

CLAIM SUMMARY / DETERMINATION FORM

Date	: 7/7/2009
Claim Number	: 906017-001
Claimant	: Great American Insurance Company
Type of Claimant	: Corporate (US)
Type of Claim	: Affirmative Defense
Claim Manager	██████████
Amount Requested	: \$210,014.23

BACKGROUND:

Incidents:

On the night of March 22-23, 2005, the M/V CONCEPTION, a million dollar charter diving boat, was docked at the Sea Landing in Santa Barbara Harbor, California. The crew left the vessel after it was allegedly secured for the night. It was moored at a private, unguarded commercial dock at the Sea Landing. Access to the dock was not physically restricted.

At about 1:00am on March 23rd, a transient, ██████████ boarded the vessel, untied the mooring, forced open a window that was secured by a nylon strap, started the boat and motored away from the dock. The doors were reportedly locked, and the fact that the thief accessed the cabin through the window makes it a likely fact.

As Mr. ██████ piloted the vessel in an erratic fashion, the vessel struck several objects and boats as it left the harbor, sinking one of the boats, the SLICK CHICK, which discharged oil into the harbor. Mr. ██████ piloted the boat for several hours after the theft was discovered. A search was launched and the CONCEPTION was found hard aground on Vandenberg Air Force Base at Point Arguello about 50-60 miles away. The CONCEPTION had been damaged, but did not leak any oil.

Claimant:

The claimant is Great American Insurance (GAI), the subrogated insurer of the vessel M/V CONCEPTION. GAI insured the vessel's owner, Truth Aquatics Inc., for vessel pollution under OPA 90. Truth Aquatics is a company that owns and operates the CONCEPTION and two other boats not the subject of this claim. Truth Aquatics leases the building and berths at the Sea Landing facility in Santa Barbara where the boats were docked. (See L&J West Coast, Inc. Interim Report No. 1 dated April 13, 2005) The CONCEPTION is a 75-ft. passenger vessel used for dive charters. The owner, ██████ valued the vessel at over a million dollars and had insured it for one million dollars. Mr. ██████ had the boat professionally built for his business in 1981. (See Santa Barbara Police Report) In addition to the CONCEPTION, Truth Aquatics, owns and operates two other dive charter boats, VISION and TRUTH, out of the same location. (See City of Santa Barbara Harbor Patrol Case Report dated March 24, 2005). The claimant paid for the salvage of the CONCEPTION, which did not discharge any oil, and costs of salvage related to the SLICK CHICK, which actually discharged oil.

Claim:

The claimant filed a claim with the NPFC seeking reimbursement of the removal costs it incurred during the response to this incident. As an explanation for why it incurred these costs, the claimant provided the following:

Truth Aquatics was insured by Great American Insurance for vessel pollution under OPA 90 and Great American assumed command and control functions utilizing Meredith Management. On site pollution abatement and mitigation responsibility was assumed by [REDACTED], reporting to Meredith Management.

The vessel Slick Chick was sunk at the dock by the Conception. As the responsible party under OPA the owner of the Conception via Great American responded to the spill and threat of spill. Ocean Blue Environmental, utilizing Castagnola Tug, as a support vessel patched and raised the Slick Chick. There was approximately 1,000 gallons of diesel at risk.

The MV Conception grounded hard near Point Arguello. It had nearly 2000 gallons of diesel aboard. The response team utilizing Clean Harbors attempted to remove fuel from the shore side of the vessel and refloat the vessel. The vessel was grounded in an environmentally and historically sensitive area. It was the breeding ground for the Point Arguello 3 toed frog, an endangered species, and an Indian burial ground. For this reason, it became necessary for environmental reasons to extract the vessel instead of simply leaving it in place. See report to [REDACTED] under Ocean Blue Environmental invoices. Great American hired Curtin Maritime, to provide a tug for extraction, and Divecon to provide patching and salvaging service. The vessel was successfully extracted without environmental damage. The hull insurer assumed the costs of towage to safe harbor and eventual repair to the vessel.

