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VIA REGISTERED MAIL & EMAIL

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To Dedicated Environmental Services Inc:

RE: *Margarethe* – Wolfe Island, ON – DOI: 6 April 2018

We have completed our investigation and assessment of the $4,854.41 claim (the "Claim") submitted by Dedicated Environmental Services Inc ("DES") pursuant to section 103 of the *Marine Liability Act*, SC 2001, c 6 (the "*MLA*")[1] as a result of its response to an oil pollution threat posed by the sailboat *Margarethe* (the "Vessel"). We find the Claim to be established, in part, in the amount of **$2,550.80**. Accordingly, we hereby make an offer of compensation (the "Offer") in that amount, plus accrued interest of $78.13, pursuant to sections 105, 106, and 116 *MLA*. The amount of the Offer plus interest comes to $2,628.93.

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The following reasons are provided to explain the disparity between the amount claimed and the amount the Administrator of the Ship-source Oil Pollution Fund (the "Administrator") finds to be established on the facts, the law, and the evidentiary record before her. For context, a brief summary of the facts surrounding the DES response and its subsequent interactions with the owner of the Vessel is provided first, followed by a description of the legal regime under which the Administrator investigates and assesses claims.

It is worth noting from the outset that the claim put forward by DES is a novel one. As such, and in spite of the fact that a relatively small amount is claimed, the reasons that follow are particularly detailed.

I – The Facts

On 22 May 2019, the Office of the Administrator received an invoice (the "Invoice") from DES indicating a total of $6,854.31 and an outstanding unpaid amount of $4,854.41. The invoice purports to cover services rendered by DES on 6 April 2018 to an unnamed sailboat, later identified as the Vessel. The Invoice is addressed to the owner of the Vessel, indicating that two payments were received from same: one in the amount of $1,500.00, on 6 April 2018; and a second, in the amount of $500.00, on 11 May 2018.

[1] All references to the *MLA* herein refer to it as it was at the time of the DES response. The substantive changes made on the coming into force of Bill C-86 thus have no application to the Claim.

On 23 May 2019, the Office of the Administrator requested further documentation from DES, including a narrative, which was provided on 6 August. Based on DES documentation, as well as some broader investigation, the Administrator has reached the following understanding of the DES response to the Vessel and the aftermath of said response.

The Canadian Coast Guard ("CCG") became aware on 5 April 2018 that the Vessel had slipped its moorings in poor conditions and drifted onto a lee shore of Wolfe Island. Damage to the Vessel's hull was suspected, and an unknown quantity of pollutants were on board, though no discharge was reported.

CCG contacted the Vessel's owner, via email, issuing him with a Notice under the *Canada Shipping* Act, *2001*, SC 2001, c 26 (the "*CSA*") and requesting that he inform CCG of his intentions by noon on 6 April 2018. On the morning of 6 April, CCG provided the owner with contact information for DES. The owner replied that DES was en route to the Vessel to remove onboard pollutants. CCG maintains that the owner engaged DES.

DES — both in its Claim documentation and in response to questions posed during the Administrator's assessment and investigation — maintains that it was not in contact with the owner until after its response, and that it was CCG who engaged its services on the morning of 6 April 2018. CCG has denied this to the Administrator. DES further maintains that it would not have undertaken work for an individual without first obtaining a deposit.

In either case, DES dispatched a vacuum truck and two personnel to the Vessel, removing almost 6,000 litres of bilge water, fuel, and engine oil and disposing of same via a subcontractor. Its on-scene response was concluded by the afternoon of 6 April 2018.

DES proceeded to contact CCG, seeking payment, the same afternoon. CCG declined to pay and directed DES to the owner. DES issued an invoice to the owner via email. The owner stated that he could not pay the entire balance immediately and proposed payments in $1,500.00 installments, paying the first such installment on 6 April 2018. He indicated that he would issue his next payment on 16 April. He did not. Instead, he began to dispute the DES invoice on that day. On 23 April, DES agreed to credit him for 480 litres of waste disposal and 5 hours' travel time. DES received $500.00 from the owner on 11 May. This was the last payment it received, despite continued efforts to collect. The owner dropped entirely out of contact with DES in March 2019.

II – The Law

Subsection 103(3) *MLA* bars a response organization, as defined in section 165 *CSA*, from filing a claim with the Administrator under subsection 103(1) *MLA*. DES is not such an organization. For this reason, *inter alia*, DES is an eligible claimant.

A claim filed with the Administrator under subsection 103(1) *MLA*, which falls in Part 7 of that Act, must be rooted in a cause of action enumerated in Part 6 of same. In this case, the Administrator finds the Claim to be broadly admissible under Part 7 via section 77 *MLA*, as the Vessel is a ship per the applicable definition in Part 6, Division 2 *MLA*.

Under section 77 *MLA*, the owner of a ship is strictly liable for costs and expenses of "measures taken to prevent, repair, remedy or minimize oil pollution damage from the ship". These

measures are subject to the test of reasonableness before they can be deemed established under paragraph 105(1)(b) *MLA* and ultimately compensated by the Administrator.

The reasonableness test consists of two parts. First, the Administrator considers whether a given measure was reasonable in light of a demonstrated pollution threat and all known circumstances at the time the measure was taken. If the Administrator finds in the affirmative, she next considers whether the cost associated with the given measure was reasonable in the circumstances.

The reasonableness test also carries with it an implicit evidentiary requirement. Costs and expenses claimed in relation to measures taken must actually have been incurred by the claimant. Where it is difficult to clearly quantify a cost or expense, the Administrator may consider compensation for economic loss. A business, for instance, may be entitled to compensation for lost profit stemming from measures it takes, provided that the business can demonstrate that it sacrificed some other profitable opportunity when it undertook the measures in question.

In addition to compensation for the foregoing, successful claimants as against the Ship-source Oil Pollution Fund are entitled to interest under section 116 *MLA*. The applicable rate is sourced from regulations made under the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) and can fluctuate quarterly. Interest runs from the date a specific cost or expense is incurred, and entitlement runs to the date the Administrator issues an offer of compensation.

Under section 4301 of the *Income Tax Regulations*, CRC, c 945 there are two prescribed rates of interest: one for corporate taxpayers, the other for non-corporate taxpayers. As DES is incorporated under the laws of Ontario, it is entitled to interest at the corporate rate, which is currently 2%.

III – Assessment Overview

We find that DES engaged in measures contemplated under section 77 *MLA* when it tended to the Vessel on 6 April 2018, regardless of whether it was engaged by the owner or by CCG. We further find that the core measures taken by DES were reasonable in light of the pollution threat posed: the Vessel was aground in poor conditions, holed, and it held an unknown quantity of pollutants. It was likely to discharge pollutants if left to the elements. But our assessment does not end here.

First, and as discussed above, only the costs and expenses actually incurred by DES are compensable in the absence of any evidence of lost business opportunities stemming from its response. In an email to the Office of the Administrator sent on 4 October 2019, DES stated that it had not suffered any lost business as a result of its response. Accordingly, reductions have been made to account for mark-up.

Further reductions have been made to account for HST, which, to the extent that it was claimed by DES, could not have been a cost or expense actually incurred. Finally, an adjustment has been made to account for amounts that DES agreed to credit to the owner on 23 April 2018.

A full breakdown of claimed amounts is provided below. We have found that the credit-adjusted amount of 23 April 2018 reflected reasonable market rates for the measures taken by DES: the

only reductions we have made are to account for claimed costs and expenses that DES did not actually incur. Our detailed reasons for these reductions are also below.

IV – Assessment Detail

The below table is a summary of the Invoice submitted to the Administrator by DES.

Table 1: Summary of Claimed Amounts

Description	Quantity	Units	Price	Total
Vacuum truck (6 hours on site; 5 hours travel)	11.0	HR	$160.00	$1,760.00
General Labour (2 x men @ 6 hours each)	12.0	HR	$60.00	$720.00
Water and light fuel disposal	6,000.0	L	$0.45	$2,700.00
Tank clean-out	1.0	EA	$385.00	$385.00
Environmental surcharge 9%	1.0	EA	$500.85	$500.85
Subtotal				$6,065.85
HST 13%				$788.56
Total				$6,854.41
Paid by owner				$2,000.00
Claimed Amount				**$4,854.41**

Credits to Owner

On 23 April 2018, DES agreed to credit the owner with 480 litres of water and light fuel disposal ($216.00), as well as 5 hours' travel time for the vacuum truck ($800.00), which was presumably billed out together with its driver. With regard to former credit, we note that DES adjusted the amount owing by the owner to reflect the quantity of fluids actually disposed. We find the resulting dollar figure reasonable. On the latter credit, we note that Bowmanville, where the DES vacuum truck discharged its contents on the evening of 6 April 2018, required substantial travel time for which we see no reasonable justification. We therefore find the post-credit dollar figure to represent a reasonable cost for reasonable usage of the vacuum truck.

The application of the foregoing is reflected in the below table.

Table 2: Adjusted Subtotal, Less Credits

Description	Quantity	Units	Price	Total
Vacuum truck (6 hours on site) [adjusted]	6.0	HR	$160.00	$960.00
General Labour (2 x men @ 6 hours each)	12.0	HR	$60.00	$720.00
Water and light fuel disposal [adjusted]	5,520.0	L	$0.45	$2,484.00
Tank clean-out	1.0	EA	$385.00	$385.00
Environmental surcharge 9% [adjusted]	1.0	EA	$409.41	$409.41
Adjusted Subtotal, Less Credits				**$4,958.41**

HST & Amounts Paid by Owner

Businesses collect HST on top of payments (and partial payments) for goods and services they provide, regularly remitting the HST amounts collected to the Canada Revenue Agency. Here,

the owner of the Vessel paid DES a total of $2,000.00, $230.09 of which represented HST to be remitted. The remaining $1,769.91 represented revenue for DES. As it received no further payments from the owner of the Vessel, DES incurred no further obligation to remit HST as a result of its response. As such, the Administrator cannot compensate any amount claimed by DES with respect to HST because the claimed cost or expense was not incurred by the claimant.

As set out above in Table 2, we have found that DES was seeking a subtotal of $4,958.41 from the owner of the Vessel, taking into account the credits it applied on 23 April 2018. Applying the $1,769.91 in revenue that DES extracted from the owner of the Vessel, we are left with a subtotal of $3,188.50: DES was seeking that amount from the owner, plus applicable HST, when it filed its Claim with the Administrator.

Mark-up

As mentioned, DES has not submitted any evidence demonstrating that it suffered a lost business opportunity as a result of its response to the Vessel. Indeed, it has stated that there was no such loss. Accordingly, we must make reductions to the claimed amounts to account for mark-up, which we have found to stand at approximately 25% for the particular DES services claimed for.

When asked by the Office of the Administrator to explain its 9% environmental surcharge, DES replied, by email on 4 October 2019, that the surcharge was designed to keep base rates competitive while allowing for safe and environmentally responsible operations in the face of fluctuating fuel and compliance costs.

It is clear to the Administrator that the environmental surcharge does not represent a tax. Instead, it appears to represent a buffer that allows DES to quote competitive base rates in an uncertain market, while safeguarding its desired profit margins. We therefore find that the environmental surcharge represented a mix of overhead and profit, and we have accordingly treated it in the same way as the other purported costs and expenses claimed for, making a single, global reduction to the subtotal that DES ultimately sought from the owner of the Vessel to account for mark-up.

DES subcontracted the water and light fuel disposal, and most probably the tank clean-out service too. Because DES declined to provide the subcontractor's invoice or invoices, we are left to infer that these charges were subject to secondary mark-up by DES.

In light of the above findings on the environmental surcharge and the subcontracted work, we can simply reduce the $3,188.50 subtotal that DES sought from the owner of the Vessel to account for mark-up, which yields an actual cost to DES of $2,550.80. It is this amount which the Administrator finds to be established.

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In considering this Offer, kindly note the following options and time limits set out in section 106 *MLA*.

You have 60 days upon receipt of this Offer to notify the undersigned whether you accept it. You may tender your acceptance by any means of communication by 16:30 Eastern Time on the final day allowed. If you accept this Offer, payment will be directed to you without delay. Upon

payment, the *MLA* provides that the Administrator becomes subrogated to your legal rights with respect to this matter, to the extent of her payment.

Alternatively, you have 60 days upon receipt of this Offer to appeal its adequacy to the Federal Court. If you wish to appeal the adequacy of the Offer, pursuant to Rules 335(c), 337, and 338 of the *Federal Courts Rules*, SOR/98-106 you may do so by filing a Notice of Appeal in Form 337. You must serve it upon the Administrator, who shall be the named Respondent. Pursuant to Rules 317 and 350 of the *Federal Courts Rules*, you may request a copy of the Certified Tribunal Record.

Lastly, the *MLA* provides that if no notification is received by the end of the 60-day period, you will be deemed to have refused the Offer. No further offer will issue.

Yours sincerely,

Mark AM Gauthier, BA, LLB
Deputy Administrator, Ship-source Oil Pollution Fund