



OFFER LETTER

Ottawa, 10 February 2023
SOPF File: 120-927-C1-C
CCG File:

VIA EMAIL

Acting Senior Director of Incident Management
Canadian Coast Guard
200 Kent Street (5N167)
Ottawa, Ontario K1A 0E6

RE: MV *Noelani* – Sand Heads, Richmond, British Columbia
Incident date: 2020-08-09

SUMMARY AND OFFER

- [1] This letter responds to a submission from the Canadian Coast Guard (the “CCG”) with respect to a pleasure craft known as the *Noelani*, which sank at Sand Heads, near Richmond, British Columbia, on or about 9 August 2020 (the “Incident”).
- [2] On 29 July 2022, the office of the Administrator of the Ship-source Oil Pollution Fund (the “Fund”) received the claim submission from the CCG. The submission advanced claims under sections 101 and 103 of the *Marine Liability Act*, SC 2001, c 6 (the “MLA”) totaling \$44,871.15 for costs and expenses arising from measures taken in response to the Incident.
- [3] The submission has been reviewed and a determination with respect to its claims has been made. This letter advances an offer of compensation to the CCG pursuant to sections 105 and 106 of the MLA.
- [4] The amount of **\$18,901.64** (the “Offer”), plus statutory interest to be calculated at the time the Offer is paid, in accordance with section 116 of the MLA, is offered with respect to this claim. The reasons for the Offer are set forth below, along with a description of the submission.

THE SUBMISSION RECEIVED

- [5] The submission includes a narrative that describes events relating to the Incident. It also includes a summary of the costs and expenses for which the CCG seeks reimbursement and corroborating documents. Where relevant to the Offer, they are reviewed below.

Narrative and photographs

- [6] According to the narrative, on 9 August 2020 at 15:35, the CCG Environmental Response (“ER”) Duty Officer in the Vancouver, British Columbia area received a report that a 41-foot pleasure craft later identified as the *Noelani* had struck a buoy at Sand Heads, south of Richmond. The vessel partially sank in shallow water.
- [7] The Incident was initially treated as a search and rescue case. A vessel of opportunity operated by Mad Props Marine Ltd. (“Mad Props”) towed the *Noelani* into shallower waters after the persons on board were rescued.
- [8] At this stage, CCG ER became involved. The Mad Props vessel reported at 15:58 that no oil was visible in the water at that time, though there were an estimated 40 gallons of diesel on board the *Noelani*.
- [9] At 16:48, CCG ER personnel spoke with the owner of the *Noelani*, who reported that approximately 100 gallons of fuel were on board the vessel, which was powered by two diesel engines, plus an “unknown quantity of engine and hydraulic lube.” The owner informed the CCG that he lacked the resources and knowledge to respond adequately. He also stated that his vessel was not insured.
- [10] At 17:15, CCG ER formally took over the response operation.
- [11] By 19:45, the Mad Props vessel had deployed 40 feet of sorbent boom around the *Noelani*.
- [12] At 20:15, the CCG dispatched a hovercraft due to the shallow water around the *Noelani*. The crew deployed 300 feet of containment boom which was left in place around the vessel overnight. No further action was taken on 9 August 2020 due to worsening weather.
- [13] On 10 August 2020 at 09:00, Mad Props reported that the containment boom had broken free on one end in the night, presumably due to strong currents and winds. In addition, the *Noelani* appeared to be breaking apart and sinking further. An oil sheen was visible.

Figure 1 – Photograph from the narrative showing containment boom failure.

- [14] Due to the owner’s inability to undertake an appropriate response, the CCG contracted with Mad Props to have the *Noelani* raised and removed, but weather conditions caused operational delays.

- [15] An overflight was conducted by the National Aerial Surveillance Program at an unspecified time. The results showed an estimated 5.1 litres of product observed in the water, 85% of which was deemed recoverable.
- [16] The CCG ER Duty Officer requested and received a list of sensitivities in the area from Environment Climate Change Canada's ("ECCC") Resource at Risk Maps. Sensitivities in the area were noted as environmental (designated wetland area, seabird colonies) and socio-economic (Indigenous lands).
- [17] On 11 August 2020, salvage operations were successful in raising and removing most of the *Noelani* (bow, keel, portions of hull, fuel tanks, batteries, wiring, exhaust), which had broken up. These recovered parts were barged to Steveston Harbour for disposal. However, the vessel's two engines remained underwater. The narrative notes that "the lube oil [in the engines] was deemed a high threat due to it being a persistent lube oil."
- [18] The CCG then deployed a Pollution Response Vessel, Class II ("PRV II") with three personnel on board to monitor the contractor's work and recover the containment boom.
- [19] On 12 August 2020, there were no on-water operations. ECCC provided a recommendation that both the submerged engines be removed "to fully mitigate the ongoing threat to the marine environment."
- [20] On 13 August 2020, salvage operations resumed to recover the two engines. To "ensure an appropriate response," a CCG ER crew of four were dispatched in a CCG vessel (PRV III).
- [21] Mad Props subcontracted divers to locate the submerged engines and assist with their removal.
- [22] By 16:00, the divers had located and tagged both engines. Removal was delayed until 20:00 due to tidal conditions. At that time, the same crew returned to the site to enforce the emergency zone and complete the salvage operation.
- [23] By 21:30, both engines were removed from the marine environment.
- [24] On 20 August 2020, Mad Props fully deconstructed and disposed of the remains of the *Noelani*. Deconstruction was delayed due to the contractor's other job commitments.

Cost summary

- [25] The CCG submission includes a summary of claimed expenses claimed as follows:

		<u>SCH</u>
MATERIALS AND SUPPLIES	-	1
CONTRACT SERVICES	33,006.75	2
TRAVEL	72.15	3
SALARIES - FULL TIME PERSONNEL	2,840.66	4
OVERTIME - FULL TIME PERSONNEL	3,205.92	5
OTHER ALLOWANCES	-	6
SALARIES - CASUAL PERSONNEL	-	7
SHIPS' COSTS (EXCL. FUEL & O/T)	-	8
SHIPS PROPULSION FUEL	-	9
AIRCRAFT	-	10
POLLUTION COUNTER-MEASURES EQUIPMENT (PCME)	5,604.73	11
VEHICLES	65.57	12
ADMINISTRATION	75.38	13
	<hr/>	
TOTAL CCG COST OF INCIDENT	<u>\$ 44,871.15</u>	

Figure 2 – Screen capture of CCG summary of costs and expenses by category.

Documentation

- [26] CCG internal documentation provided includes daily logs and internal financial coding documentation. The CCG claims \$2,840.66 in regular salary costs and \$3,205.92 in overtime costs for seven of its personnel. The CCG’s claim for pollution counter-measures equipment comprises costs associated with the use of two PRVs and 300 feet of containment boom. The CCG’s claim for vehicle costs of \$65.57 is supported with a cost summary indicating that a CCG truck was used on 13 August 2020. No vehicle log is provided, but the CCG advances no claim for mileage.
- [27] Contractor documentation is supported by invoices: a primary invoice (Mad Props) and two subcontractor invoices, issued by TKD Trading Ltd. (“TKD”) and Freedom Diving Systems Ltd. (“Freedom Diving”). No statement of work or written contract is included.

INVESTIGATION AND FURTHER CCG SUBMISSIONS

- [28] On 31 August 2022, the Fund contacted the CCG via email with several inquiries. The CCG responded on 13 September 2022. The relevant inquiries and responses are below.

Fund: Please provide copies of the situation reports specific to the closing of the original Search and Rescue Incident including the location of the vessel, state of the vessel and crew onboard the vessel prior to handing the incident over to the ER group. In addition, please provide the subsequent ER situation reports.

CCG: The [CCG] does not distribute the situation reports externally. The content within SITREPs does not evolve at the same rate as the incident and our response efforts; the information is therefore preliminary. As such, we are unable to provide the item requested, however, we can confirm the following:

Location of vessel: Fraser River

State of vessel after SAR left: Mad Props Marine (VOO) said the vessel is discharging diesel and took it upon themselves to boom the vessel. When the CCG-ER employee arrived on the scene on August 9 for the initial assessment, a diesel odour was present and containment boom had been deployed before the CCG asset was re-tasked to a SAR call.

Fund: The weather was known to be deteriorating, please address why the vessel was not towed to shore on August 9th given that Mad Props Marine (who Coast Guard contracted) were on scene and hooking up the tow? Was this a decision of Environmental Response or Search and Rescue.

CCG: Mad Props Marine was a VOO (Vessel of Opportunity) and had not been tasked by CCG ER until August 10, 2020, at 09:15hrs. On August 9, 2020, Mad Props Marine (VOO) who happened to be in the area, towed the vessel into shallower waters on their own accord for easier salvage in the event it sunk and provided CCG pollution assessments. The reason CCG did not task Mad Props Marine to “tow it to shore”. All decisions by Mad Props were correct and CCG ER would have directed them to stop had any of the volunteered decisions been incorrect. Mad Props was NOT under contract with CCG ER (therefore NOT taking direction) until 2020.08.10 @0915hrs. The reason CCG ER did not contract Mad Props right away was for 2 reasons: Duty Officer was still determining the owner’s intentions as the owner was liable under the MLA and had responsibilities under [the *Canada Shipping Act, 2001*] and Duty Officer was able to task a CCG asset to provide an assessment.

Fund: Please provide a copy of the rationale and recommendation by ECCC to remove both engines from the marine environment.

