2007 (4<sup>th</sup> Cir. 1999) as evidence that a responsible party is entitled to recover its costs for assessing damage claims under OPA. Gatlin Oil Company is inapposite for two reasons. First, a vandal entered the Gatlin facility and opened storage tanks, which resulted in the discharge of oil. The NPFC determined that Gatlin was entitled to a sole fault third party defense; therefore, Gatlin was no longer a responsible party. Second, Gatlin’s claims to the Fund were costs to assess damage to its own facility caused by the discharged oil. The NPFC determined that Gatlin was entitled to a portion of its costs associated with assessing damages to its facility. In the instant case, contrary to Gatlin, the RP/Claimants are assessing and settling damages to third party claimants, not its own damages.

For the reasons stated above this claim is denied on reconsideration.

Claim Supervisor: [REDACTED]

Date of Supervisor’s review: [REVIEW DATE]

6/2/16

Supervisor Action: **Approved**

Supervisor’s Comments:

<sup>15</sup> Registered File List compiled by MRA and attached to a November 27, 2007, MRA letter to KYL.