

## OFFER LETTER

2019-12-24

Ottawa, Ontario  
SOPF File: 120-799-C  
CCG File: n/a

### BY MAIL and EMAIL

Director, Operational Business  
Canadian Coast Guard  
200 Kent Street (5n177)  
Ottawa, Ontario K1A 0E6

**RE: S/V BIG KAHUNA– Port Hardy, B.C.**  
**Incident date: 2017-11-29**

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### SUMMARY AND OFFER

This letter responds to a claim submitted by the Canadian Coast Guard (the “CCG”) with respect to the vessel S/V BIG KAHUNA. The vessel was involved in incident on or about November 29, 2017, at a harbour in Port Hardy, B.C.

On September 24, 2019, the Office of the Administrator of the Ship-source Oil Pollution Fund (the “Fund”) received the CCG’s claim for costs and expenses related to the incident. The Fund has reviewed the claim and reached a determination. This Offer Letter explains the determination and advances an offer of compensation pursuant to sections 105, 106 and 116 of the *Marine Liability Act* (the “MLA”).

The Fund has determined that the CCG’s claim should be allowed, in part. The amount of \$7,346.20 (the “Offer”) is offered with respect to this claim.

The Offer comprises the amount of \$6,811.45 for costs and expenses, plus the amount of \$534.75 for accrued interest.

The reasons for the Offer are set forth below.

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### THE CLAIM SUBMISSION

The CCG claim submission includes a narrative that describes certain events relating to the incident involving the S/V BIG KAHUNA. The submission also includes a summary of the costs and expenses claimed, backup documents related to some of those claimed costs and expenses, documentation from contractors, and a marine survey report.

To the extent that those documents are relevant to the Fund’s determination, those contents are reviewed below.

### The narrative

The narrative provided by the CCG in its submission sets out a description of the incident involving the S/V BIG KAHUNA.

On November 29, 2017, CCG personnel were made aware of a vessel in danger of sinking in Port Hardy, B.C. The vessel, identified as the S/V BIG KAHUNA, was reportedly taking on water. CCG personnel from the local Lifeboat Station were dispatched to carry out a preliminary assessment of the situation.

Upon arriving in Port Hardy, the personnel observed a sailboat sitting low in the water. Several feet of seawater were observed inside the vessel. The water appeared to be contaminated by oily debris. The CCG personnel attending the scene were able to pump water from the vessel without discharging oily pollution into the marine environment.

CCG personnel then investigated for a possible owner for the S/V BIG KAHUNA. Inquiries were made with the local harbour master. Reportedly, the harbour master advised that the vessel had been abandoned with no known owner.

The CCG determined that a further response was warranted and sent crew from Victoria to Port Hardy to assess the vessel and the environmental threat. Those personnel attended on December 5, 2017 at Port Hardy, along with a Marine surveyor from Frykas Marine services.

The narrative reports that an effort was made to quantify the oil pollution on board the vessel, but that the effort was largely unsuccessful. The vessel itself was judged to have no residual value.

According to the narrative, the CCG made a decision to remove the vessel from the marine environment and destruct it on site. This decision was taken based on: the state of the vessel, the water ingress, the confirmed and unconfirmed oil pollution aboard the vessel and the saturated oily vessel itself.

On December 6, 2017, the boat was towed to “Mill and Timer Products”, a log sort, where the vessel was to be hauled out of the water. The vessel was then pulled from the water using a dozer boat.

After the S/V BIG KAHUNA was removed from the environment, CCG personnel removed oily waste from the vessel using fuel transfer pumps. The narrative reports that although CCG personnel were able to remove the bulk oil pollution from the vessel, residual oils remained coating the vessel’s inside and bilge area. As well, oil remained in the vessel’s engine.

The CCG made a decision to destruct the vessel at site because the vessel constituted an oily waste.

### The costs and expenses summary

The submission provided by the CCG includes the following summary of expenses incurred:



The surveyor was unable to verify the proper identity of the S/V BIG KAHUNA. He noted that there was a metal plaque at the companionway which shows a serial number of some sort: 6K10188. However no ownership or licensing documents were found aboard. No license numbers were displayed on the hull. No official numbers could be located at all.

The surveyor concluded that the vessel was in poor condition, consistent with the reports that it had been floating derelict at the Port Hardy Harbour for several years.

The exterior condition of the vessel was poor, with the composite material degrading in many places. The interior of the vessel was a mess, with personal belongings dislodged and strewn throughout the vessel. The GRP had pulled away from the materials it was supposed to sheath in many places, and mold and other fungi were observed in multiple locations.

The marine survey included limited commentary on the oil threat posed by the vessel. The marine survey noted the presence of a 3-cylinder diesel engine, as well as one 20-gallon aluminum fuel tank. From the survey report, it is not clear whether the fuel tank was emptied during the marine survey (there is no mention of the quantity of liquid removed) or whether it had already been emptied at the time the survey was conducted.

The survey report includes a conclusion that “The vessel, were it not removed from the harbour would in the surveyor’s opinion be an ongoing pollution source.” This conclusion is bare. It is not supported by photographs of oily pollution remaining aboard the vessel, or by descriptions of observations of such oily pollution.

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## **FINDINGS OF THE FUND**

### *Eligibility of the claimant*

The Fund has determined that the CCG is an eligible claimant for the purposes of s. 103 of the MLA. It is further determined that some of the claims submitted by the CCG are eligible for compensation from the Fund.

The Fund has further determined that this incident occurred in the territorial sea of Canada.

### *The incident*

The S/V BIG KAHUNA was in distress on November 29, 2017. The vessel was unstable and sitting low in the water, likely as a result of years of rain accumulation and neglect as it sat derelict in the harbour at Port Hardy, B.C.

The S/V BIG KAHUNA had not sunk, but the marina operator reported to CCG that it was sinking slowly. The observations included in the CCG submission to the Fund suggest that the report to the CCG was accurate.

The Fund accepts that the S/V BIG KAHUNA was at risk of sinking on November 29, 2017.

*The pollution threat posed and no owner was available*

In this case, it does not appear that there was any release of oil into the natural environment. The CCG response, and the submitted expenses, may still be compensable as monitoring and other measures taken in anticipation of a discharge of oil, as referred to at s. 77(1)(b) of the *MLA*.

The Fund notes that the subject vessel was a sailboat. While the primary means of propulsion for a sailboat is wind, the Fund acknowledges that it can be reasonable to treat a sailboat in distress as a potential threat to the marine environment. As is the case here, sailboats often have additional means of propulsion which require oil based fuel and lubricants. They may also be equipped with generators which run on oil based fuels. In this case, the CCG reports actually observing oily material in the water accumulating inside the vessel. The Fund concludes that it was reasonable for the CCG to consider that the S/V BIG KAHUNA could be an oil pollution threat.

On the facts, an issue arises as to whether the S/V BIG KAHUNA remained a pollution threat at all times the CCG incurred expenses to respond to the incident. As a result of the initial CCG response, on November 29, 2017, significant quantities of water were removed from the vessel. At a factual level it is not clear whether the water had accumulated as a result of rainwater accumulating and making the vessel unstable to the point it could take on seawater, or whether seawater was somehow infiltrating the vessel and thereby causing it to sink.

The Fund notes, however, that no reasonable inspection of the vessel could be made while the S/V BIG KAHUNA remained in the water owing to a persistent amount of water in the bilge as well as the deranged and decrepit state of the vessel's interior. In the circumstances, it was reasonable for the CCG to presume that the S/V BIG KAHUNA remained at risk of sinking after November 29, 2017. Coupled with the observation of some oil pollution on board, in this case it was reasonable to continue the oil pollution threat response.

