

U.S. Department
of Homeland
Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds Center

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2 March 2012

VIA EMAIL: [REDACTED]@kyl.com

Great American Insurance Company
Attn: Mr. Robert Bocko
1301 Fifth Avenue; Suite 1515
Seattle, WA 98101

Re: Claim Number: 908039-001

Dear Mr. Bocko:

The National Pollution Funds Center (NPFC) in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, has determined \$0.00 is approved for payment on your claim number 908039-001 involving the F/V MILKY WAY. Please see the enclosed Claim Summary/Determination Form for further explanation.

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. If, however 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 908039-001.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely,

[REDACTED]

Claims Manager

Enclosures: (1) Claim Summary/Determination Form
(2) NPFC Spreadsheet

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 908039-001
Date	: March 2, 2012
Claimant	: Great American Insurance Company
Type of Claimant	: Corporate (US)
Type of Claim	: Limit of Liability
Amount Requested	: \$505,760.00
Claim Manager	: Robert Rioux

I. INCIDENT

On September 14, 2005, as the crew aboard the F/V MILKY WAY was hauling a net laden with sardines the engine running the hydraulics failed and the vessel began to list.¹ The vessel subsequently capsized and sank, discharging approximately 150 gallons of diesel and hydraulic oil into the Pacific Ocean, a navigable water of the United States.² The vessel came to rest in approximately 200 feet of water, within the Olympic Coast National Marine Sanctuary (OCNMS).³ The location of the vessel sinking was 47° 51' 90.0" N and 124° 45' 84.7" W.⁴ Approximately 2000 to 3000 gallons of diesel remained in the vessel's tanks.⁵

The F/V Predator, Inc. is the owner of the F/V MILKY WAY, and is designated the Responsible Party (RP) for this incident.

II. CLAIMANT AND THE CLAIM

Claimant

The Claimant, Great American Insurance Company, (Great American), is the subrogated insurer of oil pollution liability for the F/V Predator, Inc. The Claimant presented its claim through its attorneys, Keesal, Young and Logan.

Claim

The Claimant asserts that the responsible party is entitled to a limit on its OPA liability for removal costs and damages. The Claimant seeks reimbursement of removal costs and damages exceeding the applicable limit on liability.⁶

The F/V MILKY WAY (Official Number 599711) was a 72 foot length over all (LOA) 113-gross ton fishing vessel steel-hulled, diesel fishing vessel (purse seiner) built in 1978; its intended service was "commercial fishing, trawling, long liner, crabber, and its operating limits are the Pacific Ocean and Alaskan Waters in normal operating seasons".⁷ At the time of the

¹ See Attachment 4, CG-2692 form page 2, Section IV, Description of Casualty continuation sheet.

² See POLREP 6.

³ See Keesal, Young & Logan letter of April 7, 2008, page 5.

⁴ See Claimant's attachment 8, Global Diving and Salvage, Inc. Salvage Plan page 3, 2.0.

⁵ See Claimant's submission letter dated April 7, 2008.

⁶ See Claimant's submission letter dated April 7, 2008, paragraph 3.

⁷ Coastal Marine Surveying & Consulting, Report No. SCV - 2893, page 2, dated 31 December 2003, prepared by Forest H. Mayer, NAMS-CMS

incident the applicable statutory limit on liability for vessels was \$600/gross ton or \$500,000, whichever is greater. Accordingly, 113 gross tons x \$600/gross tons = \$67,800; therefore, if Claimant is entitled to limit its liability, the amount of the liability would be the greater of \$67,000 or \$500,000. According to its April 9, 2008, submission letter Claimant paid approximately \$1,005,760.00⁸ or \$505,760 in excess of its potential limit on liability.⁹

The claim was received by the NPFC on April 9, 2008.¹⁰ The NPFC requested additional information and documentation, which the Claimant provided with letters dated July 10, 2008 and October 18, 2010.

III. FACTS

The vessel and its crew departed Westport, WA at about 2330 on 13 September 2005 enroute to an area approximately 4 miles offshore of La Push, WA. The crew began fishing for sardines in the morning of September 14, 2005.¹¹ Between 1500 and 1530 the crew was hauling its final catch into the front and back hatches via a fish pump located on the starboard side of the vessel. The crew alternated pumping fish into the front hatch of the vessel for about ten minutes while a little cold water was placed into the front hatch and then into the back hatch until the back hatch was full. The pump was moved back to the front hatch keeping the hatch full with water at all times. Water was drained from the front hatch to make room for the fish as they were pumped into the hatch.¹²

At approximately 1630 on September 14, 2005 the vessel had pumped 20-30 tons of fish into the front and back hatches and caught about 100 tons of sardines in its net. At this time, the captain realized there were too many fish in the net and he attempted to lower the net to release some fish using the auxiliary engine that provided power to the winch. The 90-kilowatt engine running the hydraulics that provided power to the boom failed. Because of the lack of hydraulic power the net could not be freed from the power block and the vessel listed to starboard.¹³ The Captain attempted to restart the engine but could not do so. As the vessel continued to list to starboard he tried to cut the net in order to release fish but the fish were hung up in the net. He put the vessel in gear in an effort to right it but the listing worsened. The vessel rolled to starboard and he and the two remaining crew members boarded a skiff manned by another crew member. The vessel sank within an hour into the Olympic Coast National Marine Sanctuary (OCNMS) in about 186 feet of water.¹⁴

On September 15, 2005, the National Oceanic and Atmospheric Administration (NOAA), the manager for national marine sanctuaries, notified the RP via e-mail that the F/V MILKY WAY sank in the OCNMS and its presence there violated the National Marine Sanctuaries Act and Sanctuary regulations. "In addition, the discharge of diesel fuel from the vessel violates the Oil

⁸ See Keesal, Young & Logan letter of July 10, 2008, page 1.

⁹ See Keesal, Young & Logan letter of July 10, 2008, page 1.

¹⁰ See Keesal, Young & Logan letter dated April 7, 2008, page one, with "Received NPFC Claims" date stamp.

¹¹ See United States Coast Guard Report of Investigation into the Circumstances Surrounding the Incident Involving Sinking/FV MILKY WAY; 05-473; NOV On 09/14/2005 – Interview with Rick Blair, Master; RE Sinking of the F/V MILKY WAY on 14 September 2005, paragraph one.

¹² See Claimant Submission Letter dated April 7, 2008, Attachment 4, CG-2692 form page 2, Section IV, Description of Casualty.

¹³ See Attachment 4, CG-2692 form page 2, Section IV, Description of Casualty continuation sheet.

¹⁴ See United States Coast Guard Report of Investigation into the Circumstances Surrounding the Incident Involving Sinking/FV MILKY WAY; 05-473; NOV On 09/14/2005 – Interview with Rick Blair, Master; RE Sinking of the F/V MILKY WAY on 14 September 2005, paragraphs two through four.