The claimant has provided inconsistent information regarding the total amount of compensation it seeks from the OSLTF. In its Claim Form, the claimant indicated that it was claiming a total of \$210,014.23. Despite this statement, the claimant's summary of costs sought reimbursement of a total of \$211,439.43 in removal costs that were itemized as follows:

1. \$10,218.18 to Castagnola Tugs;
2. \$57,000.00 to Ocean Blue Environmental;
3. \$116,250.00 to Curtin Maritime Corp.;
4. \$7,243.00 to [REDACTED];
5. \$17,698.25 to National Response Group.

Notwithstanding the above, the claimant submitted cost documentation in support of its claim that exceeded the amounts claimed in both the claim form and the summary of costs. Specifically, the claimant submitted the following:

1. An invoice to the City of Santa Barbara from Castagnola Tug Services totaling \$10,218.18 for chartering the vessel DANNY C as a support vessel to remove fishing gear, winches and rigging from the F/V SLICK CHICK at Santa Barbara Harbor;
2. An invoice to the City of Santa Barbara from Ocean Blue Environmental Services, Inc. totaling \$57,000.00 to raise, de-water, tow, beach, demolish, and dispose of 70' sunken

vessel "SLICK CHICK" (\$35,000 to raise and de-water the vessel and \$22,000 for towing, beaching, demo and disposal of vessel);

3. An invoice to the claimant from Curtin Maritime Corporation totaling \$116,250.00 for the refloating and towing of the M/V CONCEPTION;
4. An invoice to [REDACTED] from Castagnola Tug Services totaling \$9,840.00 for the salvage preparation for the M/V CONCEPTION;
5. An invoice to Meredith Management Group from Divecon totaling \$116,067.76 for services rendered in connection with the re-floating of the M/V CONCEPTION;
6. An invoice to the claimant from [REDACTED] totaling \$7,243.00 for salvage operations for the M/V CONCEPTION;
7. An invoice to the claimant from The Meredith Management Group, Inc. totaling \$1,425.00 for emergency response team charges for the M/V CONCEPTION; and
8. Documentation showing the claimant authorized payment totaling \$17,698.24 to Clean Harbors Environmental Services for pollution removal services.

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" (NCP). 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 NCP 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".

Under 33 USC §2713(b)(2) and 33 CFR 136.103(d) no claim against the OSLTF may be approved or certified for payment during the pendency of an action by the claimant in court to recover the same costs that are the subject of the claim. See also, 33 USC §2713(c) and 33 CFR 136.103(c)(2) [claimant election].

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."

OPA section 1003(a) states that, "A responsible party is not liable for removal costs or damages under section 1002 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by- ...

(3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party..., if the responsible party establishes, by a preponderance of the evidence, that the responsible party-
(A) exercised due care with respect to the oil concerned, ... in light of all relevant facts and circumstances; and
(B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.” 33 USC 2703(a)

If proven, the third party defense is a complete defense to liability for the responsible party (RP). To succeed in asserting this defense to liability, The RP must show that the discharge was caused solely by an independent third party and that The RP satisfied (A) and (B) above.

In addition, there are limitations on the defense. The defense could not be granted if The RP failed or refused to-

1. report the incident as required by law,
2. provide reasonable cooperation in removal activities, or
3. without sufficient cause, comply with an order issued under section 311 of the Federal Water Pollution Control Act (FWPCA). 33 USC 2703(c)

“The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 1013 only if the responsible party demonstrates that –

- (1) the responsible party is entitled to a defense to liability under section 1003.” 33 U.S.C. 2708*

A responsible party may present a claim directly to the Oil Spill Liability Trust Fund. 33 U.S.C. 2713

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 NCP 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].

DETERMINATION OF LOSS:

On reconsideration, the NPFC finds that the claimant is entitled to the third-party defense to liability relating to OPA removal costs for the incidents involving the M/V CONCEPTION.

Coordination with the Federal On Scene Coordinator

In addition, for an RP to be paid, 33 CFR 136.205 requires a finding that claimed costs were either directed by the Federal On Scene Coordinator (FOSC) or determined to be consistent with the NCP by the FOSC. Because the claimant has submitted no evidence on either issue with regard to the CONCEPTION grounding, the NPFC contacted the Federal On Scene Coordinator’s Representative (FOSCR), MSSD2 [REDACTED].¹ As the FOSCR, MSSD2 [REDACTED] acted on behalf of the FOSC. MSSD2 [REDACTED] stated that the OSLTF reimbursed all the removal costs associated with the sinking of the SLICK CHICK.² He also stated that only the costs of removing oil from the CONCEPTION while it was grounded were oil pollution removal costs. The oil left on board during the refloat and tow back to port was approved at the request of the RP, who needed the oil to run generators for lights and pumps during the tow. MSSD2 [REDACTED] stated that, based on the facts in this case, all activities other than removing oil from the CONCEPTION while it was grounded were salvage because the Coast Guard would have left the vessel on the rocky shore.

Compensable Removal Costs

The OPA allows for OSLTF reimbursement of uncompensated removal costs. The OPA defines the phrase ‘removal costs’ to include “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 such an incident.” 33 U.S.C. § 2701 (31). The OPA further defines the term ‘removal’ to mean “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). Despite these broad definitions, there are limits on which expenses can be reimbursed by the OSLTF. First, under the NPFC’s claims regulations only those costs that have been directed by the FOSC or determined by the FOSC to be consistent with the NCP can be reimbursed. 33 C.F.R. § 136.205. Second, the OSLTF can only reimburse those removal costs that result from a discharge of oil or from a substantial threat of oil discharge. Gatlin Oil Co., Inc. v. U.S., 169 F.3d 207, 211 (4th Cir. 1999). Lastly, the OSLTF only reimburses **reasonable** removal costs. 33 C.F.R. § 136.205.

M/V CONCEPTION Costs

In this case, the NPFC has carefully reviewed all the evidence and determined that only \$19,123.24 of the claimed costs are uncompensated oil removal costs that can be reimbursed by

¹ LCDR [REDACTED] concurred with MSSD2 [REDACTED] via email dated June 11, 2009. LCDR [REDACTED] was Mr. [REDACTED] supervisor at the unit.

² Coast Guard personnel opened Federal Project Number A085018 and retained Ocean Blue Environmental, Inc. to remove all the oil from the F/V SLICK CHICK at a cost of \$36,271.50.

the OSLTF. These costs include both the \$17,698.24 paid to Clean Harbors to remove fuel and oil from the M/V CONCEPTION and the \$1,425.00 paid to Meredith Management for emergency response team charges. As the NPFC confirmed that the claimant actually paid these costs, they satisfy OPA's requirement that only uncompensated removal costs can be reimbursed by the OSLTF. 33 U.S.C. § 2712 (a)(4). Additionally, because the FOSCR determined that these costs were consistent with the NCP and they resulted from a substantial threat of discharge, these costs can be reimbursed by the OSLTF. However, for the reasons described below, all other costs claimed by the claimant must be denied.

With respect to the M/V CONCEPTION's salvage costs (\$116,250 by Curtin Maritime Corp., \$9,840 by Castagnola Tug Services, \$116,067.76 by Divecon, and \$7,243.00 by [REDACTED]), there were many reasons why the OSLTF could not reimburse these costs. First, the claimant submitted no proof that it actually paid these costs. Some of these costs were not even invoiced to the claimant. Unless the claimant actually paid costs, they cannot be reimbursed by the OSLTF. 33 U.S.C. § 2712 (a)(4). Because the claimant has failed to document its payment of these costs, they must be denied.

Second, even if the claimant did pay these salvage costs (\$116,250 by Curtin Maritime Corp., \$9,840 by Castagnola Tug Services, \$116,067.76 by Divecon, and \$7,243.00 by [REDACTED]), they must still be denied because the FOSCR determined that the costs were not consistent with a response under the NCP to a substantial threat of oil discharge. Under the NCP, the FOSC has the authority to determine the scope of a response to a substantial threat of discharge. 40 C.F.R. §§ 300.120, 300.130, 300.135, and 300.320. See also, 33 C.F.R. § 1.01-80. In this case, the FOSCR determined that the NCP only required removing fuel and oil from the M/V CONCEPTION while she was grounded. Although other environmental concerns may have motivated the claimant to remove the grounded vessel, the FOSCR did not require the vessel to be re-floated and towed away as part of a response to a substantial threat of oil discharge. As a result, the M/V CONCEPTION's salvage costs must be denied as the salvage actions were not directed by the FOSCR or otherwise determined to be consistent with the NCP.