At the time the CCG incurred most of the expense of the response, the quantity of oil onboard the S/V BIG KAHUNA could not be ascertained. The Fund considers that the steps taken by the CCG, up to and including the vessel's removal from the water, were reasonable in the circumstances and proportional to risk of limited oil pollution posed by a sailboat.

*Removing the vessel from the water*

The Fund agrees that the CCG decision to remove the vessel from the water was a reasonable measure taken in anticipation of a release of oil.

The CCG attempted to inspect the S/V BIG KAHUNA where it floated in the water, but could not make a proper inspection because of the poor condition of the interior of the vessel and the continued presence of water in the bilge areas of the vessel. Removing the vessel from the water in order to better access the vessel and remove oil pollution aboard was, in the circumstances, reasonable.

*The survey report, the decision to deconstruct and other supporting documents*

The Fund does not accept that the survey report in this case was one obtained because of the risk of oil pollution.

The survey report itself says little or nothing about oil or the threat of oil pollution. The Fund notes that while the author of the survey report included a conclusion that the vessel would pose an ongoing environment threat, that conclusion was:

- 1) bare, with few supporting observations, and
- 2) did not explicitly identify that the environmental threat posed was an oil threat, as opposed to a threat to marine navigation and safety.

Considering the relatively small size of the fuel tank onboard and the small size of the engine, as well as the fact that the vessel was a sailboat, and that the survey report includes no observations describing oil onboard the vessel, the Fund does not accept that this survey report was a measure taken with respect to an oil pollution incident.

The Fund notes as well that the report author made no effort to inventory the oil pollution removed from the vessel or to document and photograph oil contamination of the vessel, if such contamination existed. The Fund concludes that the marine survey was obtained for purposes other than responding to an oil pollution threat.

Similarly, the Fund is unable to accept that the S/V BIG KAHUNA remained an oil pollution threat after oil was pumped from it while it sat on land. None of the photographs or records indicate that the hull of the vessel was saturated with oil, as was indicated in the narrative submitted with the claim. The survey report makes no mention of oil contamination despite detailing many problems with the hull of the vessel. No inventory was taken of the oil removed from the vessel, but given the size of the fuel tank aboard those amounts must be small. The Fund does not accept that disposal of the vessel was, itself, a reasonable measure taken in response to an oil pollution threat.

However, the Fund notes that the total cost for the towing, removal of the S/V BIG KAHUNA from the water to complete oil removal and disposal of the vessel, was less than \$1,750. The Fund accepts, on the particular facts of this case, that the cost of removing all oil from the vessel while it remained in the water may have been higher than the cost to remove the vessel from the water to remove the oil, and then dispose of the vessel. In this specific case, the Fund accepts that removing the vessel to complete oil removal, followed by disposal of the vessel, was as a whole a reasonable and proportionate measure taken to address the threat of oil pollution.

*The provenance of the S/V BIG KAHUNA*

As part of its investigation, the Fund sought to establish the provenance of the subject vessel.

The Fund obtained from Transport Canada the historical transcript for the registration of a vessel named the BIG KAHUNA. The vessel behind the official registration, bearing the official number 0822589, was originally named DAS BOOT X. That vessel was a 22m long aluminum

hulled craft, with twin screws powered by twin gasoline powered engines. The vessel, built in 1997 by Somerset Houseboats, was 4.8 m at the beam. The registration for this vessel was closed in March of 2018 (shortly after the subject incident), although the Fund notes that the basis for the closure was that the registered vessel had been sold in 2006.

None of the biographical details for registration number 0822589 match to the S/V BIG KAHUNA found by the CCG in Port Hardy. At a most basic level, the S/V BIG KAHUNA is a sailboat with a composite hull, while the registered vessel is a motor yacht with an aluminum hull. None of the dimensions match either. The S/V Big Kahuna encountered by the CCG in Port Hardy is not the vessel registered with Transport Canada.

The Fund contacted the manager of the Harbour at Port Hardy, and was provided with biographical details and contact information for the owner of the S/V BIG KAHUNA, who had apparently been paying moorage fees for the vessel up until June of 2014, at which time all contact with the owner of the vessel ended.

The Fund concludes that the vessel which the CCG encountered had never been properly registered and that its owner had abandoned it more than three years prior to the subject incident. The Fund has used the name S/V BIG KAHUNA in these reasons because that is the only identification available for the vessel encountered by the CCG, and expressly notes that the subject vessel is not the one that was registered under that name with Transport Canada.

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### **CLAIM AND OFFER DETAILS**

The CCG submission broke its claim down into several categories. This section of the offer letter reviews each of those categories of claim in detail, and provides reasons as to why certain portions of the claim have been allowed or disallowed.

*Schedule Two – Contract Services*

*Claim: \$4,649.82*

The CCG retained three contractors with respect to the S/V BIG KAHUNA incident: L. Matkovich Contracting (\$715.01 to dewater the vessel), Fox's Disposal Services (\$1,744.70 for boat removal and demolition) and Frykas Marine Services Ltd. (\$2,190.11 for the marine survey).

L. Matkovich provided a boom boat on December 5, 2017, which was used to dewater the S/V BIG KAHUNA to allow a marine survey as well as the removal of fuel from the vessel's oil tank by CCG personnel. This contractor provided three personnel plus a boom boat for this work. The total expense was \$715.01. Removing water from the vessel before the vessel was removed from the harbour to complete oil removal was prudent and the expense incurred is modest. The Fund accepts this was a reasonable expense in response to an anticipated release of oil.

This portion of the claim is allowed in its entirety.

Fox's Disposal Services were hired to tow the vessel from the harbour, remove it from the water, which allowed the CCG to complete oil removal, and then to dispose of the vessel.

The Fund notes its prior finding that it has not been established that the S/V BIG KAHUNA continued to pose an oil pollution threat after remaining oil was removed from it. However, the Fund also concluded that the total expense for towing, removal and destruction was so low (\$1,744.70) that it is likely less than the cost to complete oil removal while the vessel sat in the water. In the specific circumstances of this case, the Fund accepts that the Fox Disposal Services expense, as a whole, was reasonably incurred in response to an anticipated release of oil.

This portion of the claim is allowed in its entirety.

Frykas Marine Services Ltd. attended at Port Hardy (from Victoria) on December 5, 2017 to survey the S/V BIG KAHUNA. The CCG was billed \$2,190.11 for this service.

The Frykas survey and report itself cost only \$500. The remainder of the fee charged was for travel expenses and taxes. The Fund questions whether a marine surveyor closer to Port Hardy could not have been used instead.

In any event, the Fund does not accept that the purpose of the survey was to evaluate the threat of oil pollution posed by the vessel, and further does not accept that the survey report expense was reasonably incurred as a response to an oil pollution incident.

The survey report was not focused on oil pollution. No inventory of oil was carried out. No photographs or observations of the oily condition of the vessel were recorded. While the report includes a conclusion that the S/V BIG KAHUNA would pose an environmental threat if left in the water, that conclusion was both unsupported by documented observations and not actually specific to a threat posed by oil.

The Fund considers that the CCG had sufficient evidence that the vessel posed a threat of oil pollution before the survey was carried out, and that the survey report obtained did nothing to further the understanding of the threat. In light of that, the Fund concludes that in this case the survey carried out was not a reasonable measure taken to respond to a threat of oil pollution.

This part of the claim is disallowed in its entirety.

*Schedule Three – Travel*

*Claim \$969.48*

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The CCG sent two responders to Port Hardy after learning of the incident involving the S/V BIG KAHUNA. This was appropriate to facilitate the measures taken in response to an oil pollution incident. The total travel expense sought is \$969.48.

The documentation submitted along with this claim included a summary of the individual travel charges, as well as individual expense report statements and hotel receipts. The amounts appear to be in compliance with the applicable Treasury Board Travel Directives, which are considered a useful benchmark for reasonableness.

