

VIA REGISTERED MAIL

Director, Operational Business
Canadian Coast Guard
200 Kent Street (5N177)
Ottawa, Ontario K1A 0E6

RE: No Name Ferro-cement Sailboat – Chatham Island, BC – DOI: 8 December 2016

We have completed our investigation and assessment of the claim for \$53,954.45 (“Claim”) that the Canadian Coast Guard (“CCG”) submitted for costs and expenses incurred in relation to an oil pollution incident involving an unidentified sailboat of ferro-cement construction (“Vessel”). We find the Claim to be established, in part, in the amount of **\$10,563.98**. Accordingly, we hereby make an Offer of Compensation (“Offer”) in that amount, plus accrued interest of \$866.48, pursuant to sections 105, 106, and 116 of the *Marine Liability Act* (“MLA”). The amount of the Offer plus interest comes to \$11,430.46.

The following reasons are provided to explain the disparity between the amount claimed and the amount offered by the Administrator of the Ship-source Oil Pollution Fund (“Administrator”).

Applicable Statutory Scheme

This Claim is subject to the substantive provisions of the *Canada Shipping Act, 2001* (“CSA”) and the *MLA* as they were at the time of the incident. All references to these statutes refer to them as they were before the changes introduced in Bill C-86 came into force.

Overview of the Decision

Our assessment of this Claim was conducted on the basis of the original record and additional CCG submissions requested by the Office of the Administrator and received on 8 January 2019 (“Additional CCG Submissions”). The Administrator also obtained, via *subpoena*, an Incident Log from the Joint Rescue Co-ordination Centre in Victoria (“JRCC Incident Log”). This document sheds light on the search and rescue operation that began late on 7 December 2016, as well as the early stages of the CCG environmental response that began the following morning. CCG declined to provide it following a request for all applicable situation reports by the Office of the Administrator.

On the evidence, which is contradictory in places, we find that CCG has demonstrated the grounded and partially submerged Vessel posed a credible pollution threat from the outset of its response on 8 December 2016. We stress, however, that CCG as a claimant bears the burden under subparagraph 77(1)(c)(i) *MLA* of demonstrating that a preventive measure was reasonable *at the time it was taken*. The Administrator is not satisfied on the record that the emergency raising and removal plan devised at the beginning of the response was reasonable in light of the

circumstances as they stood by 3 January 2017, when the plan was finally enacted after substantial weather delay.

When CCG arrived on scene on the morning of 8 December 2016, the volume of pollutants onboard the Vessel was uncertain, with estimates ranging from 40 to 100 gallons of diesel plus other miscellaneous pollutants. No release of pollution was observed at this stage, but the JRCC Incident Log indicates that as of 08:48 “Fuel has been taken off, as much as can be accessible.” In addition, the Claim “Narrative” indicates that CCG “gathered several jerry cans and miscellaneous oil jugs from the beach and vessel before departing for the day”. The volume of remaining pollutants is unclear, but the evidence suggests that the Vessel began upwelling diesel the following day, 9 December, when CCG first deployed sorbent boom. CCG returned to the Vessel on 12, 19, 27, and 30 December. Sorbents were changed out on 12 and 19 December only. No change-outs were required on 27 or 30 December, which suggests that the upwelling of pollutants had either ceased entirely or reduced substantially. Weather conditions were poor, after all, and it is likely that wave action would have by then flushed out the bulk of pollutants located outside closed systems.

CCG determined very early in its response, however, that it was necessary to remove the Vessel from the marine environment. To this end, CCG entered a verbal emergency contract on or about 8 December 2016 with Heavy Metal Marine Ltd (“Heavy Metal”) to “salvage the vessel, pull it from the marine environment, remove the oil pollution, destruct the oil polluted vessel [*sic*]” (Additional CCG Submissions). As mentioned, this Heavy Metal operation was delayed by nearly a month, until 3 January 2017. The situation was evolving over this period, as was the relative pollution threat. By 19 December it is clear from the evidence that any remaining pollution threat was significantly reduced. The Vessel remained surrounded by sorbent boom, with any residual threat contained. In spite of the waning pollution threat, CCG has provided no evidence that it conducted any reassessment before proceeding with an emergency plan formulated on the first day of its response. If there had ever been an emergency, there is substantial doubt as to whether it persisted at this stage. Taken as a whole, the evidence suggests that by 3 January 2017, CCG was engaged primarily in a wreck removal operation, which cannot be compensated by the Administrator.

Assessment

Schedule 2 – Contract Services

CCG claimed \$41,765.64 for contracted services provided by Heavy Metal beginning 3 January 2017. These included the raising, removal, deconstruction, and disposal of the Vessel. For the reasons above, the Administrator is not persuaded on the evidence that raising the Vessel at this time represented a reasonable preventive measure in light of the circumstances. It follows that none of the contracted measures undertaken thereafter can be compensable. Further, we note the paucity of documentation pertaining to the work done by Heavy Metal and the lack of evidentiary support for the decision to deconstruct the Vessel, particularly given that it appears to have been made on the first day of the response, while the Vessel remained partially submerged. CCG declined to complete the record on these two items when given the opportunity during the Administrator’s assessment.

Schedule 4 – Salaries – Full Time Personnel

CCG claimed \$2,964.48 for the salaries of two or three (varying day to day) environmental response personnel who attended to the Vessel on 8, 9, 12, 19, 27, and 30 December 2016 as well as on 3 January 2017. We find that all actions taken in December 2016 were related to reasonable preventive measures or monitoring. With regard to the 3 January 2017, however, we find the deployment of two GT 04 personnel to have been solely for the purpose of monitoring what on the evidence can only be deemed a wreck removal operation. Taking into account this reduction, we find this Schedule to be established in the amount of **\$2,618.64**.

Schedule 11 – Pollution Counter-measures Equipment

CCG claimed \$8,619.61 for the use of a PRV II on seven days as well as three bales of sorbent boom and one bale of sorbent pads. Of this claimed amount, we find **\$7,425.38** to be established, applying the same logic set out above in Schedule 4.

Schedule 12 – Vehicles

CCG claimed \$542.22 for the use of a vehicle for seven days during its response. Applying the same logic set out above in Schedules 4 and 11, we find the amount of **\$464.76** to be established, representing six days' use, calculated based on the average per-day vehicle cost.

Schedule 13 – Administration Costs

CCG claimed \$62.50 in administration costs, representing 2.53% of the amount claimed for salaries, less employee benefits. Taking into account our reductions under Schedule 4, we find the amount of **\$55.20** to be established under this Schedule.

We look forward to receiving notification of your acceptance so that payment can be made without delay. In considering this Offer, kindly note that you have 60 days upon receipt to notify the undersigned whether you accept it. Alternatively, you have 60 days upon receiving this Offer to appeal its adequacy in the Federal Court. The *MLA* provides that if no notification is received at the end of the 60-day period, you will be deemed to have refused the Offer.

If you accept this Offer, the *MLA* provides that the Administrator benefits from a statutory release and subrogation to the extent of the payment made to you in relation to the subject incident.

Yours sincerely,

Mark A.M. Gauthier, B.A., LL.B
Deputy Administrator, Ship-source Oil Pollution Fund

c.c.: Superintendent, Environmental Response, Western
Acting Superintendent, Environmental Response, Western

Appendix: Summary Assessment Table

Schedule	Claimed	Established
2 – Contract Services	\$41,765.64	\$0.00
4 – Salaries – Full Time Personnel	\$2,964.48	\$2,618.64
11 – Pollution Counter-measures Equipment	\$8,619.61	\$7,425.38
12 – Vehicles	\$542.22	\$464.76
13 – Administration	\$62.50	\$55.20
Total in Principal	\$53,954.45	\$10,563.98
Interest		\$866.48
Grand Total		\$11,430.46