Third, the M/V CONCEPTION's salvage costs (\$116,250 by Curtin Maritime Corp., \$9,840 by Castagnola Tug Services, \$116,067.76 by Divecon, and \$7,243.00 by [REDACTED]) must be denied because the claimant has failed to carry its burden of showing by a preponderance of the credible evidence that these costs resulted from a substantial threat of oil discharge. Instead, the credible evidence in this case shows that these costs resulted from the claimant's efforts to preserve the vessel and mitigate the property damages from the casualty. If it were otherwise, the claimant would have finished pumping the fuel and oil off the vessel instead of incurring an additional \$249,400.76 in costs to tow the vessel to a different location. Moreover, even if there were other environmental reasons for moving the vessel, the claimant has still failed to show how these costs resulted from either actual discharges of oil or substantial threats of future oil discharges. Simply having a casualty where a vessel poses a substantial threat of oil discharge for a limited amount of time does not mean that all costs associated with the casualty may be reimbursed by the OSLTF.

Lastly, even if the M/V CONCEPTION's salvage costs (\$116,250 by Curtin Maritime Corp., \$9,840 by Castagnola Tug Services, \$116,067.76 by Divecon, and \$7,243.00 by [REDACTED]) had been paid by the claimant, were consistent with the NCP, and resulted from a substantial threat of oil discharge, the NPFC finds that they still must be denied. The claimant has failed to carry its burden of showing by a preponderance of the credible evidence that these costs were reasonable. During the initial response to the grounded M/V CONCEPTION, the claimant removed fuel and oil from the vessel. The claimant incurred significant costs to have

the fuel and oil removed (\$19,123.24 to Clean Harbors and Meredith Management). It was not reasonable to leave the fuel and oil onboard the vessel and incur more than ten times the initial removal costs so that the vessel could be towed to another location. Instead, the claimant should have simply removed all the oil and fuel from the vessel before it was towed. Because these costs were not reasonable OPA removal costs, they must be denied.

F/V SLICK CHICK Costs

Similar to the salvage costs for the M/V CONCEPTION, the costs relating to the F/V SLICK CHICK (\$10,218.18 to Castagnola and \$57,000 to Ocean Blue Environmental Services) must also be denied. Just like the other costs, the claimant has submitted no proof that it actually incurred these costs. In fact, when the NPFC asked the claimant for proof of actual payment for \$57,000 allegedly paid by the claimant for services provided by Ocean Blue Environmental Services, Inc., the claimant conceded that it had no such proof and requested that those costs be removed from its claim. Also, the invoice submitted by the claimant to support its claim for the Castagnola costs was directed to the City of Santa Barbara, not the claimant. Without more, the claimant has failed to carry its burden of showing that these costs were actually incurred.

Even if the claimant could prove that it actually reimbursed Castagnola tugs \$10,218.18, those costs would still have to be denied because the FOSCR determined that they were not consistent with a response to a substantial threat of oil discharge under the NCP. The FOSCR determined that all of the NCP's oil removal activities for the F/V SLICK CHICK were funded by the OSLTF. Also, the claimant has failed to carry its burden of showing by a preponderance of the credible evidence that these costs resulted from either an actual discharge of oil or a substantial threat of oil discharge. The invoices state that these costs were incurred to remove fishing gear, winches, and rigging from the F/V SLICK CHICK. Because there is nothing to show how these costs resulted from an oil discharge or a substantial threat of oil discharge, they must be denied. Instead of being OPA response costs, these costs appear to have been incurred to mitigate the property damage loss from the casualty by saving items of value. Lastly, even if the claimant paid these costs and they resulted from either an actual discharge of oil or a substantial threat of oil discharge, the claimant has failed to carry its burden of showing by a preponderance of credible evidence that these costs were reasonably necessary for OPA removal activities. Accordingly, these costs must be denied.

DETERMINED AMOUNT: \$19,123.24

Claim Supervisor: [REDACTED]

Date of Supervisor's Review:

Supervisor Action:

Supervisor's Comments: