

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 800-280-7118
E-mail: [REDACTED]@uscg.mil
Fax: 703-872-6103

5890
5/29/2012

VIA EMAIL: [REDACTED]@kyl.com

IMC Shipping Co. Pte. Ltd., Ayu Navigation Sdn Bhd, and The Swedish Club
c/o Keesal, Young & Logan
ATTN: Herbert H. Ray
1029 West Third Avenue, Suite 650
Anchorage, AK 99501-1954

Re: Claim Number J05003-001

Dear Mr. Ray:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act (OPA) (33 U.S.C. 2701 et seq.), has determined that \$546,484.54 is full compensation for the first interim determination identified as OPA claim number J05003-001.

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.

All costs that are not determined as compensable are considered denied. 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 claims. Reconsideration will be based upon the information provided and a claim may be reconsidered only once. Disposition of the reconsideration 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 corresponding claim number.

Mail reconsideration request to:

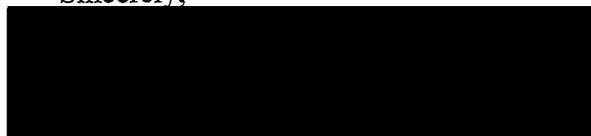
Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

If you accept this determination, please sign the enclosed Acceptance/Release Form where indicated and return to the above address.

If we do not receive the signed original Acceptance/Release Form within 60 days of the date of this letter, the determination is void. If the determination is accepted, an original signature and a valid tax identification number (EIN or SSN) are required for payment. If you are a Claimant that has submitted other claims to the National Pollution Funds Center, you are required to have a valid Central Contractor Registration (CCR) record prior to payment. If you do not, you may register free of charge at www.ccr.gov. Your payment will be mailed or electronically deposited in your account within 60 days of receipt of the Release Form.

If you have any questions or would like to discuss the matter, you may contact me at the above address or by phone at 202-493-6891.

Sincerely,

A large black rectangular redaction box covering the signature of Robert Kloux.

Robert Kloux
Claims Adjudication Branch Chief
United States Coast Guard

ENCL: Claim Summary / Determination Form
Acceptance/Release Form

(1) Summary of vendors spreadsheet with accompanying vendor spreadsheets

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| | |
|--------------------------|--|
| Claim Number: J05003-001 | IMC Shipping Co. Pte. Ltd., Ayu Navigation Sdn Bhd, and the Swedish Club Keesal, Young & Logan 1029 West Third Avenue, Suite 650 Anchorage, AK 99501-1954 |
|--------------------------|--|

I, the undersigned, ACCEPT this settlement offer of \$546,484.54 as full and final compensation for the removal costs identified for services provided by various vendors as set forth in the summary and invoice listings, which are attached to this release and incorporated as if fully set forth herein. With my signature, I also acknowledge that I accept as final agency action all costs identified in this interim claim determination that were denied in this determination and for which I received no compensation.

This settlement represents full and final release and satisfaction of the amounts paid from the Oil Spill Liability Trust Fund under the Oil Pollution Act of 1990 for this interim claim. I hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action, that I may have against any party, person, firm or corporation that may be liable for the amounts paid for which I have been compensated under this claim. I authorize the United States to sue, compromise or settle in my name and the United States fully substituted for me and subrogated to all of my rights arising from and associated with those amounts paid for which I am compensated for with this settlement offer. I warrant that no legal action has been brought regarding this matter and no settlement has been or will be made by me or any person on my behalf with any other party for amounts paid which is the subject of this claim against the Oil Spill Liability Trust Fund (Fund).

This settlement is not an admission of liability by any party.

With my signature, I acknowledge that I accept as final agency action all amounts paid for in this interim claim determination and amounts denied in this determination for which I received no compensation.

I, the undersigned, agree that, upon acceptance of any compensation from the Fund, I will cooperate fully with the United States in any claim and/or action by the United States against any person or party to recover the compensation. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for those amounts paid for which the Fund has provided compensation, by providing any documentation, evidence, testimony, and other support, as may be necessary for the United States to recover from any other person or party.

I, the undersigned, certify that to the best of my knowledge and belief the information contained in this claim represents all material facts and is true. I understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. §§ 287 and 1001).

| | |
|--|-------------------|
| _____ | _____ |
| Title of Person Signing | Date of Signature |
| _____ | _____ |
| Typed or Printed Name of Claimant or Name of Authorized Representative | Signature |

| | |
|----------------------------------|-------------------|
| _____ | _____ |
| Title of Witness | Date of Signature |
| _____ | _____ |
| Typed or Printed Name of Witness | Signature |

| | | |
|--------------------------|---------------------|---------------------|
| _____ | _____ | _____ |
| TIN Required for Payment | Bank Routing Number | Bank Account Number |

CLAIM SUMMARY / DETERMINATION FORM

| | |
|------------------|--|
| Date | : 5/21/2012 |
| Claim Number | : J05003-001 |
| Claimant | : IMC Shipping Co. Pte. Ltd., Ayu Navigation Sdn Bhd, & The Swedish Club |
| Type of Claimant | : Corporate (US) |
| Type of Claim | : Removal Costs |
| Claim Manager | : Robert Rioux |
| Amount Requested | : \$24,500,453.89 |

I. INCIDENT

The M/V SELENDANG AYU (the vessel) was on a voyage from Seattle to China when, on the morning of December 6, 2004¹ while operating in adverse weather conditions, the crew shut down the main engine as a result of a casualty to the No. 3 cylinder. The vessel drifted toward Unalaska Island and eventually grounded on December 8 on a rocky shelf on the north shore of Unalaska Island, northeast of Spray Cape. The grounding ruptured the vessel's bottom tanks, releasing approximately 330,000 gallons² of bunkers into the waters off Unalaska Island.

II. CLAIMANT AND CLAIM

The Claimants are the OPA responsible parties and their insurers. Ayu Navigation Sdn Bhd was the owner of the vessel and IMC Shipping Co. Pte. Ltd. was the operator of the vessel. Sveriges Angfartygs Assurans Forening (The Swedish Club), members of the International Group of Protection and Indemnity Clubs ("International Group"), and the International Group's re-insurers were their subrogated underwriters.

III. PROCEDURAL BACKGROUND:

Pursuant to 33 U.S.C. § 2708(a)(2) Claimant presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) seeking a limit on its liability for the incident. At the time of the incident the applicable limit per ton was \$600; the gross tonnage for the *Selendang* was 39,755 gross tons; therefore, its limit on liability, if granted, was \$23,853,000.00. The Claims Adjudication Division conducted an analysis of evidence and facts and determined that IMC Shipping Co. Pte. Ltd, et al demonstrated entitlement to its limit of liability on 27 January 2012.

IV. REMOVAL COST CLAIM

Claimant asserts that it incurred approximately \$148,651,185.13 in removal costs and hired 153 vendors to conduct the removal actions. The removal actions at the site ended on or about 23 June 2006, per a Pollution Report (PolRep) #110 dated 27 June 2006 issued by the

¹ See, Claimant Submission, Attachment 24, Government's Videotape Deposition of Kailash B. Singh Vol. I, 00074.

² See, Claimant's submission letter, page 3, paragraph 3.

FOSC for this incident. As required by 33 CFR 136.203, the RP worked closely with the FOSC throughout the response; MSO Anchorage provided FOSC coordination.

Based on the magnitude of the costs associated with this response, the NPFC anticipates that adjudication of this claim will be lengthy. Claimant and the NPFC agreed to adjudicate the costs on a phased basis. The NPFC will separate the claim into smaller claims, based on vendors contracted with and used by the Claimants. Each smaller claim will bear a separate claim number and after adjudication the NPFC will offer an amount for that claim. Claimant may accept the offer or request reconsideration pursuant to the Claims Regulations at 33 CFR Part 136.

V. INITIAL CLAIM

The NPFC adjudicated the initial claim (J05003-001) in the amount of \$24,500,453.89. The responsible party, through its legal representative, provided over 31 binders of invoices to document the removal costs claimed in this first determination package. The NPFC claims manager reviewed each and every submitted invoice as well as every "daily" sheet submitted to substantiate the invoices. The review of the actual costs, invoices and dailies focused on (1) whether the actions were taken to prevent, minimize or mitigate the effects of the incident; (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented. Additionally, the NPFC claims manager reviewed the payment record against the claimed costs for each contractor/subcontractor.

See Enclosure (1) for the itemization and summary spreadsheet of vendors and their associated invoices that support this claim. It is deemed full and final for the identified vendors and invoices listed in Enclosure (1) and listed below.

| <u>Vendor</u> | <u>Binder #</u> | <u>Claimed Amount</u> | <u>NPFC Approved</u> | <u>NPFC D</u> |
|--|-----------------|-----------------------|----------------------|---------------|
| Agnes Beach Rentals | 72 | \$ 37,678.07 | 37,678.07 | |
| Alaska Logistics LLC | 1 | \$ 126.26 | \$126.26 | |
| Alaska Marine Transport & Salvage-PEGASUS | 184 | \$ 223,424.55 | \$223,424.55 | |
| Alaska Marine Transport & Salvage-POLAR BEAR | 185 | \$ 829,902.15 | \$829,902.15 | |
| Alaska Safety Inc | 1 | \$ 2,120.00 | \$2,120.00 | |
| Aleutian Propane Sales | 1 | \$ 2,174.41 | \$2,174.41 | |
| Bering Sea Eccotech Inc | 93 | \$ 6,756,655.58 | 6,655,686.83 | 100,9 |
| Coastal Transportation Inc | 110 | \$ 3,972.05 | 3,972.05 | |
| Evergreen Helicopters of Alaska Inc | 114 | \$ 9,583.20 | 9,583.20 | |
| Everts Air Cargo | 114 | \$ 28,076.56 | 28,076.56 | |
| Joe Henning Construction | 117 | \$ 59,667.45 | 59,667.45 | |
| Juanita Lewis | 117 | \$ 209.70 | 209.70 | |
| Lunde Marine Electronics Inc | 117 | \$ 2,310.81 | 2,310.81 | |
| Lynden Air Cargo | 117 | \$ 772,329.38 | 772,329.38 | |
| Norman Bautista | 189 | \$ 7,004.00 | 7,004.00 | |
| North Port Rentals Inc | 240 | \$ 21,413.50 | 21,413.50 | |
| North Star Fisheries, Inc | 178 | \$ 58,920.00 | 58,920.00 | |

| | | | | |
|------------------------------------|-----|-----------|----------------------|------------------------|
| Pen Air | 126 | \$ | 23,229.91 | 23,229.91 |
| Sampson Tug and Barge Co., Inc. | 142 | \$ | 772,193.31 | 772,192.71 |
| Shuregood Adventures -MISS PEPPERS | 178 | \$ | 76,320.00 | 76,320.00 |
| U S Coast Guard | 273 | \$ | 6,560,480.35 | |
| U S Coast Guard | 274 | | | |
| U S Coast Guard | 275 | | | 7,300.93 |
| U S Coast Guard | 153 | | | |
| U S Coast Guard | 154 | | | 2,277,440.34 |
| U S Coast Guard | 155 | | | 1,440,124.51 |
| U S Coast Guard | 156 | | | |
| U S Coast Guard | 157 | | | |
| U S Coast Guard | 158 | | | |
| U S Coast Guard | 159 | | | |
| U S Coast Guard | 160 | | | 1,197,914.51 |
| U S Coast Guard | 161 | | | |
| U S Coast Guard | 265 | | | 841,786.86 |
| U S Coast Guard | 266 | | | 594,782.83 |
| U S Coast Guard | 267 | | | |
| U S Coast Guard | 268 | | | 201,130.37 |
| U S Coast Guard | 269 | | | |
| Waste Management | 164 | \$ | 8,252,662.65 | \$ 8,252,662.65 |
| Less Limit of Liability | | | | (23,853,000.00) |
| | | \$ | 24,500,453.89 | \$546,484.54 |
| | | | | \$100,9 |

Claimant's sum certain for this claim is \$24,500,453.89. The claims manager determined, as more fully discussed below, that \$100,969.35 is not compensable from the OSLTF. The Claimants' limit on liability is \$23,853,000.000; therefore the NPFC will deduct its statutory limit from the amount determined to be compensable, 24,399,484.54. The total amount paid exceeds the Claimants' limit on liability by \$546,484.54. Therefore, the NPFC will offer this amount for this first claim.

VI. APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into navigable waters and adjoining shorelines, as described in Section 2702(b) of OPA 90. A responsible party's liability will include "removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan". 33 USC § 2702(b)(1)(B).

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

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

substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident”.

The responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of discharge of oil, may assert a claim for removal costs and damages under section 2713 only if the responsible party demonstrates that it is entitled to a defense to liability under section 2703 or to a limitation of liability under section 2704. 33 USC § 2708(a)(1) and (2).

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

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

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, “a claimant must establish -

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

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

VII. DETERMINATION OF LOSS:

A. *Findings of Fact:*

1. MSO Anchorage, as the FOSC for this incident, determined that the actions undertaken by the Claimant are deemed consistent with the NCP. 33 U.S.C. §§ 2702(b)(1)(B) and 2712(a)(4);
2. The incident involved the discharge of “oil” as defined in OPA 90, 33 U.S.C. § 2701(23), to navigable waters;
3. The Responsible Parties were identified. 33 U.S.C. § 2701(32).
4. The claim was submitted within the six-year period of limitations for claims. 33 U.S.C. § 2712(h)(2);
5. The NPFC Claims Manager reviewed all documentation submitted with the claim and determined which removal costs were incurred for removal actions in accordance

with the NCP and whether the costs for these actions were reasonable and allowable under OPA and 33 CFR § 136.205. The Claims Manager also identified denied costs and the grounds for denial.

B. *Analysis:*

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

The NPFC determines that the majority of costs incurred by the Claimant were reasonable and necessary in order to mitigate the effects of the incident. Upon review of the information provided by the Claimant, the NPFC determines that the costs were billed in accordance with the rate schedules and/or contracts/charter agreements in place at the time the services were rendered, unless otherwise indicated below, and were determined to be consistent with the NCP.

Itemization of denied costs broken down by Vendor:

Samsung Tug & Barge Co – the NPFC denied an overpayment made by the Claimant in the amount of \$.60; and

Bering Sea Ecotech Inc. –

- Invoice # 11991 – the NPFC denied \$3,415.50 in moorage fees originally denied by GMS as Spill Management Team (SMT). Despite the fact that GMS identified \$3,415.50 in denied costs, they inadvertently paid all of the costs for this invoice. The NPFC has upheld GMS' original denial of moorage fees;
- Invoice # 11997 – the NPFC denied a total amount of \$314.67 which is actually the denial of a credit card admin fee in the amount of \$602.66 also flagged by GMS as denied and there was a math calculation error on this invoice in the amount of \$287.99 which brings the total amount denied to \$314.67;
- Invoice # 12039 – the NPFC denied \$1,000.00 as the Claimant underpaid the invoice by \$1,000 therefore the NPFC denied \$1,000.00 as uncompensated;
- Invoice # 12084 – the NPFC denied \$6,000.00 as the Claimant underpaid the invoice by \$6,000.00 therefore the NPFC denied \$6,000.00 as uncompensated;
- Invoice # 12062 – the claimant underpaid the invoice by \$5,000.00 therefore the NPFC denied \$5,000.00 as uncompensated;
- Invoice # 12142 – the NPFC denied \$3,000.00 for crew shortage adjustment made by GMS during their audit of the costs;
- Invoice # 12147 – the NPFC denied \$14,000.00 for crew shortage identified by GMS as a reduction although GMS inadvertently paid all invoiced amounts in error. NPFC denied the crew shortage accordingly;
- Invoice # 12143 – the NPFC denied \$11,000 for crew shortage identified by GMS as a denial but inadvertently paid between two payments. The NPFC denied the crew shortage;

- Invoice # 12755 – the NPFC denied \$57,238.58 for repairs and damages to vessels/skiffs/barges. The damages reported were the result of the operators during response and therefore not a proper use of the Fund and as such denied.

The NPFC hereby determines that the NPFC offers, and the OSLTF is available to pay, **\$546,484.54** as full compensation for the reimbursable removal costs incurred by the Claimant and submitted to the NPFC under claim # J05003-001 as the first interim determination associated with this incident. All costs claimed are for charges paid for by the Claimant for removal actions as that term is defined in OPA and, are compensable removal costs payable by the OSLTF as presented by the Claimant.

All costs determined payable included in this determination have been reviewed and determined to be compensable as presented and in accordance with 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136.203 and 136.205, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan. 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”.

AMOUNT: \$546,484.54

Claim Supervisor: *Thomas Morrison* 

Date of Supervisor's review: *5/29/12*

3/29/12

Supervisor Action: *Approved*

Supervisor's Comments: