

CLAIM SUMMARY / DETERMINATION FORM

Date	: 06/10/2010
Claim Number	: P06017-001
Claimant	: MS Elegance Scheepvaartbedrijf CV
Type of Claimant	: Corporate (US)
Type of Claim	: Limit of Liability
Claim Manager	: (b) (6)
Amount Requested	: \$367,682.44

FACTS:**A. Oil Pollution Incident:**

In the early morning hours of 25 April 2006, while outbound in the Delaware Bay, the M/V Bermuda Islander released fuel oil into the Bay while performing ballasting operations. The oil-spill incident affected the Delaware and NJ shorelines along the Delaware Bay.

B. Claim Detail:

This claim is presented to the National Pollution Funds Center (NPFC) for a limitation of liability and reimbursement from the Oil Spill Liability Trust Fund (OSLTF) for costs incurred from the oil-spill incident and which exceed its Limit on Liability (\$2,289,000.00) in accordance with the Oil Pollution Act of 1990 (OPA). 33 U.S.C. 2701-2761. Presenting, and hereby deemed claimants in their respective roles with the M/V Bermuda Islander, are: MS Elegance Scheepvaartbedrijf CV – owner, JR Shipmanagement – Manager, and British Marine Luxembourg SA – Pollution Insurer.

Given the brevity of claimant's representation of the facts surrounding this incident, this section will first present the facts as presented by claimant and then the facts as the claim manager came to understand them, through research conducted in the process of adjudicating the claim.

FACTS – Pursuant to Claimant's Submission:**Incident Information:**

- Date: April 25, 2006
- Time: 0140
- NRC Report#: Unknown
- Name of vessel or facility causing damage: M/V Bermuda Islander
- Geographic location of the incident: Delaware Bay, Delaware

Brief Description of the Incident as alleged by claimant:

Shortly after midnight on April 25, 2006, while outbound in the Delaware Bay, the Bermuda Islander inadvertently released fuel oil into the Bay while ballasting afterpeak and No.2 C

tanks. The crew initially discovered oil on deck. Due to the dark conditions, there was no immediate indication that any of the oil had escaped over the side of the ship. In fact, when the Delaware River pilot departed the vessel at 0140 hrs, he and the pilot boat crew examined the side of the vessel with flashlights and did not observe any oil at that time. The scuppers on deck were ordered plugged immediately and the crew commenced the messy and time consuming job of cleaning up the oil on deck. This took a couple of days but there was no indication to the crew that oil had gone over the side.

Even though the crew of the Bermuda Islander and the Delaware River pilot and crew did not notice any sign that oil may have gone over the side, when reports of the spill in Delaware Bay surfaced and it was realized that this vessel may have been the source, the Owner's P&I Club and Pollution Insurer representative voluntarily phoned the Coast Guard to report that the vessel had been in the area where and when the spill occurred, that it had experienced a problem with its bunker tanks and thus was a potential source of the spill.

It was later determined that oil had indeed spilled from the Bermuda Islander into the Delaware Bay. The precise amount of oil spilled was never established, but estimates varied widely from 1,000 gallons to 20-30 barrels.¹

Thereafter, the Bermuda Islander interest cooperated fully with the Coast Guard during its investigation on the vessel during discharge in Bermuda and gave their complete cooperation to the Coast Guard and the various Federal and state Trustees with respect to the spill response and natural resource damage assessment.

The above concludes claimant's presentation of facts.

FACTS – Based on Claim Manager's Additional Research:

A local paper from NJ reported² at the time that at 06:45 on 25 April 2006 a tugboat crewman (first) noticed a six mile oil slick in the waters of the Delaware Bay, a navigable waterway of the United States.

By using CG Investigator³ Statements dated 21 Jun 2006 on what took place, a more accurate and different picture from that portrayed by the claimant emerges. The following facts elaborate and fill in the gaps on the events surrounding this incident.

1. At approximately 0716 April 25, 2006, USCG Sector Delaware Bay received National Response Center Incident Reports #795080 and #795077. Mr. (b) (6) of Maritrans Inc., a marine carrier of petroleum products, reported an oil slick in the water of the Delaware Bay, a navigable water of the United States, at approximately 39° 9' N and 075° 15' W (NRC#795080). This was followed by NRC #795077 from Mr. (b) (6) of Gallagher Marine Systems. Mr. (b) (6) reported a one mile long sheen in the Delaware Bay, between buoy 31 and the Miah Maull shoal. For both reports, the source was unknown and the time of discovery was 0620 April 25, 2006. Both reports were relayed from the same vessel, the Maritrans tug Liberty⁴.

¹ Claim Form – Section 2's Brief Description of the Incident.

² The Gloucester County [NJ] Times article "Delaware Bay Cleanup Continues After Oil Spill" of 2 May 2006.

