U.S. Department of Homeland Security

United States Coast Guard

Director
National Pollution Funds Center

4200 Wilson Blvd Stop 7100
Arlington VA 20598-7100
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5890
October 09, 2013

RE: J05003-0009

Via email: [redacted]@kyl.com

IMC Shipping Co. Pte. Ltd., Ayu Navigation Sdn Bhd
c/o Keesal Young & Logan
Anchorage, AK 99501
Attn: Douglas Davis

Dear Mr. Davis:

The National Pollution Funds Center (NPFC), in accordance with 33 CFR Part 136, denies payment on claim number J05003-0009 involving the M/V SELENDANG AYU - J05003 spill. This determination is based on an analysis of the information submitted. Please see the attached determination for further details regarding the rationale for this decision.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request. Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number J05003-0009.

Mail reconsideration request to:

Director
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Boulevard
Arlington, VA 20598-7100

Sincerely,

[redacted]
Claims Manager
U.S. Coast Guard
By direction

Enclosure: Claim Summary / Determination

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	J05003-0009
Claimant	IMC Shipping Co. Pte. Ltd. *et al*
Type of Claimant	Responsible Party (US)
Type of Claim	RP payment to 3rd Party Claimant – Tanadgusix Corporation
Amount Requested	$2,300,000

INCIDENT

The M/V SELENDANG AYU (SELENDANG or vessel) was on a voyage from Seattle to China on December 06, 2004. While operating in adverse weather conditions, the crew shut down the main engine as a result of a casualty to the No. 3 cylinder. While attempting to repair the engine, the vessel drifted and eventually grounded on December 08, 2004 on a rocky shelf on the north shore of Unalaska Island, northeast of Spray Cape. The grounding ruptured the vessel's hull and bottom tanks, causing a discharge of approximately 330,000 gallons of bunkers into the waters off Unalaska Island.

CLAIMANT AND CLAIM

1. Claimants

Ayu Navigation Sdn Bhd (Ayu), IMC Shipping Co. Pte. Ltd. (IMC), Sveriges Angfartygs Assurans Forening (The Swedish Club), and International Group of Protection and Indemnity Clubs (International Group) (collectively "the Claimants") are the responsible parties under the Oil Pollution Act of 1990 (OPA) and their insurers. Ayu owned the vessel, and IMC operated it. The Swedish Club, International Group, and the International Group's reinsurers were the subrogated underwriters.

Pursuant to 33 U.S.C. § 2708(a)(2), the Claimants presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) via the National Pollution Funds Center (NPFC) on December 07, 2007, asserting entitlement to a limit on its liability for oil removal costs and damages resulting from the incident. The Claimants sought reimbursement for incurred removal costs and for damages paid to third parties above their liability limit. On January 27, 2012, the NPFC determined that the Claimants' were entitled to their statutory limit of liability, $23,853,000. The NPFC began adjudicating the Claimant's removal costs claims, reimbursing qualifying costs that exceed the liability limit. Claimants (hereinafter RP/Claimants) also paid damage claims to certain third parties. In this claim they seek reimbursement of $2.3 million they paid in settlement to a third party.

2. Third-Party Tribal Corporation Claim

The RP/Claimants settled a third party claim with the Tanadgusix Corporation (TDX), a Native Alaskan Village Corporation, with a payment of $2.3 million. TDX resides in Anchorage, Alaska and has land holdings on Unalaska Island. TDX argued to the RP/Claimants that its lands on Unalaska Island were oiled by the incident, two full segments and one partial segment of its shoreline land holdings were not sufficiently cleaned during the federally-directed response, and, as a result, TDX would clean the segments themselves. It sought compensation for projected

cleanup costs, punitive damages, contingency risk funds, diminution in value (compensatory damages) for its oiled lands, and expended costs for damage assessments and cleanup preparations.

APPLICABLE LAW

Each responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shoreline or exclusive economic zone is liable for removal costs and damages. 33 U.S.C. § 2702(a).

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". 33 U.S.C. § 2701(31).

"Damages" include damages to, or economic losses resulting from the destruction of, real or personal property, which is recoverable by a claimant who owns or leases the land. 33 U.S.C. § 2702(b)(2)(B).

Natural resource damages are damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee. 33 U.S.C. § 2702(b)(2)(A).

The President shall promulgate, and may from time to time amend, regulations for the presentation, filing, processing, settlement, and adjudication of claims under this Act against the Fund. 33 U.S.C. § 2713(e). The Claims Regulations are found at 33 CFR Part 136.

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available to pay claims in accordance with section 2713 for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan and uncompensated damages. 33 USC §§ 2712(a)(4).

Under 33 C.F.R. §§ 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 CFR §136.215(a) provides the proof requirements for property damage claims. A claimant must establish --

(1) An ownership or leasehold interest in the property;
(2) That the property was injured or destroyed;
(3) The cost of repair or replacement; and
(4) The value of the property both before and after injury occurred.