This portion of the claim is allowed in its entirety.



Schedule Four – Salaries for Full Time Personnel

Claim \$1,945.35

The coast guard has claimed for the salary paid to two personnel for this incident.

It was reasonable to send two persons in response to the report the CCG received in respect of the S/V BIG KAHUNA. The personnel sent carried out numerous tasks at the scene including dewatering and pollution removal, supervision of the removal of the vessel, ultimate removal of remaining oil and handling the disposal of the vessel. Significant travel (from Victoria to Port Hardy) as necessary to carry out these tasks, which the Fund accepts were measures reasonably taken in response to an oil pollution incident.

This portion of the claim is allowed in its entirety.

Schedule Five – Overtime for Full Time Personnel

Claim \$783.44

The CCG claimed for overtime paid to two personnel for this incident.

The documentation included with the CCG submission includes calendars and daily personnel logs detailing what work was done. The documentation explains why overtime was unavoidable. The Fund accepts that given the response required, and the distance from the CCG base, the overtime submitted was necessarily incurred in order to carry out reasonable measures taken in response to an oil pollution incident.

This portion of the claim is allowed in its entirety.

Schedule 11 - Pollution Counter-Measures Equipment (PCME)

Claim \$147.21

The CCG personnel attending at the scene of the S/V BIG KAHUNA incident used a Pollution Response Vessel 1 (“PRV 1”) class vessel for one day. The amount sought is consistent with published rates for this class of vessel. The vessel was used during dewatering and the deployment of sorbent materials.

The Fund concludes that the use of the PRV 1 vessel was reasonable as part of the measures taken in response to an oil pollution incident.

This portion of the claim is allowed in its entirety.

Schedule 12 – Vehicles

Claim \$440.72

The CCG personnel had to travel from Victoria to Port Hardy to respond to this incident. This claim is comprised of claims for \$67.56 per day for a vehicle, plus \$0.22/km travelled.

The CCG submission included a daily trip report log extract. The Fund has reviewed this document and considers that the amount claimed is reasonable, and that this expense was necessary as part of measures taken to respond to an oil pollution incident.

This portion of the claim is allowed in its entirety.

The Fund and the CCG have previously agreed to increase payments on CCG claims to account for administrative overhead and claim preparation expenses. The rate previously agreed upon is 2.53%.

The CCG has claimed for admin fees using a rate of 3.09%. There are discussions underway to modifying the admin rate, but no agreement has been reached. Using the established rate, the admin charge is \$65.54.

This portion of the claim is allowed, in part, in the amount of \$65.54.

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**OFFER SUMMARY AND CLOSING**

The following table is provided to summarize the claimed and allowed expenses with respect to the CCG claim for the S/V BIG KAHUNA incident:

*Table 1 - Summary of expenses claimed and allowed*

Schedule	Claim	Offer	Comment
Contract Services	\$4,649.82	\$2459.71	Disallowed vessel survey costs
Travel	\$969.48	\$969.48	
Salaries	\$1,945.35	\$1,945.35	
Overtime	\$783.44	\$783.44	
PCME	\$147.21	147.21	
Vehicles	\$440.72	440.72	
Administration	\$80.05	\$65.54	
<b>Total</b>	<b>\$9,016.06</b>	<b>\$6,811.45</b>	

The amount of the Offer is \$7,346.20.

The Offer comprises the amount of \$6,811.45 for costs and expenses, plus the amount of \$534.75 for accrued interest.

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In considering this Offer, please observe the following options and time limits that arise from section 106 of the *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.

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.

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.

Finally, where a claimant accepts an offer of compensation from the Fund, the Fund becomes subrogated to the claimant's rights with respect to the subject matter of the claim. The claimant must thereafter cease any effort to recover for its claim, and further it must cooperate with the Fund in its subrogation efforts.

Yours sincerely,

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