³ USCG's Investigator was (b) (6)

⁴ U.S. Coast Guard Investigator Statement dtd 21 Jun 06; pg 1 of 5

2. On April 25, 2006 at 0645 local time USCG Sector Delaware Bay commenced investigating the incident by deploying a helicopter to the spill location⁵. Using the Maritime Exchange Delaware River Ports Vessel Activity List⁶ a list of vessels which may have been in the vicinity transiting the area was compiled. Due to the freshness of the product, the estimated time frame of the spill's occurrence was thought to have occurred between 0001 and 0600 April 25, 2006. Three pollution investigation teams were dispatched to collect oil samples from vessels that had transited the spill location during the stated timeframe. Oil samples were obtained from the following vessels: M/V Cap Saray, M/V Team Actinia, M/V Luzon Strait, M/V Dole Columbia, and the cruise ship Norwegian Crown.⁷
3. On April 25, 2006, at 0140, the vessel was at the Cape Henlopen pilot station and Mr. (b) (6) departed the wheelhouse to meet the pilot's launch located on the starboard side of the M/V Bermuda Islander. During his walk on the vessel's starboard side main deck, (b) (6) stated he was walking through black and brown waste oil. After his arrival on the pilot launch, he and the launch crew looked for oil. They examined the starboard side of the vessel with flashlights but did not observe any oil at that time⁸.
4. On April 26, 2006 at 0845⁹ USCG Sector Delaware Bay's (b) (6) received a telephone call from Mr. (b) (6) a Delaware River Pilot, regarding the probable source for the oil-spill incident. Mr. (b) (6) was the river pilot on board the foreign flagged 340 foot container vessel Bermuda Islander, which had departed Mid Atlantic Terminals, Salem, NJ, at 2145 on April 24, 2006, enroute to Hamilton, Bermuda. According to the conversation with (b) (6) Mr. (b) (6) had overheard a conversation, at approximately 0100 on April 25, 2006, between the captain of the vessel and a deckhand, where the deckhand had reported to the captain that there was oil on the main deck. The captain instructed the deckhand to plug the deck scuppers as the vessel continued its outbound transit¹⁰.
5. On April 26, 2006, at 1130 the investigator received a call from Mr. (b) (6) of Lamorte, Burns & Co., acting as the P&I correspondent for the P&I Club, British Marine Managers Ltd., associated with the Dutch P&I Club for the M/V Bermuda Islander. Mr. (b) (6) affirmed that the vessel had transited the area in which the oil-spill incident occurred and also that the vessel had problems associated with its bunker tanks. Mr. (b) (6) reported that there may be potential involvement of the M/V Bermuda Islander with the oil-spill incident in Delaware Bay. Mr. (b) (6) stated that he was unaware of the exact cause of problems aboard the vessel, but he understood there was internal leakage within the vessel and a pipe breakage and the vessel was enroute to Bermuda¹¹.

⁵ USCG's SITREP-POL ONE dtd 26 Apr 2006.

⁶ The local pilot's association list of arriving and departing vessels.

⁷ U.S. Coast Guard Investigator Statement dtd 21 Jun 06; pg 2 of 5

⁸ *Ibid.*

⁹ USCG Enforcement Action #2667736; Exhibit CG 07 - Email from (b) (6) of 26 Apr 2006 at 0949; Subj: Oil Spill Suspect Source

¹⁰ *Ibid.*

¹¹ *Ibid.*

6. During the pollution investigation that followed, it was determined that the foreign flagged 340 foot container vessel Bermuda Islander <Bermuda> (IMO 9015993, Flag State: Netherlands), owned and operated by JR Ship Management, was responsible for the discharge of oil into the surrounding waters¹². Based on this information we determine that in fact, the M/V Bermuda Islander was the responsible party for this oil-spill incident.
7. Mr. (b) (6) Chief Mate of the Bermuda confirmed during the investigation that at 0400 (25 April 2006) of the day of the incident, oil was found on both the starboard and port side main deck and at that point, scuppers were closed and four (4) crew members were assigned the oil cleaning. The fuel oil discharged, as he explained, came from the #2 center ballast tank vents while the vessel had been conducting ballast operations. Mr. (b) (6) stated that he was notified of the spill when the vessel was approximately 30 miles from Cape Henlopen, NJ and that he questioned the second mate as to why he was not notified earlier, to which the second mate replied that the Captain told him not to wake him up. Mr. (b) (6) reported the oil to be about 2 cm thick all over the deck. At 0600 (25 April 2006), Mr. (b) (6) completed the spill report form as per the vessel's Shipboard Oil Pollution Emergency Plan to notify the owners, but was unsure as to whether it was released or not¹³.
8. During the investigation USCG personnel obtained a copy of the Bermuda Islander's Shipboard Oil Pollution Emergency Plan (SOSEP). Page 11 of 30 contains the following sections: Reporting Requirements (6.2), Flow Chart Reporting Procedure (6.2.1) and When To Report (6.3). Section's 6.2.1 has a flow chart that depicts the procedure of how to report an actual or probable discharge in open water. Section 6.3, WHEN TO REPORT, specifies reporting for an actual discharge of oil and a probable discharge of oil. Specifically, it states that "Although an actual discharge may not have occurred, a report is required if there is the probability of a discharge". The SOSEP lists the following factors to be taken into account when there is "Probable discharge"¹⁴:
9. Section 6.2, REPORTING REQUIREMENTS, states "... *that the nearest coastal state should be notified of actual or probable discharges of oil to the sea.... to ensure*