Pollution Act. The vessel must be removed from the Sanctuary as soon as practicable with the least possible injury to Sanctuary resources. The vessel and its owner and operator are subject to civil penalties as well as natural resource damages liability under the Marine Sanctuaries Act and natural resource damages under the Oil Pollution Act.”¹⁵

Subsequent Activities

On September 16, 2005 the RP hired a remotely operated vehicle (ROV) to survey the general condition of the vessel, the attitude, condition, burial level and the remaining contaminants on board in anticipation of raising the vessel. A vessel removal plan prepared in September 2005 noted that the vessel was sitting on the sea floor in 195 feet of water with a five-degree list to port. “The hull and keel appear to be intact.”¹⁶ In October 2005 Global Diving and Salvage, Inc. attempted to raise the vessel but could not do so, due in part to bad weather. Worsening weather for the fall and winter prevented further attempts to raise the vessel.¹⁷ No further actions were taken until 2006.

In June 2006 the Federal On-Scene Coordinator (FOSC), CAPT Metruck, issued a letter to the RP notifying him that the vessel was still actively discharging oil into the water. The FOSC advised the RP of his liability for removal costs and that failure to properly carry out the removal of the discharge would subject him to additional penalties. He further requested that “all oil on the vessel be removed to preclude further environmental damage and oil pollution, using the most effective and safe method.”¹⁸

On August 21, 2006, a second ROV underwater video inspection of the MILKY WAY was conducted to check the condition of the vessel and assess the feasibility of removing fuel from the vessel.¹⁹ Global Diving & Salvage, Inc. prepared a report for Meredith Management Group, Inc. (MMG)²⁰ to assess the feasibility and cost of safely removing the bulk of the fuel oil on board. At this time the vessel was sitting on a sandy bottom at roughly a 70-degree list to port and was buried to within one foot of the rail on the port side with most of the starboard side exposed. Four of the fuel tank fills were on the port side and four were on the starboard side.²¹

A Unified Command (UC)²² was established; on October 13, 2006 an Incident Briefing was held. Attendees included the FOSC, LCDR Martin Smith, and representatives from NOAA, OCNMS, MMG and the Responsible Party (RP).²³ The Initial Incident Objectives included: (1) Develop approved vessel removal and dive plans and submit to the UC as soon as they are complete, and (2) Safely and efficiently remove the vessel from its sunken position at the earliest window of opportunity. The Briefing also noted that if the vessel was not removed from the OCNMS by

¹⁵ KYL October 18, 2010 letter, Attachment 5, (Bates No. 0490)

¹⁶ See Claimant Submission Letter dated April 7, 2008, Attachment 8, Global Diving & Salvage Inc., Salvage Plan, page 3, section 3.1.2.

¹⁷ See Claimant Submission Letter dated April 7, 2008, page 8, D.IV.

¹⁸ See Claimant Submission Letter dated April 7, 2008, Attachment 2, letter from Captain Metruck (FOSC) to Mr. Blair dated Jun 30, 2006.

¹⁹ See Claimant’s initial submission Attachment 9; Global Diving & Salvage Inc. letter dated August 23, 2006.

²⁰ Meredith Management Group, an emergency response management group, provided response support to the Claimant.

²¹ See Claimant Submission Letter dated April 7, 2008, Attachment 10, Global Diving & Salvage Inc., letter dated August 28, 2006.

²² The Unified Command was established by the Coast Guard to “establish objectives, set milestones and establish if removal of the vessel was feasible”. See, POLREP Six, 232129Z AUG 07, 2.C.

²³ Incident Briefing dated October 13, 2006.

August 31, 2007, the Sanctuary would take action to remove the vessel and pursue penalty enforcement.²⁴

An October 24, 2006, letter to the RP, signed by the FOSC and the OCNMS Sanctuary Superintendent, memorialized the October 13, 2006, Incident Briefing. The letter stated that the RP's representatives at the Unified Command meeting indicated that in order to meet the requirements of both the Coast Guard and the OCNMS, their overarching goal was to remove the vessel in order to remove the threat of further discharge of oil into the environment.²⁵ The letter also stated that other members of the Unified Command found this proposal acceptable. The vessel was beginning to silt in, and there was an element of urgency and concern over losing the entire season of opportunity to move forward and remove the vessel from the Sanctuary. However, no further actions were taken until May 2007.²⁶

A second Incident Briefing was held on 30 November 2006. The same persons participated in this Briefing as in the October 13, 2006, Briefing: CAPT Metruck and LCDR Smith, OCNMS and NOAA representatives, the Responsible Party's attorneys, MMG and contractors hired by the responsible party to raise the vessel. One of the Incident Objectives for the meeting was to "Safely and efficiently remove the vessel from its sunken position at the earliest weather window of opportunity."²⁷ Global Diving and Salvage briefed the group on how the vessel would be raised and that a vessel removal and dive plan would be reviewed and approved by the Unified Command. The notes of this meeting do not reflect that the Coast Guard required the vessel be removed; however, the NOAA representative reiterated at the briefing that unless the vessel was raised, NOAA would take action to remove the vessel and seek penalties.²⁸

On May 10-11, 2007, Global Diving & Salvage, Inc. conducted an ROV survey to confirm the vessel's circumstances and determine if there were significant changes from August 2006. The vessel appeared to be in good condition with no major external damage. During the ROV survey there was no evidence of diesel or hydraulic oil discharging from the vessel nor was there evidence of oil on the surface waters.²⁹

On August 24, 2007, the Responsible Party funded activities to plug the fuel vents. The FOSC determined at this time that the vessel no longer posed an immediate threat to the marine environment.³⁰

IV. APPLICABLE LAW

In general, OPA provides that "... 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 shorelines ... is liable for the removal costs and damages specified in subsection (b) that results from such incident. 33 U.S.C. § 2702(a).

²⁴ Id.

²⁵ See Keesal, Young & Logan letter of April 7, 2008, Attachment 3, FOSC letter to Mr. Andrew Blair dated 24 October 2006.

²⁶ See Claimant Submission Letter dated April 7, 2008, Attachment 3, letter from Captain Metruck (FOSC) and Carol Bernthal (Sanctuary Superintendent) to Mr. Blair dated 24 October 2006.

²⁷ Meeting Notes, Objective No. 2.

²⁸ Keesal, Young & Logan letter to the NPFC dated May 5, 2009, Exhibit 4, ICS 201-OS Form.

²⁹ See Claimant Submission Letter dated April 7, 2008, Attachment 11, Appendix C: May, 2007 ROV Report.

³⁰ See POLREP Seven dated 242025Z AUG 07, 2H, and 3.

“Incident” means “any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil.” 33 U.S.C. § 2701(14).

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).

“Remove” or “removal” means “containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to fish, shellfish, wildlife and public and private property, shorelines and beaches.” 33 U.S.C. § 2701(30).

Removal costs include all removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.” 33 U.S.C. § 2702(b)(1)(B).

"Oil" is defined in relevant part, 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”. 33 U.S.C. § 2701(23).

A responsible party’s liability may be limited. For a vessel other than a tank vessel the total of the liability of a responsible party under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed \$600 per gross ton or \$500,000, whichever is greater. 33 U.S.C. § 2704(a).

However, liability is not limited in certain circumstances addressed at 33 U.S.C. § 2704(c).

(c) Exceptions –

(1) Act of responsible party – Subsection (a) 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) 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 311 of the Federal Water Pollution Control Act...

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.

Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law. 33 U.S.C. § 2715(a).

Payment of the claim by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or the State to recover from the responsible party. 33 U.S.C. §2712(f).

The responsible party for a vessel or facility from which oil is discharged, or which poses a 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 the responsible party is entitled to a limitation of liability under section 2704 of this title. 33 U.S.C. § 2708(a)(2).

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, 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. 33 U.S.C. § 2708(b).

In addition, 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. Also, 33 CFR 136 provides that 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]

In making determinations with respect to claims where gross negligence is an issue, the NPFC has defined gross negligence as follows:

Negligence is a failure to exercise the degree of care, which a person of ordinary caution and prudence would exercise under the circumstances. A greater degree of care is required when the circumstances present a greater apparent risk. Negligence is "gross" when there is an extreme departure from the care required under the circumstances or a failure to exercise even slight care.

In making determinations with respect to claims where willful misconduct is an issue, the NPFC has defined willful misconduct as follows:

An act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences.

V. CLAIMANT'S ARGUMENT SUPPORTING ENTITLEMENT to a LIMIT on LIABILITY

Claimant's submission letter states "the proximate cause of the incident was the loss of power in the auxiliary engine operating the hydraulics while hauling a net laden with fish. Because of the hydraulic engine's unexpected failure, the vessel was unable to release the net or the fish it contained, which resulted in the loss of the vessel's stability and subsequent capsizing and sinking."³¹ The Claimant asserts that the responsible party is entitled to its limit on liability under the provisions of the Oil Pollution Act (OPA) because the incident did not occur as the result of gross negligence or willful misconduct. Claimant also asserts the incident was not proximately caused by the violation of any applicable federal regulations.³² The Claimant states that it incurred costs in excess of its limit on liability of \$500,000, and that any oil spill response costs and damages paid by F/V Predator, Inc. and Great American, as subrogated insurer, in excess of \$500,000 should be reimbursed under OPA.³³

VI. NPFC'S ANALYSIS OF CLAIMANT'S ARGUMENT for ENTITLEMENT to a LIMIT on LIABILITY

Factors Leading up to the Capsizing of the Vessel

The Claimant states "the proximate cause of the incident was the loss of power in the auxiliary engine operating the hydraulics while hauling a net laden with fish. Because of the hydraulic engine's unexpected failure, the vessel was unable to release the net or the fish it contained, which resulted in the loss of the vessel's stability and subsequent capsizing and sinking".³⁴

The crew, fishing for sardines, alternately pumped water then fish into the front hatch, then into the back hatch. Water would be pumped out of a hatch as the fish were pumped in. These actions were efforts to maintain the vessel's stability but alternately loading water and fish into the vessel's front and back tanks produced a free surface effect that exacerbated the rolling and listing of the vessel which contributed to the eventual capsizing of the vessel. At approximately 1630 on September 14, there were approximately 25 tons of fish onboard the vessel and 100 tons of fish in the net off the starboard side of the vessel. At this time the Captain realized there were too many fish in the net and he attempted to lower the net back into the water to release some of the fish. The auxiliary engine to the winch failed as he attempted to lower the net and there was no power to do so. The captain went below and tried to restart the engine but was unable to do so. He then returned to the deck as the vessel was listing to starboard. In an effort to stop the list he cut the net, hoping to free some of the fish. However, the fish were caught up in the net and none were released. Finally, the Captain attempted to bring the vessel to center by putting the main engine into gear and gunning the engine; this only worsened the problem and the vessel finally rolled completely over to starboard.³⁵ All of the Captain's efforts failed.

³¹ See Keesal, Young & Logan letter of April 7, 2008, page 5, section III.A.

³² See Keesal, Young & Logan letter of April 7, 2008, page 5, section III.A.

³³ See Keesal, Young & Logan letter of April 7, 2008, page 10, section V.

³⁴ See Footnote 26.

³⁵ See United States Coast Guard Report of Investigation into the Circumstances Surrounding the Incident Involving Sinking/FV MILKY WAY; 05-473; NOV On 09/14/2005 – Interview with Rick Blair, Master; RE Sinking of the F/V MILKY WAY on 14 September 2005.

The incident included the loading of too many fish into the net off the starboard side of the vessel, the failure of the auxiliary engine, the Captain's failure to restart the engine and his putting the main engine in gear, which worsened the list. By Claimant's admission the proximate cause of the incident was the loss of power operating the hydraulics while hauling a net laden with fish. There is no evidence in the administrative record that prior to the incident the winch engine was defective or malfunctioning. The engine was a Caterpillar No. 3304, inline four-cylinder diesel engine, with a turbo.³⁶ The engine's age is unknown, but it was on the vessel for at least the last eight years (as of July 7, 2008). Andrew Blair, father of Rick Blair and captain of the MILKY WAY at the time of the incident, indicated that his son serviced the engine every 200 hours by replacing filters and changing the oil. Captain Rick stated that he had recently changed the oil and the oil filter for the auxiliary engine.³⁷ The latest service was completed within the month of the vessel sinking. Maintenance records were kept, but sank with the vessel.³⁸ Captain Rick stated that he had used the engine on the previous day (prior to the incident) during fishing operations, both holds were full of fish and the engine had functioned properly.³⁹ Thus, he had no reason to think the engine was malfunctioning or needed maintenance just prior to the incident.

The NPFC finds that the actions of the crew were negligent, i.e., loading too many fish into the net, and the captain putting the boat in gear were negligent; however, these actions do not rise to gross negligence nor do they constitute willful misconduct. The responsible party did not violate any applicable safety regulation, cooperated and assisted officials and reported the incident as required by law. Therefore, the NPFC determines that the Claimant has established entitlement to its limit of liability of \$500,000.00.

CLAIMANT'S ARGUMENT THAT ITS COSTS ARE REMOVAL COSTS REIMBURSABLE FROM THE OIL SPILL LIABILITY TRUST FUND.

Great American asserts that it reimbursed its insured, F/V PREDATOR, Inc., \$1,005,760.00⁴⁰ in response costs associated with ROV surveys, preparation of plans and activities to raise the vessel. The activities began on September 16, 2005, the day after the vessel sank in the OCNMS, continued in 2006 and concluded in August 2007, when the fuel tank vents on the vessel were plugged and the FOSC determined that the vessel no longer posed an immediate threat of a discharge.