Under 33 CFR §136.217(a), the "amount of compensation allowable for damaged property is the lesser of --

(1) Actual or estimated net cost of repairs necessary to restore the property to substantially the same condition which existed immediately before the damage;
(2) The difference between the value of the property before and after the damage; or

(3) The replacement value."

Compensation allowable for economic loss resulting from real property damages is limited to actual economic losses suffered from loss of use of commercial property or for costs incurred in utilizing substitute commercial property. 33 C.F.R. § 136.217(b).

Under 33 C.F.R. § 136.215(b), a claimant seeking economic losses resulting from destruction of the property must establish the following:

(1) That the property was not available for use and, if it had been, the value for that use;
(2) Whether or not substitute property was available and, if used, the costs thereof; [and]
(3) That the economic loss claimed was incurred as the result of the injury to or destruction of the property.

Claims for loss of use of noncommercial property are not compensable as an economic loss resulting from injury to real or personal property. 33 C.F.R. § 136.217(b).

A responsible party who has paid a claim to a third party and acquired subrogation rights, shall, as a subrogee, support a claim in the same manner as any other claimant. 33 C.F.R. § 136.107.

RP/CLAIMANTS -- CLAIM TO THE FUND

Keesal, Young and Logan, attorneys for the RP/Claimants, provided the following documents with its claim:[1]

(1) letters between Tanadgusix Corporation and Gallagher Marine Systems, Spill Management Company for the RP/Claimants;
(2) July 23, 2006 Unified Command Decision Memo
(2) settlement options from The Swedish Club, and
(3) an executed Settlement Agreement and Release dated September 8, 2006, and proof of payment.

The letters between TDX and Gallagher reflect arguments regarding TDX's disagreement with the Unified Command's decision to not clean up the remaining oil on shoreline segments MKS14 and 16, part of the TDX property. The Unified Command determined that it was not safe to conduct removal actions in these areas because of the uncertainty of weather and limited access and time frames in which to conduct the operations. TDX first intended to conduct the cleanup activities and sought $2.6 million from the RP/Claimants to fund the activities. In a letter dated July 26, 2006 the Swedish Club, the RP entity involved in the negotiations with TDX, argued that the $2.6 million was unreasonable under the circumstances and noted that it could contract with Magone Marine Services to conduct the removal actions for $520,000. In a Settlement Agreement and Release dated September 8, 2006, the parties agreed to settle for $2.3

[1] 1) July 6, 2006 TDX intent to start removal actions of contaminated shoreline segments MKS 14-16;
2) July 12, 2006 Gallagher provided TDX the UC recommendations for MKS 14-16;
3) July 24, 2006 TDX settlement negotiation letter;
4) July 26, 2006 Swedish Club settlement options.

million. The RP/Claimants now seek reimbursement of the settlement amount of $2.3 million from the Fund.

NPFC DETERMINATION

The Claims Regulations at 33 CFR §136.107 provide that a subrogee must support a claim in the same manner as any other claimant. As will be more fully explained below, the claim is denied on the grounds that the RP/Claimants have not established that the $2.3 million payment compensated TDX for OPA damages or removal costs; therefore, the claim is not reimbursable from the Fund.

According to the documents presented to the Fund by the RP/Claimants TDX initially sought $4,874,580.20 from the RP/Claimants. This amount included $2,600,597.70 (future estimated removal costs), $273,982.50 (previously expended TDX costs), $500,000 (risk contingency) and $1.5 million (punitive damages). Based on the sparse administrative record provided by the RP/Claimants it is not clear if the sum certain presented to the Fund by the RP/Claimants, $2.3 million, is for a portion of TDX's future estimated removal costs and/or if it included previously expended costs, risk contingency or punitive damages.

The Settlement Agreement and Release notes that it is a compromise of disputed claims; however, it focuses on TDX being responsible for additional cleanup operations on its oiled lands or other lands if it decides to do so. The Agreement provides that RP/Claimants have no further liability for such cleanup.[2]

OPA provides that the Fund is available to pay for certain uncompensated removal costs determined by the President to be consistent with the NCP. In this claim the $2.3 million appears to compensate TDX, at least in part, for future estimated removal costs if it decides to conduct removal actions. There is no provision that any removal actions would be consistent with the NCP or coordinated with the FOSC. In fact the Unified Command determined that removal action at these sites was not feasible given safety risks, and that the site should be left to natural attenuation of the oil because the oil posed only a minimal threat to public health and the environment.[3] To the extent that the $2.3 million compensated TDX for future removal costs the claim is denied.

The Settlement Agreement and Release also provides that TDX waives any and all claims against the RP/Claimants for unknown or future losses or damages. There is some notation in the administrative record that TDX may have sought reimbursement for loss of value of its lands due to the oiling. Damages for injury to, or economic losses resulting from destruction of, real or

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[2] July 26, 2006 Sweedish Club letter of settlement negotiation, the RP/Claimants also argued how a court might rule against awarding restoration damages to TDX based on:

1) the USCG and state both concluding that additional cleanup was not necessary,
2) it will be very expensive to conduct cleanup,
3) shoreline areas that remain oiled are narrow beaches adjacent to steep cliffs in an area that is remote, uninhabited, and which few, if any, TDX shareholders ever visit,
4) TDX's proposal far exceeds the actual value of these areas, and
5) the USCG and State both concluded that remaining oil is not a significant threat to the environment, and that it will degrade over time.

[3] June 23, 2006 Unified Command Decision Memorandum

personal property, which shall be recoverable by a claimant who owns or leases the property. See 33 U.S.C. § 2702(b)(2)(B).

To the extent that any portion of the claim is a claim for property damages the RP/Claimants must establish under 33 CFR §136.215(a) that (1) TDX had an ownership or leasehold interest in the property, (2) the property was injured or destroyed by the incident, (3) the cost of repair or replacement of the damaged property; and (4) the value of the damaged property both before and after the injury occurred.

In the record provided by the RP/Claimants there are references (but, not primary evidentiary documentation)[4] that TDX owned lands on Makushin Bay on Unalaska Island and that some portion of the property was damaged by oil.[5] There are conflicting allegations about the value of the TDX lands in the record. TDX claims that as many as 1,000 acres[6] may remain impacted by visible and submerged oil. TDX stated that the lands should be "conservatively valued at $1,000 per acre," and "assumed that half the value has been lost as a result of the remaining oil."[7] The Swedish Club, on the other hand, argued that "the land would appraise for much less than $1,000 per acre," and disagreed that the remaining oil resulted in a 50 percent impairment of the land value.[8] The Swedish Club did not provide its own estimates of unimpaired land value or the effect of the remaining oil on the land value. RP/Claimants provided no evidence that TDX lands lost value due to the incident.

Nor did RP/Claimants provide evidence that TDX realized any financial loss due to oil damage, a necessity to proving an economic loss. Presumably TDX is the owner of the lands; however, there is no evidence that any of the property was under contract for sale or lease at the time of the incident or that TDX suffered a loss of a sale or lease or suffered a reduced sale price or reduced rental income. Without proof of actual financial loss, the Fund would not have been available to reimburse TDX and it is not available to reimburse the RP/Claimants for any alleged loss.

It is unclear from the administrative record if TDX sought compensation for the impairment of use of its preserved and noncommercial lands.[9] In general, claims for loss of use of noncommercial property are not compensable to third parties as an economic loss resulting from injury to real or personal property. There is one exception under OPA: designated natural resource trustees may recover for loss of use of noncommercial real property or natural resources. 33 U.S.C. § 2702(b)(2)(A). Trustees include federal, state and Indian tribe trustees. 33 U.S.C. § 2706(b)(1); however, the definition of an "Indian tribe" under OPA excludes any Alaska Native regional or village corporation. 33 U.S.C. § 2701(15). TDX is an Alaskan village corporation and is not an Indian tribe trustee as defined by OPA. To the extent that the Settlement Agreement includes reimbursement for loss of use of TDX lands the claim is denied.

Finally, to the extent that the Settlement Agreement and Release compensates TDX for contingency risk costs and punitive damages, the claim is denied. These costs and damages are

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[4] RP/Claimants provided no source documentation or evidence with its claim to the Fund.
[5] July 12, 2006 Gallagher Marine Systems settlement negotiation letter.
[6] July 24, 2006 TDX settlement negotiation letter stated area based on SCAT reports.
[7] July 24, 2006 TDX settlement negotiation letter.
[8] July 26, 2006 Swedish Club settlement negotiation letter.
[9] Whether the property was commercial or noncommercial is debatable. The RP/Claimants argue that it was commercial reality

not OPA damages and are not compensable from the Fund. Additionally, damage assessment costs are only payable from the Fund if the underlying damages are payable. Since there are no underlying payable damages in this claim, no assessment costs may be paid.

In summary, TDX and the RP/Claimants executed a Settlement Agreement and Release on September 8, 2006; the RP remitted a $2.3 million payment to TDX on September 13, 2006.[10] The Agreement noted that this was a compromised settlement of claims between the parties. It does not establish that the $2.3 million in settlement was for OPA damages that the Fund is available to pay.

For the reasons stated above this claim is denied.

Claim Supervisor:	Robert Rioux [redacted]
Date of Supervisor's Review:	10/9/2013
Supervisor's Action:	Denial Approved.
Supervisor's Comments:	

[10] September 7, 2006 Swedish Club Letter of Remittance.