¹²*Ibid.* Pg 4 of 5. On May 4, 2006, USCG Sector Delaware Bay received U.S. Coast Guard Marine Safety Laboratory Sample analysis report, MSL Case Number 06-154. In summary; three spill samples were taken from the waters of Delaware Bay and one from Gandy Beach, NJ. Two source samples were taken from the M/V Bermuda Islander's #2 center ballast tank and heavy oil fuel tank. One sample was taken from Vane Brothers Barge VB12, which supplied the fuel oil to the M/V Bermuda Islander. This sample was taken by the tankerman on the barge VB12 and kept it in storage. The oil sample was transferred to U.S. Coast Guard on May 2, 2006. The MSL report confirmed that the samples taken from the M/V Bermuda Islander matched the open water samples and the Vane Brothers Barge sample.

¹³ U.S. Coast Guard Investigator Statement dtd 21 Jun 06; pg 4 of 5

¹⁴ SOSEP – Page 12 of 20 Nature of damage sustained by the ship

- Failure or breakdown of machinery or equipment which may adversely affect the ability of the ship to maneuver, operate pumps, etc.;
- Location of the ship and its proximity to land or other navigational hazards
- Present weather, tide, current and sea state; expected weather conditions; traffic density;
- Morale, health and ability of the crew on board to deal with the situation
- Damage, failure or breakdown which affects the safety of the ship

that coastal states are informed without delay of any incident giving rise to pollution, or threat of pollution... so that appropriate action may be taken."

10. Neither the National Response Center nor the U.S. Coast Guard Captain of the Port Philadelphia received notification of a probable discharge from the vessel M/V Bermuda Islander as required by the vessel's own SOPEP and as required by 33 CFR 151.15, a violation of a regulation of the United States. Claimant, in its submission, clearly shows that it did not know of any report that had been filed by the vessel or claimant, which is reflected in the claim submission by the "NRC Report #" block showing "Unknown"¹⁵.
11. When the vessel arrived at Hamilton, Bermuda, it was boarded by the Bermuda Government Maritime Administration. One of the defective items on the issued Port State Control Report was described as a suspected discharge violation¹⁶.
12. Mr. (b) (6) of the vessel's classification society, Germanischer Lloyd, issued a class survey statement to the vessel's master, Captain (b) (6). A condition of class was imposed on the vessel to offload contaminated products and access the fuel tank for repairs to the vent pipe at their next port of call, as Bermuda did not have the facilities to effect repairs¹⁷.
13. As a result of this oil-spill incident, two violations¹⁸ were determined by the US Coast Guard, which led to citations and enforcement actions carrying fines totaling \$10,000¹⁹. These fines were based on claimant violating 33 U.S.C 1321(b)(3) and 33 CFR 151.15. Both fines were paid by claimant on 19 Sept 2009²⁰.
14. As a result of the oil-spill incident and based on the USCG issued SITREP-POLs (1 through 7) the incident response can be summarized as follows:
 - a. Upon initial notification of an oil sheen on the upper Delaware Bay by a crewman onboard of a tug, a USCG Air Station Atlantic City's helicopter (helo) was dispatched to conduct an initial assessment. The helo crew confirmed the sheen and oil across the shipping channel, measuring approximately 100 yards wide. Estimates at that time put the quantity of oil spilled at approximately 1,000 gallons.
 - b. An Incident Command (IC) post that included stakeholders from NJ and Delaware, was established by USCG to monitor situation and direct actions. Initially, the IC determined that booming would be the primary strategy to follow, as inclement weather conditions at the time, significantly constrained the safe conduct of skimming operations.

¹⁵ Claim Form; submission's pg 2 of 8, Section 2.

¹⁶ USCG's Investigator Statement dtd 21 Jun 06; Pg 2 of 2.

¹⁷ *Ibid.*

¹⁸ MISLE Database – (1) Failure to report a discharge or probability of a discharge (33 DFR 151.15) and (2) Discharge of oil or a hazardous substance into the navigable waters of the United States, adjoining shoreline, or contiguous zone (33 U.S.C. 1321 (b)(3)).

¹⁹ USCG's MISLE Report for Activity #2667736 – Violation Date: 25 Apr 2006; Charged Party: J.R. Shipmanagement B.V.

²⁰ Claim Form; submission's pg 6 of 8, item #27.

- c. A concerted effort to identify the oil-spill incident's responsible party caused CG personnel to intercept and board various vessels that had transited the Delaware Bay. At the same time an economic impact was felt by local fishermen, when ninety (90) percent of NJ's oyster beds (70,000 acres) were closed, for the potential contamination threat from submerged/sinking oil. Prior to the RP stepping up and taking over the coordination of and accepting cost relating to the spill response and cleanup, 12,300 feet of boom were deployed (5,700 – NJ + 6,600 – DE).
- d. Due to the oil-spill incident, and its unknown impact, an informal natural resources damage (NRDA) assessment was initiated. As of the last and final SITREP-POL (#7), twenty-three (23) waterfowl had been observed oiled.

APPLICABLE LAW:

Under OPA 90, at 33 U.S.C § 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 U.S.C § 2702(b)(1)(B).

"Oil" is defined in relevant part, at 33 U.S.C § 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 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. 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 U.S.C §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 U.S.C §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."

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].

Under OPA 90, at 33 U.S.C § 2704 limits on liability provided in this section, the total 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 –

- (2) for any other vessel, \$600²¹ per gross ton or \$500,000, whichever is greater;

(C) Exceptions

(1) Acts of responsible party

Subsection (a) of this section does not apply if the incident was proximately caused by –

- (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 (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

(2) Failure or refusal of responsible party.

Subsection (a) of this section 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;

ADJUDICATION OF CLAIM:

Claimants’ request for reimbursement from the OSLTF requires the NPFC follow a two-step process. The first step is to determine whether or not claimant is eligible to a limit on liability for the costs incurred during the oil pollution incident. If the claimant is eligible to a limit on liability, then we move on to a second step. This second step is to determine whether the costs

²¹ Statutory limit in effect at the time of oil spill, per 33 U.S.C. 2704

submitted are OPA compensable. Compensable removal costs are those that are in accordance with the National Contingency Plan (NCP) or were coordinated with the Federal On-Scene Coordinator (FOSC). After adding all OPA compensable costs, those costs exceeding the vessel's limit on liability would be eligible for reimbursement from the OSLTF.

DETERMINATION – AS TO ENTITLEMENT OF LIMITS ON LIABILITY:

Upon review of the claim submission and research of the incident, the claim manager determined the following:

- Presentation²² to the NPFC was made less than three years after the incident and well within the statute of limitations. 33 U.S.C 2712 (h).
- Claim stems from a discharge of an oil as defined in OPA. 33 U.S.C 2701(23).
- Claimed costs do not involve any that are the subject of a pending court action²³ by claimant to recover the same costs [33 U.S.C 2713(b)(2)] and are for costs resulting from a discharge where the costs were paid by the responsible party (RP).

When claimant failed to follow its own procedures, as called for in its Shipboard Oil Pollution Emergency Plan (SOPEP), claimant failed to report the incident as required by law. This failure by claimant meets one of the exceptions to Limits on Liability, where claimant failed to report the incident as required by law and the responsible party knows or has reason to know of the incident. (33 U.S.C 2704 (c) (2) (A)) (33 CFR 151.15) Given that claimant violated a Federal regulation (33 CFR 151.15) the provisions in 33 U.S.C 2704 (a) do not apply and therefore, claimant is ineligible to a limit on liability as provided by OPA.

Claimant was fined by the US Coast Guard for failing to report²⁴ the incident and paid the fine it was assessed. Given that claimant is ineligible for a limit on liability, claimant's liability is without limit. Since claimant is ineligible for a limit on liability, the claim manager did not adjudicate the costs submitted, which would have taken place in the second step of the process outlined above.

DETERMINATION OF LOSS:

After considering all the facts presented by claimant and the research conducted, I have concluded that claimant is ineligible for a limit on liability and therefore is liable for all costs stemming from the incident. As claimant is liable for all costs this claim is denied.

DETERMINED AMOUNT: \$0.00

²² Claim received by the NPFC on 14 April 2009, which is less than 3 years after the incident.

²³ Claim Form; submission's pg 7 of 8, item #7.

²⁴ Enforcement Summary – Activity #2667736; Failure to report a discharge or probability of discharge.

Claim Supervisor: Thomas S. Morrison
Date of Supervisor's Review: 6/14/10
Supervisor Action: Denial Affirmed
Supervisor's Comments: