

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

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NPFCCCLAIMSINFO@uscg.mil

5890
July 19, 2013

RE: J05003-0026

Via email: @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 the claim number J05003-0026 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 J05003-0026.

Mail reconsideration request to:

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



ERIC BUNIN
Claims Manager
U.S. Coast Guard
By direction

Enclosure: Claim Summary / Determination

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	J05003-0026
Claimant	IMC Shipping Co. Pte. Ltd. <i>et al</i>
Type of Claimant	Responsible Party (US)
Type of Claim	RP payment to 3 rd Party Claimant - Atxam Corporation
Amount Requested	\$1,500,000

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. This claim before the Fund seeks reimbursement of certain amounts Claimants paid in settlement to third parties who asserted property damages caused by the incident.

2. Third-Party Tribal Corporation Claim

The RP/Claimants settled a third party claim of the Atxam Corporation, a Native Alaskan Village Corporation (Atxam), with a payment of \$1.5 million. Atxam resides on Atka Island and has land holdings on Unalaska Island. Atxam argued to the RP/Claimants that its land holdings on Unalaska Island were contaminated from the spill, and, as a result its land values were diminished. It sought compensation for the reduced land values. Atxam presented a claim to the RP/Claimants, alleging that the SELENDANG's owner and operator were strictly liable under

OPA, Alaska Statutes § 46.03.822, and common law trespass for contaminating Atxam lands with oil from the spill.

APPLICABLE LAW

Under OPA, responsible parties are liable for certain defined removal costs and damages resulting from oil discharges into or upon the navigable water, adjoining shorelines, or the exclusive economic zone of the United States. 33 U.S.C. § 2702(a).

Pursuant to 33 U.S.C. § 2708(a) a responsible party may assert a claim for such removal costs or damages to the NPFCC, provided the responsible party demonstrates entitlement to a complete defense or limitation of liability.

Where the asserted claim is for amounts paid to a third party claimant the responsible party, as subrogee, must support the claim for removal costs or damages just as any other claimant. 33 C.F.R. § 136.107.

A real or personal property damages claim seeks compensation for “[d]amages for injury to, or economic losses resulting from destruction of, real or personal property.” 33 U.S.C. § 2702(b)(2)(B).

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).

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)

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.

RP/CLAIMANTS -- CLAIM TO THE FUND

Keesal, Young and Logan, attorneys for the RP/Claimants, provided the following documents to support its claim:¹

- (1) letters between Faegre & Benson, attorneys for Atxam, and Keesal, Young and Logan, attorneys for the RP/Claimants;
- (2) a MacSwain Associates appraisal prepared for Keesal, Young and Logan, and
- (3) an executed Settlement Agreement and Release dated November 28, 2007, and proof of payment.

The letters between Atxam attorneys and RP/Claimants attorneys were arguments regarding each party's estimation of damages, methodologies and valuations for the Atxam property and briefs to the mediator.

According to the letters to the RP/Claimants and a brief submitted to a mediator Atxam argued that its entire 5,809 acres of owned and "selected" lands were impacted by the persistent nature of the oil, uncertainty and stigma. Using a projected impaired rental valuation over a 30-year period, Atxam claimed \$2,899,170 for impairment of use of its property. In arguing injury to its property, Atxam asserted that the highest and best use of the land is cultural and ecological preservation, and that the disruption of the use of their land should be valued in the context of damages to natural resources.²

¹1) April 4, 2007 Faegre & Benson (FB) initial letter claiming damages from the RP;
2) August 15, 2007 Keesal, Young & Logan (KYL) letter to Atxam's attorney with settlement offer, release and MacSwain Associates Restricted Use Appraisal.
3) September 20, 2007 FB rebuttal letter rejecting the RP's initial settlement offer and arguing for a higher claim amount.
4) November 5, 2007 FB letter presenting its argument to the mediator, Brian Shortell;
5) November 6, 2007 KYL letter presenting its argument to the mediator. KYL's letter included attachments. Attachment 1 contained comments and some information on the companion claimant St. George Tanaq. Attachment 2 pertained to Atxam's claim, including the MacSwain Associates Restricted Use Appraisal estimating land damages on Atxam land on Unalaska Island. Attachment 3 contained maps of the island and distances to the island.; and
6) The signed final release and wire transfer payment details.