The MILKY WAY sank in the OCNMS with 2000 to 3000 gallons of fuel remaining in its tanks. The RP asserts that the activities associated with attempts to remove the vessel from the OCNMS were removal activities because the FOSC and the OCNMS Sanctuary Superintendent ordered the vessel to be removed from the Sanctuary in compliance with sanctuary rules and in order to prevent a substantial threat of a discharge of oil into the Sanctuary. The Claimant notes that the Coast Guard oversaw the response and removal activities related to the sinking. Citing to a letter signed by CAPT Metruck and C. Bernthal, OCNMS Sanctuary Superintendent, Claimant argues that the "overarching objective and plan of action was to remove the vessel in order to remove

³⁶ See statement by Philip Sanford, attorney, Holmes Weddle & Barcott letter dated July 7, 2008

³⁷ Interview with Master re Sinking of the F/V Milky Way on 14 September 2005, Evidence Control # 2494189 #11.

³⁸ See Holmes Weddle & Barcott letter dated July 7, 2008 with enclosed response 4 to NPFC letter dated April 15, 2008.

³⁹ See Holmes Weddle & Barcott letter dated July 7, 2008 with enclosed response 4 to NPFC letter dated April 15, 2008.

⁴⁰ See Keesal, Young & Logan letter of July 10, 2008.

the threat of further discharge of oil.”⁴¹ Claimant asserts that the claim materials submitted on April 7, 2008, as well as the Declaration of Philip McCrudden, provide clear evidence supporting this fact.⁴²

NPFC ANALYSIS OF THE CLAIMANT’S COSTS PRESENTED TO THE OSLTF

The Oil Spill Liability Trust Fund is available for the payment of claims in accordance with section 2713 for uncompensated removal costs determined by the FOSC to be consistent with the National Contingency Fund or uncompensated damages. 33 U.S.C. § 2712(a)(4); 33 CFR 136.203(c). Removal costs are those incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge, the costs to prevent, minimize or mitigate oil pollution from such incident. 33 U.S.C. § 2701(31). “Remove” or “removal” means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to fish, shellfish, wildlife, and public and private property, shorelines and beaches. 33 U.S.C. § 2701(30).

The Claimant asserts that the FOSC and the Unified Command directed all actions associated with the incident, including several attempts to raise the vessel from its location in the OCNMS. The Claimant contends that the overarching objective and plan of action was to “remove the vessel in order to remove the threat of further discharge of oil.”⁴³ In making its assertion that the FOSC directed the raising of the vessel as the method to alleviate the threat of further discharge, the Claimant relies on correspondence between the FOSC, Coast Guard personnel at the Unified Command, representatives from the OCNMS and the Claimant.

The FOSC issued the first of three letters to the responsible party, Andy Blair (owner of F/V Predator, Inc.), on June 30, 2006. In that letter he advised the owner that there is evidence that the vessel is still “actively discharging” oil into the navigable waters, it is still liable for costs and damages and that failure to properly carry out removal as directed by the FOSC will result in penalties. The letter further states that “[T]he United States Coast Guard takes matters of this nature very seriously and requests that all oil on the vessel be removed to preclude further environmental damage and oil pollution utilizing the most effective and safe method.”⁴⁴ The letter provides no direction as to how the oil on the vessel should be removed, only a request that it be removed.

A second letter addressed to Mr. Andrew Blair dated October 24, 2006 and executed by both the FOSC and OCNMS Superintendent Bernthal memorialized the outcome/objectives of the October 13, 2006 briefing. The letter states, “Your *representatives* (emphasis added) indicated that to meet the requirements of both the Coast Guard and the OCNMS, your overarching goal was to remove the vessel in order to remove the threat of further discharge of oil into the environment. This is acceptable to the other members of the Unified Command.”⁴⁵ The letter does not clearly state that raising the vessel was the only way to remove the threat of further discharge nor did it state that the Coast Guard was ordering the raising of the vessel in order to remove the threat of discharge. The letter noted that “[W]e are obligated in our regulatory

⁴¹ See Keesal, Young & Logan letter of April 7, 2008, Attachment 3, FOSC letter to Mr. Andrew Blair dated 24 October 2006.

⁴² See Keesal, Young & Logan letter of May 5, 2009, page 2.

⁴³ Claimant’s submission letter of 7 April 2008, page 8

⁴⁴ M. P. Metruck letter to Predator Inc, dated June 30, 2006.

⁴⁵ October 24, 2006 letter to Andrew Blair.

positions to oversee and ensure these actions were taken, and appreciate your willingness to participate by taking a lead position in this response.”⁴⁶

The third letter from the FOSC⁴⁷ to the Responsible Party states that the F/V Predator (owners of the vessel) had “exhausted every reasonable resource and option to raise and remove the F/V MILKY WAY” and that it had satisfied “the obligation of responding to the threat of a further spill by attempting to raise and remove the F/V MILKY WAY and plugging the vents.”⁴⁸

On or about July 23, 2009 the FOSC prepared a memorandum describing his actions associated with the sinking of the F/V MILKY WAY incident.⁴⁹ In this memorandum, the FOSC notes that since the vessel sank in the OCNMS he included representatives from the OCNMS in the Unified Command stood up for addressing the actions associated with the incident. He states that his goals were that the threat of the 3,500 gallons of oil be mitigated and that operations be done in a safe manner and with minimal environmental impact. He notes that these goals did not mandate the removal of the vessel itself; however, the National Marine Sanctuary objectives were the removal of the vessel from the boundaries of the OCNMS. The memorandum indicates that at the time of the response he “consulted with the NPFC” and “determined that removal of the vessel was not necessary to mitigate the threat from the vessel, and, in fact, use of the OSLTF to [fund] raise/remove the vessel should the owner’s failure to take sufficient action would not be appropriate”.⁵⁰

He further states in the memorandum that his position that whether removal of the vessel was mandated for mitigation of the threat was articulated by LCDR Smith in an e-mail to Mr. Paul Sanford dated August 10, 2007 and that the e-mail clearly states that use of the OSLTF to raise/remove the vessel was inappropriate. When NOAA requested the FOSC open the Fund to pay for certain activities associated with raising the vessel, he denied the request.⁵¹ His statement references the October 24, 2006 letter that Claimant relies on in support of its position. The FOSC indicates that the October 24, 2006, letter stated the understanding of the objectives as agreed to and noted that the MILKY WAY representatives agreed to these objectives. “The letter was co-signed by the Supervisor of the OCNMS reinforcing that the desire to remove the MILKY WAY came from the OCNMS and its authority under the NMS Act and not myself as the FOSC.”⁵²

While the administrative record evidences the FOSC notified the Responsible Party and the Claimant that use of the Fund to pay costs associated with raising or removing the vessel from the OCNMS was inappropriate, there are conflicting or unclear communications in the record about whether he or the Unified Command mandated removal of the vessel to mitigate the threat of discharge of oil into the OCNMS.

The NPFC finds that some communications from Unified Command personnel to the Claimant and the Responsible Party were not clear as to whether the vessel had to be removed to abate or prevent the substantial threat of discharge of oil into navigable waters. E-mails reflect that LCDR Martin Smith was in continual communications with, offered advice to, and cooperated with the

⁴⁶ Id.