CCG: CCG ER had requested from ECCC a sensitivities map of the area and spill trajectory, for 100 gallons of diesel and 16 litres of lube oil for the period of 22:00 hours August 10, 2020. ECC response email follows: “The engines which were part of *Noelani* have not been removed from the original grounding site and therefore remain a threat to pollute. It is ECCC’s opinion that even low concentrations of hydrocarbons (i.e., rainbow sheen) from the engines or other machinery may harm the aquatic environment and therefore the removal of the threat(s) is strongly recommended.”

- [29] In addition, the CCG provided a copy of the above-referenced email from ECCC dated 10 August 2020. That email references “pollution report number 0690-2020 POL-ROC-SUNK P/C, Fraser River – Update #8 2020-08-11 17:30PDT.”
- [30] The Fund responded to the CCG on 1 September 2022 with a request to speak with one of the ER personnel who had participated in the response. A follow-up was sent on 7 September, but no substantive response was received from the CCG.

DETERMINATIONS AND FINDINGS

Identification and description of the *Noelani*

- [31] The vessel, identified as the *Noelani*, was a 1963-built White Monk wooden cabin cruiser of 24.25 gross tons and roughly 41 feet in length. It was registered in Canada under the official number 319502 until 2011, at which time its registration certificate was cancelled. According to the Registry, the vessel was powered by two gasoline engines.

The CCG submission presents potentially eligible claims

- [32] The Incident resulted in oil pollution damage within the territorial seas or internal waters of Canada, as well as in costs and expenses to carry out measures to address that oil pollution damage and mitigate further damage. As a result, claims arising from the Incident are potentially eligible for compensation.
- [33] The CCG is an eligible claimant for the purposes of section 103 of the MLA.
- [34] The submission was received within the limitation periods set out under subsection 103(2) of the MLA.

- [35] Some of the claimed costs and expenses arise from what appear to be reasonable measures taken to “prevent, repair, remedy or minimize” oil pollution damage from a ship, as contemplated under Part 6, Division 2 of the MLA. Alternatively, those costs and expenses arise from “preventive measures”, as contemplated under the International Convention on Civil Liability for Bunker Oil Pollution Damage. In either case, some of the claimed costs and expenses are potentially eligible for compensation.
- [36] Accordingly, the submission presents claims that are potentially eligible for compensation under section 103 of the MLA.
- [37] The extent to which the measures taken were reasonable must be evaluated.

Findings of the investigation and assessment

*The facts of the Incident as set out by the CCG are generally accepted,
with important caveats*

- [38] The CCG included with its submission a narrative, supporting documents, and photographs that set out the facts of the Incident and its response thereto. The CCG also provided some supplementary information at the request of the Fund. The descriptions of material events contained in the submissions are accepted as generally accurate.
- [39] The CCG’s submissions are sparse, and some important details are missing. Compounding this, the CCG has declined to provide documents requested by the Fund.
- [40] Where a claimant declines to provide available documents which could explain discrepancies, it is not appropriate to draw inferences which are favourable to the claimant to overcome gaps in the record.

The initial response to the Incident was reasonable

- [41] The CCG’s email to the Fund on 13 September 2022 indicates that it was operating on the understanding that the *Noelani* contained approximately 100 gallons of diesel fuel, as well as 16 litres of lubricants. The Incident occurred in an environmentally sensitive estuary, and these volumes of oil, though small, justified some level of intervention. The owner was unable to carry out an effective response, so the CCG stepped in.

[42] Broadly, the CCG's measures taken up to and including 11 August 2020 are accepted as reasonable and are established. Those measures include engaging Mad Props, which had already been on site, to respond and to remove the vessel. The measures taken during that period also include the boom deployment around the partially sunken vessel.

Measures taken after 11 August 2020 are not compensable on the evidence submitted

[43] The principal pollution threat was mitigated by 11 August 2020. This conclusion is bolstered by the decision of response personnel to remove all containment boom while the engines were still submerged. The costs incurred from the response efforts implemented after that date, in particular the considerable expenses to recover the engines which had been submerged for days, are not established in the evidence.

[44] In an effort to substantiate the decision to recover the engines, the CCG narrative cites a recommendation provided by ECCC. The email is not accepted as sufficient to justify the costs and expenses incurred. The CCG did not submit the pollution report which was provided to ECCC, and which presumably forms the basis for the advisory opinion. It is not established that ECCC was aware of the quantity of oil at issue nor of the expected costs of retrieving the engines.

[45] Costs for deconstruction and demolition are not compensable in this case. They were not incurred as a response to the oil pollution threat.

CLAIM AND OFFER DETAILS

[46] The CCG presented its costs and expenses across seven schedules. To the extent that reasons are not already set out in this letter, explanations are provided below as to why each portion of the claim has been allowed or disallowed.

Schedule 2: Contract Services

Claimed: \$33,006.75

[47] Most of the claimed contract services expenses arise from services rendered by the primary contractor, who stabilized the vessel, removed it from the marine environment, stored it temporarily, and finally had it deconstructed. These costs are detailed among three invoices. Each cost amount is analyzed for reasonableness below.

[48] The first invoice is for Mad Props' primary and subcontracting services. Refer to Table 1 below for a summary.

Contract Services (Mad Props Invoice 1174)			
Activity	Rate	Quantity	Amount Claimed
Emergency / spill response rate	\$400.00	2	\$800.00
Spill sorbent socks	\$300.00	1	\$300.00
Services (tug, salvage, barge, etc.)	\$13,070.00	1	\$13,070.00
Services (engine recovery, divers, excavator, etc.)	\$12,355.00	1	\$12,355.00
Services (demolition, disposal)	\$4,910.00	1	\$4,910.00
GST	5%		\$1,571.75
Total			\$33,006.75

Table 1 – Breakdown of costs claimed for total contract services, including primary contractor and subcontractor services as recorded in Schedule 2.

- [49] The amount offered for claimed contracting costs is **\$13,070.00**. The reasoning for this offered amount is as follows.
- [50] The \$800 claimed for emergency/spill response and the \$300 for spill sorbent socks are not established because they were incurred prior to contracting with the CCG. Per Part 6 of the MLA, these costs are rejected as Mad Props incurred these costs prior to being directed to take measures.
- [51] The amount of \$13,070.00 claimed for Services (tug, salvage, barge, etc.) is accepted. This amount covers the costs incurred through 11 August 2020 but excludes the costs incurred after that date.
- [52] The amount of \$12,355.00 claimed for Services (engine recovery, divers, excavators, etc.) is not accepted as it is not established in the evidence presented in the claim submission.
- [53] The amount of \$4,910.00 claimed for Services (demolition, disposal) is not accepted as it is distinguishable as wreckage operations, not oil pollution counter measures.

Schedule 3: Travel

Claimed: \$72.15

- [54] Without any specifics on the CCG’s claimed travel costs beyond the name of the employee with whom they are associated, and without any indication that that employee was away from the usual place of work for any considerable period, the

CCG's claim under this Schedule is not established. The costs claimed for travel are rejected.

Schedules 4 and 5: Salaries and Overtime – Full Time Personnel Claimed: \$6,046.58

- [55] The amount claimed for CCG's regular salary costs is \$6,046.58. For the reasons previously noted, only the amounts claimed for 9-11 August 2020 are accepted. Accordingly, the amount of **\$3,166.80** is offered.

Schedule 11: Pollution Counter-measures Equipment Claimed: \$5,604.73

- [56] The claimed costs for the pollution counter-measures equipment ("PCME") comprise the use of 300 feet of containment boom (\$201.00), a PRV II on 11 August 2020 (\$1,194.23), and a PRV III on 13 August 2020 (\$4,209.50).
- [57] The amount claimed for PCME is \$5,604.73, for which **\$2,589.46** is offered.
- [58] The costs associated with containment boom are established. Accordingly, they are accepted in full.
- [59] With respect to the PRV costs, the decisions to deploy CCG vessels on both 11 and 13 August 2020 are considered reasonable. The use of a PRV II on 11 August, and the associated costs, are accepted. However, the use of a PRV III on 13 August is unsupported in the evidence provided. Accordingly, the associated claimed costs are partially rejected. With the contractors on scene and no apparent justification for the use of a larger vessel, only the PRV II rate of \$1,194.23 is accepted with respect to the 13 August deployment.

Schedule 12: Vehicles Claimed: \$65.57

- [60] The CCG's vehicle costs were incurred with respect to 13 August 2020. For the reasons set out above, they are not accepted.

Schedule 13: Administration Claimed: \$75.38

- [61] Lastly, the claimed administration costs amount to **\$75.38**. This amount is accepted in full.

OFFER SUMMARY AND CLOSING

[62] The following table summarizes the claimed and offered expenses.

Schedule	Claimed	Offered
2 – Contract Services	\$33,006.75	\$13,070.00
3 – Travel	\$72.15	\$0
4 – Salaries – Full-time personnel	\$2,840.66	\$1,151.18
5 – Overtime – Full-time personnel	\$3,205.92	\$2,015.62
11 – Pollution counter-measure equipment (“PCME”)	\$5,604.73	\$2,589.46
12 – Vehicles	\$65.57	\$0
13 – Administration	\$75.38	\$75.38
TOTAL	\$44,871.15	\$18,901.64

Table 8 – Total submitted versus offered claim costs.

[63] Costs and expenses in the amount of **\$18,901.64** are accepted and will be paid together with statutory interest calculated at the date of payment if the Offer is accepted.

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

[65] 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.

[66] 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.

[67] 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 be issued.

[68] Finally, where a claimant accepts an offer of compensation, the Administrator 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