² FB letter dated 4/4/07, p. 7

The RP/Claimants stated that they were strictly liable to pay for damages resulting from a temporary impairment in the preservation value of lands that were being preserved.³ Their letters to Atxam attorneys state that only a small portion of Atxam's oceanfront land (approximately 3 miles of shoreline⁴) was contaminated by the incident.⁵ The MacSwain report states that the impact was temporary, terminating by the end of the cleanup response. In their brief to the mediator, the RP/Claimants valued the property based on the MacSwain Associates appraisal, which used a standard appraisal technique for valuing remote lands in Alaska. It determined that the impaired rental value of Atxam's affected 1,858± acres of shoreline-related area over the one impaired year was \$81,800.⁶

DETERMINATION

The RP/Claimants seek reimbursement from the Fund for the \$1.5 million settlement payment made to Atxam for alleged real property damages. The records provided by the RP/Claimants reflect that Atxam and the RP/Claimants disputed key aspects of Atxam's claim. The RP/Claimants disagreed with Atxam as to: (1) the fair market value of the land; (2) whether the land was in fact being preserved when it was used to graze livestock;⁷ (3) the extent of the oiling; (4) the distance inland that the spill affected the temporary use of the land, and (5) the temporal duration of the impairment to use of the lands. The parties submitted their arguments to a mediator. They settled their disputes and executed a \$1.5 million settlement agreement in favor of Atxam.⁸

As will be more fully explained below the claim is denied on the grounds that the RP/Claimants have not established that the \$1.5 million payment to Atxam compensated for real property damages as defined by OPA; therefore, the claim is not reimbursable from the Fund.

OPA provides that the Fund is available to pay for uncompensated removal costs and uncompensated damages. 33 U.S.C. § 2712 (a)(4). Pertinent to this claim are damages for injury to, or economic losses resulting from, the destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property. 33 U.S.C. §§ 2702(b)(2)(B). The Fund is also available to pay damages for the injury to, destruction of, or loss of natural resources, but these damages are only payable to a natural resource trustee that has been designated pursuant to OPA. 33 U.S.C. § 2702(b)(2)(A).

The Claims Regulations at 33 CFR 136.107 provide that a subrogee must support a claim in the same manner as any other claimant and is only entitled to reimbursement of OPA-compensable damages identified in 33 U.S.C. § 2702(b). Thus, under 33 CFR §136.215(a) the information presented by the RP/Claimants must establish that (1) Atxam had an ownership or leasehold

³ November 6, 2007 KYL letter to mediator, p. 2.

⁴ MacSwain Associates, Restricted Land Use Appraisal for Atxam Corporation Land, page 15.

⁵ Atxam based this argument on an Alaska Supreme Court case that held that contiguous lands follow a unity rule under Alaska state law.

⁶ MacSwain Associates, Restricted Land Use Appraisal for Atxam Corporation Land, pages 20 & 21.

⁷ It is unclear whether Atxam lands were actually leased for livestock grazing. Their claim was submitted to the RP/Claimants simultaneously with another tribal corporation, St. George Tanaq. Although the RP/Claimants state that both tribal corporations leased their land to a livestock grazing operation, the Atxam/St. George Tanaq letters only reference a grazing operation on St. George Tanaq land.

⁸ The administrative record provided by RP/Claimants does not reveal if the settlement was prior to, during, or a result of the mediation.

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. Real property damage does not include impairment of preservation value.

Regarding ownership, there are references (but, not primary evidentiary documentation)⁹ in the administrative record provided by the RP/Claimants that Atxam owned lands on Skan Bay and Kismaliuk Bay on Unalaska Island and that some portion of the property may have been initially impacted by oil. The RP/Claimants have not proven Atxam's ownership in the allegedly damaged property.

Further, regarding proof of damage, the MacSwain report states that oil impacted some areas of the shorelines and required cleanup and further assessment, but that for the remainder of the lands either no oil was observed or the location and extent of the oiling did not warrant cleanup operations.¹⁰ The property passed CG inspection by the end of August 2005.¹¹ MacSwain's assessment stated that any disruption of Atxam's land use lasted one year.¹² The RP/Claimants have not proven injury or destruction of the property. It is unclear why, even after receiving information that any damages were mitigated within one year, the RP/Claimants initially offered Atxam \$81,800 for the appraised fair market rental value of the shoreline property it alleged was temporarily injured. The RP/Claimants provided no evidence of continuing residual oil damage to Atxam's property for which it compensated Atxam. So, given the estimate via MacSwain that no damage remained after one year, the record does not show why Atxam was compensated if it presumably had no lasting damage.

Based on the administrative record provided by the RP/Claimants Atxam was not seeking reimbursement for repair or replacement of injured or damaged property or for economic losses due to destruction of property. It was, however, seeking \$2,899,170 for lost value and/or impairment of use of the entire 5,809 acres for a 30-year period even though, apparently, only a portion of its shoreline property was impacted by oil until cleanup was complete, or at the latest, August 2005.

The RP/Claimants have not provided evidence that Atxam land actually lost value nor that Atxam actually realized any financial loss due to oil damage, a necessity to proving damage. And, impairment of use of noncommercial property¹³ is not OPA-compensable. Additionally, Atxam's assertions regarding persistence, uncertainty and stigma are speculative. In this case Atxam remains the owner of the property and there is no evidence that the property was under contract for sale or lease at the time of the incident. There is no evidence that Atxam suffered a loss of a sale or lease or suffered a reduced sale price or reduced rental income. For lack of proof of actual financial loss, the Fund would not have been available to reimburse Atxam and it is not available to reimburse the RP/Claimants.

⁹ RP/Claimants provided no source documentation or evidence with its claim to the Fund.

¹⁰ MacSwain Associates, Restricted Land Use Appraisal for Atxam Corporation Land, page 15.

¹¹ MacSwain Associates, Restricted Land Use Appraisal for Atxam Corporation Land, page 15.

¹² MacSwain Associates, Restricted Land Use Appraisal for Atxam Corporation Land, page 15.

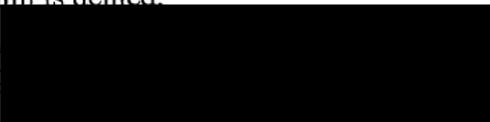
¹³ Whether the property was commercial or noncommercial is debatable. The RP/Claimants argue that it was commercially leased for grazing purposes and Atxam argues that it was noncommercial.

Further, Atxam, in a letter to the RP/Claimants, argued non-economic losses and damage to natural resources (i.e. disruption to preservation use of its lands). Such damages, if proven, would be payable only to natural resource trustees designated pursuant to OPA. Atxam is not a designated natural resource trustee and could not be compensated from the Fund for such claimed damages. Thus, the RP/Claimants could not be compensated for paying Atxam for this type of claim.

In summary, there is no information in the administrative record establishing that Atxam asserted a claim to the RP/Claimants for damages that are payable from the Fund. It is unclear whether the parties' settled their differences via the mediation process or independently. Atxam and the RP/Claimants executed a settlement agreement on November 28, 2007; the RP remitted a \$1.5 million payment on December 03, 2007.¹⁴ The Settlement Agreement and Release, dated November 28, 2007 and executed by Atxam and the RP/Claimants does not establish that the \$1.5 million in settlement was for OPA damages that the Fund is available to pay. 33 USC § 2712(a)(4). The Agreement noted that this was a compromised settlement of claims between the parties.

Conclusion

For the reasons stated above this claim is denied.

Claim Supervisor: Robert Rioux 

Date of Supervisor's Review: 7/19/2013

Supervisor's Action: Denial Approved.

Supervisor's Comments:

¹⁴ Atxam Letter of Remittance, dated December 03, 2007.