⁴⁷ The parties stipulated that this letter was received by the responsible party in January 2008.

⁴⁸ See Claimant Submission Letter dated April 7,

2008, Attachment 7, letter from Captain Metruck (FOSC) to Mr. Blair, 16465, 07-456.

⁴⁹ Memo to file from CAPT S.P. Metruck, USCG dated July 23, 2009.

⁵⁰ Footnote 41, page 1.

⁵¹ See POLREP Six dated 232129Z AUG 07, 1B.

⁵² Memo to file from CAPT S.P. Metruck, USCG dated July 23, 2009.

responsible party and MMG from at least September 14, 2006.⁵³ In an e-mail from LCDR Smith⁵⁴ to representatives of the MMG dated April 30, 2007, LCDR Smith stated that he had discussed with a Global Project Manager its intent to make a proposal to raise the vessel and LCDR Smith recommended that the Coast Guard would host a Tactics Meeting to outline and validate the actions to be taken for the development of the incident action plan for the project.⁵⁵ It appears from subsequent e-mails that the RP representatives wanted the Coast Guard approval for designing the vessel removal plan, methodology and contractors in the event that the remaining private funding ended and the Fund would need to be accessed to fund remaining vessel raising actions.⁵⁶

LCDR Smith offered advice to MMG on the protocols that would be followed after the vessel was raised. There is no evidence in the record reflecting that the FOSC or LCDR Smith advised the responsible party or MMG that the Coast Guard was not requiring the vessel to be raised. In an e-mail dated June 1, 2007 from Phil McCrudden, MMG, Mr. McCrudden notes a conversation he had with LCDR Smith as to when the Coast Guard would determine that the vessel would no longer be considered a pollution threat once it was raised, transferred to and secured at a suitable port facility. According to LCDR Smith "secured" requires that the vessel's fuel tanks had integrity to hold oil/water in its tanks and the vessel could float without assistance or be secure on land. Further, the Coast Guard would have an FOSC representative on site during the wreck removal operations, with the ability to make decisions on scene based on actual conditions at the time of the operations.⁵⁷

The NPFC also reviewed the FOSC memorandum dated July 23, 2009, which was prepared four years after the incident and two years after the vessel ports were plugged. He strongly argues in the memo that he was not requiring the raising of the vessel to mitigate the threat of discharge of oil, and substantiates this assertion by citing to the October 24, 2006 letter that he co-signed with OCNMS Superintendent, C. Bernthal. However, the letter does not state that he was not requiring the raising of the vessel. It states that the RP's representatives indicated that to meet the requirements of the Coast Guard (removing the threat of a discharge of oil) and the OCNMS (removing the vessel from the OCNMS) their goal was to remove the vessel. Thus, removal of the vessel would satisfy both the Coast Guard and the OCNMS. The letter states, "[T]his is acceptable to the other members of the Unified Command." Since the members of the Unified Command included representatives from the Coast Guard, the OCNMS, the Responsible Party and the Claimant, it is not clear who, if any of the members disagreed that raising the vessel was the only option that would mitigate the threat of discharge. While the FOSC may have known that he was not requiring that the vessel be raised, he executed the letter, which states that removal of the vessel is "acceptable to the other members of the Unified Command." He was the FOSC and a member of the Unified Command.

The determination to salvage or remove a vessel in order to remove oil or mitigate the substantial threat of oil is fact specific for each incident. Based on the facts in this case and considering the conflicting evidence and communications in the administrative record the NPFC finds that the effort to raise the vessel and, when that failed, to plug the vents, were oil removal activities acceptable to the Unified Command and directed by the FOSC.

⁵³ See email from Phil McCrudden dated September 14, 2006.

⁵⁴ LCDR Smith, Chief, Incident Management Division, Sector Seattle, participated in the Unified Command for this incident.

⁵⁵ LCDR Smith email dated April 30, 2007; Claimant submission letter dated October 18, 2010, with attached binder 2 of 3, Bates 0660.

⁵⁶ E-mail dated April 30, 2007 from Phil McFadden to LCDR Smith, the responsible party and his attorneys.

⁵⁷ Keesal, Young & Logan letter dated May 5, 2009, attached Exhibit 7.

VII. REMOVAL COSTS PRESENTED

Invoices:

Tab 1: Coastal/Global

Invoice amount \$308,780.00

Amount NPFC determined compensable: \$0.00

In order to provide background information as it pertains to Tab 1 which is for costs associated with Coastal Marine Fund and Global Diving & Salvage, the vessel owner, F/V PREDATOR Inc. hired Coastal Marine Fund & Global Diving & Salvage to raise the vessel. According to both the claimant's submission and the POLREPs, the first attempt was not successful because of two factors: the weather and disputes between the underwriters regarding who was going to fund the removal of the vessel.⁵⁸

According to the claimant's submission of 10 October 2010, the mobilization estimate for vessel removal provided by Global Diving via a proposal on or about September 21, 2005, was cited by the Claimant as being \$309,000.00⁵⁹. Global's summary estimate invoice shows a total amount of \$308,780.00.⁶⁰ Initially, it was stated the sunken vessel was not deemed a pollution threat. However, Global's September 2005 proposal identified and addressed the pollution mitigation plans and resources and "estimated percentage for pollution as being 10% of the mobilization estimate and an additional lump sum of \$30,000.00. Therefore, according to the evidence provided by the claimant, the "pollution estimate" was acknowledged as \$60,900.00.⁶¹

There was a dispute between the parties regarding the Global invoice for these pollution charges. As a result of negotiations, it was agreed that the amount to be invoiced and paid by Great American for their portion was \$41,071.00. The Claimant provided the entire invoice and evidence that they made a payment of \$41,071.00; however, Claimant did not provide an itemized breakdown of which of the specific costs associated with the invoice were compensated by their payment of \$41,071.00. Without knowing exactly what costs by item were paid by the claimant vice what costs were paid by the vessel owner, the NPFC cannot determine which subrogation rights it would acquire from the Claimant if it paid the \$41,071.00.

Based on the foregoing, the NPFC denies the \$41,071.00 claimed under Tab 1.

Tab 2: Extreme Marine Services:

Invoice amount \$3,250.00

Invoice Date: 10/06/06

Invoice No. 703014

Amount NPFC determined compensable: \$0.00

⁵⁸ POLREP Seven and Final R 242025Z and Claimant's cover letter dated 18 October 2010, page 3

⁵⁹ See Binder 1 of 3 from Claimant in response to the NPFC request for additional information on page 3, paragraph 3 of the October 18, 2010 letter by the Claimant.

⁶⁰ See Binder 1 of 3 from Claimant in response to the NPFC request for additional information on bates page #0021.

⁶¹ Claimant's cover letter and submission dated 18 October 2010, page 3.

Extreme Marine was engaged in August 2006 initially to review available information, to evaluate pollution concerns and to consider the casualty and operating circumstances in terms of the feasibility and safety of the alternative for removing the perceived threats to the environment posed by the F/V MILKY WAY. Extreme Marine's official report, which was provided to the NPFC, included discussions about raising the vessel.

The claimant paid 100% of the invoice and the costs associated with these actions may be OPA compensable removal costs; however, the claimant failed to provide the daily breakdown of hours by person. The invoice states that 16.25 hours were billed between August 29, 2006 and September 12, 2006, but does not indicate who was performing what task on any given day. The NPFC determines that these costs are denied but may be reimbursable on reconsideration if the Claimant provides specificity as to the identification of the persons performing the work, the dates the individual worked, and tasks performed each day.

Based on the foregoing, the NPFC denies the \$3,250.00 claimed under Tab 2.

Tab 3: Extreme Marine Services, LLC

Invoice No. 703040
Invoice Amount: \$16,697.80
Invoice Date: 6/1/07
Amount NPFC determined compensable: \$0.00

Extreme Marine was engaged in providing services provided from January 2007 – May 2007, which included phone conferences regarding proposed underwater ROV, reviewing Global's survey report and preparation of RFP's. The purpose of their work was to re-assess the status of the wreck, including its location since last ROV in August of 2006, to look at the feasibility of removing wreck and associated methodologies.⁶² At the time the services were rendered, the vessel remained on the sea bottom. In October 2006, a Unified Command was established and participants established a primary objective to develop vessel removal plans.

The costs included in this invoice appear to be associated primarily with the possible removal of the vessel. The claimant paid 50% of this invoice and has requested 50% of the costs associated with the invoice without providing an itemization of exactly what costs by day, by person, by activity, for which it is seeking reimbursement. As noted above without knowing the exact costs paid by the claimant the NPFC cannot determine the subrogation rights it would acquire from the claimant if it paid the \$8,348.90.

Based on the foregoing, the NPFC denies the \$8,348.90 claimed under Tab 3.

Tab 4: Extreme Marine Services, LLC

Invoice Date: 8/2/07
Invoice No.: 703044
Invoice amount: \$6,300.00
Amount paid by claimant: \$3,150.00
Amount NPFC determined compensable: \$0.00

⁶² Report from Extreme Marine Services, LLC, dated 22 May 2007, pages 0140 – 0144.

Extreme Marine was engaged in providing services associated with revisions of the project requirements for the Scope of Work established in the Request for Proposals (RFP). Extreme Marine was tasked to revise the RFPs to reflect the project history and disposal options. The claimant's submission states that this invoice was divided equally between Great American and Chubb, with each paying \$3,150.00. The period of time covered in this invoice is June – July 2007.⁶³ The documentation in support of this invoice appears that these costs are associated with the removal of the vessel with a particular focus on disposal options.

The claimant paid 50% of this invoice without providing an itemization of exactly what costs by day, by person, by activity, for which it requests compensation. The other 50% in costs were paid by Chubb. Chubb is not a party to this claim and has not presented its costs to the Fund. Without knowing the exact costs for which it seeks reimbursement the NPFC cannot determine which subrogation rights it would acquire if it paid the \$3,150.00

Based on the foregoing, the NPFC denies the \$3,150.00 claimed under Tab 4.

Tab 5:

Invoice Date: 8/2/07
Invoice No.: 703044
Invoice amount: \$6,300.00
Amount paid by claimant: \$3,150.00
Amount NPFC determined compensable: \$0.00

The costs associated with Tab 5 represent the same invoice costs as in Tab 4⁶⁴ and are denied on the grounds that they are duplicative. Additionally, these costs are denied because even if they are not duplicative, the NPFC could not determine which subrogation rights it would receive.

Tab 6: Extreme Marine Services, LLC

Invoice No. 703047
Invoice Date: 8/29/07
Invoice Amount: \$1,450.00
Amount NPFC determined compensable: \$1,450.00

Extreme Marine was engaged in providing services to review comments submitted regarding the proposed plan to remove the vessel and the equipment that to be used. Extreme reviewed revised project cost projections from Titan and reviewed revised contract provisions along with phone conversations and email exchanges pertaining to the mobilization and operations schedules associated with the vessel removal plan.

Based on the foregoing, the NPFC determines that these costs are OPA compensable and approves the amount paid and requested.

Tab 7: Global Diving & Salvage

Invoice No. 0107363-IN
Invoice Date: 11/29/06

⁶³ Binder: Removal Expenses re: F/V MILKY WAY, Binder 1 of 3, page 0211

⁶⁴ See Claimant summary of vendors and invoices by Tab located in the original claim submission binder identifies on the front as bates # KYL_SES2619.

Invoice Amount: \$6,099.30

Amount NPFC determined compensable: \$6,099.30

Description of services for this invoice included providing ROV support personnel and equipment to survey the condition of F/V MILKY WAY, as directed by MMG.⁶⁵ The purpose of the survey was to “assess the feasibility of removing fuel from the fuel tanks of the vessel.”⁶⁶ The primary purpose of the contract and actions taken was to remove the oil from the vessel and mitigate the discharge of oil into the waters of the United States. This purpose was consistent with the FOSC’s direction to the Claimant.

The claimant provided specific supporting documentation for the costs incurred, including hourly rates for personnel and the number of hours worked. The NPFC determines that these costs are OPA compensable.

Tab 8: Global Diving

Invoice No. 0108671 - IN

Invoice Amount: \$30,333.04

Invoice Date: 6/22/07

Amount NPFC determined compensable: \$0.00

The documentation submitted states that the purpose of this contract was to provide “ROV and support personnel....to survey condition of MILKY WAY, as directed by Phil McCrudden of MMG.”⁶⁷ The work was done from March – April 2007.

According to the ROV survey report⁶⁸ the objectives of the survey were to determine “vessel’s position”, “general condition of hull and deck”, the “depth of the vessel has sanded into the sea floor”, “access to vents” and “indications of hydrocarbons leaking from the vessel.”⁶⁹ The report concluded in part, that there was “no fuel leakage” from the ROV or on the surface of the water.

A letter was provided with this invoice from Extreme Marine Services, LLC which addressed the “proposed wreck removal prospect”. According to the letter the prospect of removing the wreck was “major” in nature. It would be diving and equipment intensive. It also discussed the various options for wreck removal and the pros and cons of all options.

The evidence submitted including e-mails indicates that both the removal of the vessel and fuel from tanks were addressed and considered. According to an e-mail from Phil McCrudden (MMG), fuel off-loading was considered a feasible option based on the reports submitted.

There was no direction or other correspondence from the FOSC during this time period, nor were there any applicable POLREPS that addressed official discussions and direction.

The claimant submitted detailed invoices to show the personnel, time, equipment and other costs related to conducting the ROV survey. These costs appear to be primarily associated with the

⁶⁵ Binder: Cost Documentation Supporting Great American portion of Oil Reimbursement Claim, July 2008, tab 7, and binder 1 of 3, page 0276

⁶⁶ Correspondence dated 10 August 2006 from Global to Phil McCrudden of MMG, page 0279

⁶⁷ Costs Documentation supporting Great American portion of claim reimbursement for F/V MILKY WAY, and supplemental Binder 1 of 3, page 0384.

⁶⁸ The survey was conducted on May 10 and 11 2007

⁶⁹ Global’s ROV survey dated May 2007, page 0412

ROV survey. That survey appears to have been conducted primarily for the purposes of determining the feasibility of removing the oil from the vessel tanks.

The claimant paid 50% of this invoice; Chubb paid the other 50%. Without providing an itemization of exactly what costs by day, by person, by activity, for which it seeks compensation, it is impossible for the NPFC to determine what subrogation rights it would receive if it paid the \$15,166.52.

Based on the foregoing, the NPFC denies the \$15,166.52 claimed under Tab 8.

Tab 9: Jensen Maritime Consultants

Invoice Date: 9/7/06
Invoice amount: \$150.00
Invoice No.: 106115-9-2006
Amount NPFC determined compensable: \$150.00

These costs were incurred to obtain the drawings of the vessel in order to get a more accurate description of the design of the vessel and “assess the apparent condition of the vessel....for mitigating the perceived threat to the environment”.⁷⁰

Evidence in the form of an e-mail indicates that these drawings were obtained for the purposes of determining whether it was better to raise the vessel with oil in the tanks and if so, what lifting capacity would be needed.⁷¹ There was a requirement to know the weight of the vessel.

Because these costs were incurred to assess future options and actions to remove the threat of discharge of oil, the NPFC determines these costs to be OPA compensable.

Tab 10: MMG

Invoice No. 1944
Invoice amount: \$3,975.00
Invoice Date: 9/15/2005
Amount NPFC determined compensable: \$0.00

The only evidence the claimant has submitted appears to be in the original submission in July 2008. It is important to note that the Claimant has identified the subject invoice amount as \$20,383.06 in a spreadsheet of costs presented to the NPFC. The documentation behind tab 10 of that binder shows a copy of an altered invoice with handwritten notes indicating an amount of \$3,975.00 along with a copy of a check from Great American to MMG in the amount of \$20,383.06 issued in September, 2006. The evidence presented does not make it clear what costs are being claimed or why the Claimant has presented an altered invoice as opposed to the actual invoice with a better explanation of why they were only claiming \$3,975.00 of that invoice.

The NPFC reviewed evidence submitted in October 2010 that allegedly contained supplemental documentation to clarify the original submission but has not located any clarifying information. Claimants bear the burden of proving the claims. The NPFC denies the costs associated with this

⁷⁰ Binder 1 of 3, page 0447

⁷¹ Binder 1 of 3, page 0452

invoice on the grounds that the submitted costs are not fully explained nor has the Claimant produced an unaltered copy of the subject invoice.

Tab 11: MMG

Invoice Date: 2/8/2007
Invoice Amount: \$8,910.00
Invoice No.: 2189
Amount NPFC determined compensable: \$0.00

The initial submission consists of a copy of the invoice, daily activity reports and a copy of a check from Great American to MMG in the amount of \$13,385.00. The NPFC has searched all three binders⁷² for supporting documentation that explains what these costs were and where the associated back-up documentation is and has determined that no such evidence has been presented. Therefore, because the NPFC cannot determine what the costs were, if the costs were split with the vessel owner, and if the itemization between the claimant and the vessel owner can be established, these costs are denied.

Additionally, it is important to note that the Claimant produced an altered invoice that changed the amount of the invoice to \$8,910.00 but the spreadsheet presented by the Claimant identifying invoice amounts states the invoice is \$11,398.00 with an amount paid of \$8,910.00. The NPFC is uncertain why the Claimant has a proof of payment of \$13,385.00 for an invoice they state was for \$11,398.00 and the copy of the invoice is altered to show \$8,910.00. The Claimant bears the burden of providing unaltered documents and all associated supporting documentation to support the amount requested. This invoice is denied as unsubstantiated.

Tab 12: MMG

Invoice Date: 4/10/2007
Invoice No.: 2210
Invoice amount: \$7,526.78
Invoice Dates: 2/1/2007 – 3/31/07
Amount NPFC determined compensable: \$7,526.78

The costs incurred under this invoice are for services rendered by T. Neumann, P. McCrudden and J. Jackson on 2/1/2007. In support of these costs, the claimant has submitted Daily Activity Reports (DARs).

The claimant submitted a series of e-mails from this period of time to support their invoices for costs incurred. In summary, the e-mails discuss the drafting of a new RFP for a new ROV Survey and plans to make a second attempt at raising the vessel in April of 2007. The e-mails are between MMG, the owner of the vessel, and the lawyers for Great American. An e-mail on 1 February 2007 indicates that a report prepared for MMG was to “serve as our guidance in addressing any potential pollution issues associated with the second attempt to raise the vessel.⁷³ Another e-mail states that MMG was designated by the owner as project managers for the second attempt to raise the vessel MILKY WAY and that conducting the ROV survey was the first step in that process.⁷⁴ There were discussions about the type of equipment (cranes and

⁷² Binders submitted on 18 October 2010 by claimant

⁷³ E-mail of 1 February 2007, from Phil McCrudden, page 1016, October 28, 2010 supplemental submission

⁷⁴ Id, Page 1023, e-mail dated 20 February 2007

barges) that would be needed in order to raise the vessel. There was also discussion about what to do with the vessel once it has been raised.⁷⁵

These e-mails were sent immediately after the Unified Command was established and meeting with all the relevant parties to discuss the claimant's need to develop a plan to abate and mitigate the continuing substantial threat of a discharge identified by the FOOSC. It was at that meeting that the claimant and representatives established that they had decided to raise the vessel as the method to mitigate the continuing threat of a discharge.⁷⁶

The NPFC has determined that the actions taken associated with this invoice were associated with the removal of the vessel and coordinated with the Unified Command and are therefore OPA compensable.

Invoice 13: MMG

Invoice Date: 7/3/2007
Invoice No.: 2318
Invoice Total: \$30,107.47
Scope of Time: 4/1/2007 – 5/31/2007
Amount NPFC determined compensable: \$0.00

This invoice contains costs for the Incident Commander, T. Neumann and Deputy Incident Commander, Phil McCrudden. The DARs include tasks, including reviewing reports, holding various phone conferences, making arrangements for ROV study, discussions re: ROV survey and plans, continuing review of RFP's, review EPA and NOAA permit issues⁷⁷ Additional costs are for vessel, ROV equipment, hotel accommodations, office supplies, administrative matters.

The submission includes a copy of a check issued by Great American to MMG for payment in full of the above invoice of \$15,053.74.

The claimant included, in its supplemental submission⁷⁸ supporting documents that explain the actions taken during this period of time that would support payment of this invoice. The submissions include series of e-mails between parties. The discussions are regarding the weather at the location of the vessel and whether it is conducive to conducting the ROV survey.

Claimant paid 50% of this invoice without providing an itemization of exactly what costs by day, by person, by activity, for which it requests compensation. The other 50% was paid by Chubb, which has not presented a claim to the Fund for reimbursement of its 50% contribution. Because the costs have not been specifically identified it is impossible for the NPFC to determine the subrogation rights it would acquire if it paid the \$15,053.74.

Based on the foregoing, the NPFC denies the \$15,053.74 claimed under Tab 13.

Invoice 14: MMG

Invoice Date: 8/7/2007

⁷⁵ E-mail dated 12 March 2007, page 1054

⁷⁶ See POLREPS.....

⁷⁷ Daily Activity Reports, Tom Neumann for \$11,302.50, Phil McCrudden for 16,725.00

⁷⁸ October 28, 2010 submission to the NPFC

Invoice No.: 2362
Invoice Total: \$17,576.56
Scope of Time: 6/16 2007 – 7/25/2007
Amount NPFC determined compensable: \$0.00

This invoice consists of hours for T. Neumann and P. McCrudden. The DARs indicate time for review of e-mails, proposals, teleconferences, logistics for raising the vessel, and contract negotiations with vendors for raising the vessel. After a review of all of the correspondence, which consists mainly of e-mails it is clear that all costs incurred here were associated with the raising and potential removal of the vessel, actions which were coordinated with the Unified Command.

The claimant paid 50% of this invoice but did not provide an itemization of exactly what costs by day, by person, by activity, it paid and for which it requests compensation. Therefore, it is impossible for the NPFC to determine what subrogation rights it would acquire if it paid \$8,788.28 for this invoice.

Based on the foregoing, the NPFC denies the \$8,788.28 claimed under Tab 14.

Invoice 15: MMG

Invoice Date: 8/31/2007
Invoice Number: 2383
Invoice Amount: \$25,199.41
Scope of Time: 8/1/2007 – 8/31/2007
Amount NPFC determined compensable: \$25,199.41

This invoice consists of hours for T. Neumann, P. McCrudden and J. Jackson. The DARs indicate time for review of contract terms, cost projections, invoices, vessel removal plans, etc. All of these activities appear to be associated with the removal of the vessel as coordinated with the Unified Command and as such, are OPA compensable.

Invoice 16: MMG

Invoice Date: 9/28/2007
Invoice Number: 2392
Invoice Amount: \$1,800.00
Scope of Time: 9/1/2007 – 9/28/2007
Amount NPFC determined compensable: \$1,800.00

The DARs attached to this invoice consists of time for T. Neumann, P. McCrudden and J. Jackson. The activities consisted of review of cost information, including Titan invoice, subcontracts and subcontractor invoices and approval of payment for invoices. The Titan contract was awarded for wreck removal of the F/V MILKY WAY and was coordinated with the Unified Command and are OPA compensable costs.

Invoice 17: Polaris Applied Sciences

Invoice Date: 2/2/2007
Invoice Amount: \$540.00
Invoice Number: 1934

Period of Time: ending 31 January 2007
Amount NPFC determined compensable: \$0.00

The costs associated with this invoice are for "non legal technical support". There was no additional explanation or supporting documentation to provide clarification about what these services entailed. Without this information, the NPFC cannot make a determination that the costs are OPA compensable; therefore, these costs are denied.

Invoice 18: Polaris Applied Sciences

Invoice Date: 4/5/2007
Invoice Amount: \$135.00
Invoice Number 2002
Period of Time: ending 31 March 2007
Amount NPFC determined compensable: \$0.00

The costs associated with this invoice are for "non legal technical support". There was no additional explanation or supporting documentation to provide clarification about what these services entailed. Without this information, the NPFC cannot make a determination that the costs are OPA compensable; therefore these costs are denied.

Invoice 19: Titan Maritime, LLC

Invoice Date: August 16, 2007
Invoice Number: TUS7024-001
Invoice Amount: \$535,000.00
Amount paid by Chubb: \$267,500.00
Amount paid by Great American: \$267,500.00
Amount NPFC determined compensable: \$0.00

According to the documentation submitted the entire invoice from Titan was paid: half by Chubb and half by Great American. The costs incurred are for the Contract mob/Demob Fee associated with the wreck removal. The claimant did not provide an itemized accounting of these costs for which it seek reimbursement. Therefore, it is impossible for the NPFC to determine what subrogation rights it would acquire if it paid the \$267,500 for this invoice. These costs are denied.

Invoice 20: Titan Maritime, LLC

Invoice Date: 8/17/2007
Invoice Amount: \$318,500.00
Invoice Number: TUS7024-002
Period of Time: August 16 – August 22/2007
Amount NPFC determined compensable: \$0.00

This invoice is for the daily working rate for personnel and equipment associated with the wreck removal of the F/V MILKY WAY. The NPFC has determined that the wreck removal was coordinated with the Unified Command.

According to the documentation submitted the entire invoice from Titan was paid: \$70,331.00 by Chubb and \$244,669.00 by Great American. The costs incurred are for the Contract mob/Demob

Fee associated with the wreck removal. The claimant did not itemize the costs it paid on this invoice; therefore, it is impossible for the NPFC to determine what subrogation rights it would acquire if it paid the \$244,669.00. Additionally, the actual invoice amount is \$318,500.00. The Claimant's documentation demonstrates \$315,000.00 was approved and of that amount, \$70,331.00 was Chubb's portion and \$244,669.00 was the Claimant's portion although there is no discussion or documentation associated with the \$3,500.00 difference between amount invoiced and total amount paid by all parties. These costs are denied.

Invoice 21: Titan Maritime, LLC

Invoice Date: 9/13/07

Invoice Amount: \$427,494.23

Invoice Number TUS7024-004

Period of Time: 8/15/07 – 8/18/07, 8/18/07 – 8/24/07, 8/24/07 - 8/25/07

Amount NPFC determined compensable: \$339,827.07

The costs incurred in the invoices were for transit from Seattle to and from the site, personnel and equipment. These costs were associated solely for the vessel removal, were coordinated with the Unified Command and are OPA compensable. The difference between the amount invoiced and the amount paid by the Claimant are agreed upon adjustments.

Summary:

The NPFC determines that \$382,052.56 of the \$1,005,760.00 submitted to the Fund are costs found OPA compensable and are applicable to the claimant's limit on liability (LOL). The LOL for the fishing vessel MILKY WAY is \$500,000.00. Based on this adjudication, the claimant's OPA compensable removal costs do not exceed \$500,000; therefore, no compensation is offered.

See the attached spreadsheet of costs which itemizes the total costs presented and adjudicated by the NPFC.

Claim Supervisor:  Thomas S. Morrison

Date of Supervisor's Review: 3/2/12

Supervisor's Actions: Approved

Supervisor's Comments: