CLAIM DETERMINATION

Claim Number:	H18007-0001
Claimant:	Seabridge, Inc./Shipowners' Mutual Protection & Indemnity Assoc.
Type of Claimant:	RP
Type of Claim:	Limit of Liability
Claim Manager:	(b) (6)
Amount Requested:	$6,494,234.53
Action Taken:	Approved

EXECUTIVE SUMMARY:

On March 23, 2018, the Seabridge deck barge S-2006 (S-2006) under tow from the Seabridge tug CHAMORRO (CHAMORRO) grounded near the entrance of Wake Island and posed a substantial threat to discharge oil into the Pacific Ocean, a navigable waterway of the United States. The S-2006 was immediately re-floated and moved to a mooring buoy outside of the channel pending a damage assessment.[1] Seabridge, Inc. (Seabridge), the owner and operator of the S-2006, responded and hired Resolve Marine Group (Resolve) to oversee the pollution removal activities and salvage operations.[2] On April 4, 2018, the S-2006 broke from the mooring buoy and grounded onto the shore of Wake Island discharging hydraulic fluid from a forklift secured to the deck of the barge into the Pacific Ocean.[3] The discharge of oil was reported U.S. Coast Guard (CG) National Response Center.[4] On May 9, 2018, the S-2006 was successfully re-floated and towed to sea for scuttling.[5] Upon scuttling, the CG Federal On-Scene Coordinator (FOSC) issued a decision memo stating that the S-2006 no longer posed a substantial threat to discharge oil into a navigable waterway of the United States and that the Federal response and removal actions specific to the incident were complete.[6] Shipowners' Mutual Protection & Indemnity Association provided protection & indemnity insurance to Seabridge.[7] After incurring the removal costs associated with the response and having been subrogated to Seabridge's rights as the responsible party,[8] Shipowners' Mutual Protection & Indemnity Association along with Seabridge (Claimants) submitted a claim for entitlement to limited liability to the CG National Pollution Funds Center (NPFC) for $6,494,234.53.[9] The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the

[1] Coast Guard Pollution Report Message (CG POLREP/CG-SITREP-POL) 1 DTG P310310Z Mar 2018.
[2] Letter from Claimants to the NPFC dated June 7, 2019, page 4. This letter was the Claimants first attempt to submit its limit of liability claim to the NPFC but the submission lacked a sum certain. The Claimants were notified and properly re-submitted its limit of liability claim on June 21, 2019.
[3] CG-SITREP-POL 3 DTG P070823Z Apr 2018.
[4] CG National Response Center Report #1208597 dated April 5, 2018.
[5] CG-SITREP-POL 6 AND FINAL DTG P190029Z May 2018.
[6] CG Sector Honolulu Decision Memo dated May 12, 2018.
[7] Shipowners' Mutual Protection & Indemnity Association certificate # 5697/905561/1 effective February 20, 2018 through February 20, 2019, which provided $100,000,000.00 per incident of protection and indemnity insurance to Seabridge, Inc.
[8] Assignment of Rights letter from Seabridge, Inc. to the Shipowners' Mutual Protection & Indemnity Association dated September 23, 2019.
[9] Claim submission cover page dated June 21, 2019, with a sum certain identified as $6,382,267.76. *See also*, letter from Claimants to NPFC dated September 24, 2019, updating its claim to include an uncompensated removal cost invoice to London Offshore Consultants in the amount of $111,966.77 and amending its sum certain to include payment of that invoice to $6,494,234.53.

applicable law and regulations, and concluded that Claimants have demonstrated an entitlement to limited liability and has determined that $5,548,655.26 of the requested $6,494,234.53 is compensable and offers this amount as full and final compensation of this claim[10] for its uncompensated removal costs and damages under the Oil Pollution Act (OPA) that exceed its limit of liability.[11]

I. BACKGROUND/INCIDENT, RECOVERY OPERATIONS AND THE RESPONSIBLE PARTY:

Background/Incident

Black Construction Corporation chartered the Seabridge CHAMORRO and S-2006 to deliver construction materials and equipment from Guam to Wake Island. Terms of the charter included a survey of the CHAMORRO, S-2006 and cargo prior to departure to ensure suitability for transit. Allied Marine Surveyors (Allied) conducted the survey and found the CHAMORRO to be properly manned, equipped and fit for her transit from Guam to Wake Island. Allied also surveyed the S-2006 and supervised the loading of cargo which included nine 20' containers; eight 40' containers; 1,485 tons of aggregate in bulk or in bags; and 120 tons of light and heavy equipment. Upon completion of the loading, Allied determined that S-2006 and her cargo were fit for transit from Guam and Wake Island.[12] On March 10, 2018, the S-2006 departed Guam loaded to a mean draft less than the maximum allowable draft as specified on her CG issued stability letter.[13]

On March 23, 2018, at approximately 0600, the CHAMORRO and S-2006 arrived Wake Island.[14] In preparation for their transit into the Wake Island channel, the vessel's crew shortened the tow length on the barge and awaited high tide[15], which occurred at 0713.[16] Additionally, crewmembers were positioned on the vessel's bridge wings and S-2006 to serve as lookouts and a crewmember was placed on the vessel's small boat to assist with monitoring and line handling. The vessel's Chief Engineer was positioned at the tow winch located on the stern of the vessel and was responsible for maintaining the proper tow length in an effort to keep the S-2006 on centerline while entering the channel. The vessel's Captain was at the helm and in control of the tug.[17] At approximately 0700,[18] the Captain began his entry into the channel and subsequently grounded the S-2006 on a coral reef located approximately 85' east of the harbor mouth. Immediately after the grounding, the Captain backed the CHAMORRO down and recovered the S-2006 which had since floated off the coral reef. The S-2006 was secured to the

[10] 33 CFR 136.115.
[11] 33 U.S.C. § 2703(a) and 33 U.S.C. § 2704(a).
[12] Allied Marine Surveyors report dated March 14, 2018, pages 1-17.
[13] Email from CG Marine Safety Center to CG Sector Honolulu dated July 24, 2019.
[14] Seabridge tug CHAMORRO logbook entry page 15.
[15] Entering the Wake Island channel on high tide was a requirement of the 11th Air Force Detachment. *See*, email from Sector Honolulu to the NPFC dated July 10, 2019. In addition, entering the Wake Island channel on a high tide was a requirement of the Allied Marine survey. *See*, Allied Marine Surveyors report dated March 14, 2018, page 14.
[16] https://tidesandcurrents.noaa.gov/noaatidepredictions.html (last visited November 22, 2019).
[17] Letter from Claimants to the NPFC dated July 30, 2019, pages 6-7.
[18] Seabridge tug CHAMORRO logbook entry page 15.

west-mooring buoy near the entrance of the channel pending a survey to determine the extent of damage incurred as a result of the grounding.[19]

Recovery Operations

Seabridge responded and hired Resolve Marine Group (Resolve) to provide oil spill response capabilities and to assist in the damage survey of the S-2006. Resolve subsequently subcontracted PENCO Pacific Environmental (PENCO) to provide pollution removal and response capabilities and American Marine Corporation (American Marine) to assist with salvage. As the S-2006 had sustained significant damage to its port bow during grounding, CG Sector Honolulu required Seabridge to submit a tow plan before allowing the barge to move off its mooring ball and into Wake Island. The initial tow plan submitted by Seabridge on March 26, 2018, failed to address the vessel's stability, trim or draft and was determined to be unacceptable by the CG FOSC. Several iterations of the tow plan followed but were denied by the CG FOSC because they failed to contain sufficient information.[20]

On March 28, 2018, Sector Honolulu identified several palletized drums of oil and rolling stock that cumulatively contained approximately 3,000 gallons of oil and diesel fuel. Because of the condition of the barge, the CG determined that the S-2006 posed a substantial threat to discharge oil into the Pacific Ocean, a navigable waterway of the United States and accessed the Oil Spill Liability Trust Fund (OSLTF) to fund the CG's assessment, oversight, and evaluation of events undertaken by Seabridge.[21]

On March 30, 2018, Seabridge's revised tow plan was submitted to and approved by the CG FOSC but the tow of the S-2006 into Wake Island was delayed as the weather exceeded the parameters allowed by the approved tow plan.

On the evening of April 4, 2018, while awaiting for the weather to improve, the S-2006 broke all six of its mooring lines and grounded onto Wake Island approximately 50 yards from the channel entrance.[22] A sheen of hydraulic fluid was observed discharging from a forklift secured to the deck of the S-2006 into the Pacific Ocean.[23]

Damage to the S-2006 was extensive as it grounded and partially sank with a 12-degree list to starboard and 2-degree forward trim approximately 180 feet from the shoreline.[24] Most of the cargo remained secure to the deck with the exception of one container that breached and discharged its contents into the environment. All deck cargo starboard of centerline was awash or submerged and the loose aggregate was contained by the outer containers.[25] Over the next several weeks, the salvage team lightered all material possible in preparation of refloating the

[19] Letter from Claimants to the NPFC dated July 30, 2019, pages 6-7.

[20] CG Sector Honolulu decision memo dated April 5, 2018.
[21] *Id*.
[22] *Id*.
[23] CG-SITREP-POL 3 DTG P 070823Z Apr 2018.
[24] Resolve Survey Report dated April 10, 2018, page 3.
[25] *Id*. at 7.

barge. Once refloated, the decision was made to scuttle the barge as it was not fit to survive a long distance tow and Wake Island did not have the resources available to stabilize the barge.[26]

On May 9, 2018, the S-2006 was successfully refloated and towed to sea for scuttling. Approximately 4 miles into its transit the barge lost stability and was released for safety reasons. Upon release, the barge quickly capsized and sank.[27]

On May 12, 2018, the CG FOSC issued a decision memo stating that the S-2006 no longer posed a substantial threat to discharge oil into a navigable waterway of the United States and that the Federal response and removal actions specific to the incident were complete.[28]

Responsible Party

The S-2006 was owned and operated by Seabridge, Inc. Seabridge is the designated responsible party (RP) for the oil spill incident.[29]

Shipowners' Mutual Protection & Indemnity Association provided protection & indemnity insurance to Seabridge.[30] Having subrogated Seabridge's rights as the responsible party,[31] Shipowners' Mutual Protection & Indemnity Association along with Seabridge have submitted a claim for entitlement to limited liability with the NPFC.

II. DISCUSSION:

Under the OPA, a responsible party is liable for all removal costs and damages resulting from either an oil discharge or a substantial threat of oil discharge into a navigable water of the United States.[32] Further, a responsible party's liability is strict, joint, and several.[33] In the case of a vessel, the responsible party includes any person owning, operating or demise chartering the vessel.[34] When enacting OPA, "Congress explicitly recognized that the existing federal and states laws provided inadequate cleanup and damage remedies, required large taxpayer subsidies for costly cleanup activities and presented substantial burdens to victim's recoveries such as… burdens of proof unfairly favoring those responsible for the spills."[35] OPA was intended to cure these deficiencies in the law.

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[26] Resolve Survey Report dated May 10, 2018, page 2.
[27] Resolve Survey Report dated May 10, 2018, page 3.
[28] CG Sector Honolulu Decision Memo dated May 12, 2018.
[29] National Vessel Documentation Center Certificate of Documentation issued to Seabridge, Inc. dated March 27, 2018.
[30]Shipowners' Mutual Protection & Indemnity Association certificate # 5697/905561/1 effective February 20, 2018 thru February 20, 2019, which provided $100,000,000.00 per incident of protection and indemnity insurance to Seabridge, Inc.
[31] Assignment of Rights letter from Seabridge, Inc. to the Shipowners' Mutual Protection & Indemnity Association dated September 23, 2019.
[32] 33 U.S.C. § 2702(a).
[33] H.R. Rep. No. 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.
[34] 33 U.S.C. § 2701(32)(A).
[34] *Apex Oil Co., Inc. v United States*, 208 F. Supp. 2d 642, 651-52 (E.D. La. 2002)(*citing* S. Rep. No. 101-94 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722).

Notwithstanding, under limited circumstances the OSLTF may reimburse a responsible party for its uncompensated removal costs and damages. Under the plain meaning of 33 U.S.C. § 2708(a), a responsible party must demonstrate that a defense applies before the OSLTF can reimburse removal costs or damages. Consistent with this statutory requirement, the OSLTF's claims regulations also require all claimants to carry the burden of proving an entitlement to reimbursement. [36] Therefore, as with any other claimant, a responsible party must prove an entitlement under the OPA before receiving reimbursement from the OSLTF. If a responsible party fails to introduce evidence in support of any of the elements necessary to establish entitlement to compensation from the OSLTF, or fails to establish each of the elements, the NPFC must deny the claim.[37]

The Claimants have demonstrated that they incurred the pollution removal costs associated with this response and have submitted a claim to limit their liability under 33 U.S.C. § 2704. As such, the Claimant's limitation to liability is evaluated below.

III. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the OSLTF.[38] As a result, 5 U.S.C. § 555(e) requires the NPFC to provide a brief statement explaining its determinations. This determination is issued to satisfy that requirement for the Claimant's claim against the OSLTF.

When adjudicating claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence, including evidence provided by claimants and evidence obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim. The NPFC is not bound by the findings of fact, opinions, or conclusions reached by other entities.[39] If there is conflicting evidence in the record, the NPFC makes a

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[36] *See*, 33 CFR 136.105(a)("The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim."); and 33 CFR 136.105(e)(6)(Requiring that each claim include evidence to support the claim).

[37] OPA's legislative history makes it clear that a responsible party has the burden of showing an entitlement to OSLTF compensation under 33 U.S.C. § 2708. As explained in the House Conference Report on OPA:

> Section 1008 of the House bill allows a responsible party…, or a guarantor for that responsible party… to assert a claim for removal costs and damages *only if the responsible party… can show that the responsible party…has a defense to liability, or is entitled to a limitation of liability*.

H.R. Conf. Rep. 101-653 at 110 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 788 (emphasis added). *See also*, *Apex,* 208 F.Supp.2d 642 (claimant failed to carry its burden of proof with respect to the "act of God" defense); *International Marine Carriers v. OSLTF*, 903 F.Supp. 1097 (S.D. Tex. 1994) (claimant must show elements of a third party defense by a preponderance of the evidence); *Water Quality Insurance Syndicate v. United States*, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009) (holding that a responsible party has the burden of showing an entitlement to OSLTF compensation under 33 U.S.C. § 2708).

[38] 33 CFR Part 136.

[39] *See, e.g.*, *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center*, 71 Fed. Reg. 60553 (October 13, 2006) and *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center* 72 Fed. Reg. 17574 (concluding that NPFC may consider marine casualty reports but is not bound by them). The NPFC notes that it did not rely on the Marine Casualty Investigation Report for this determination. (While the

determination as to what evidence is more credible or deserves greater weight, and finds facts and makes its determination based on the preponderance of the credible evidence.

The administrative record in this case unequivocally resolves several important issues. Specifically, the Pacific Ocean is a navigable waterway of the United States and the oil spill and substantial threat to discharge oil at issue here was an incident under the OPA. In addition, Seabridge was the owner and operator of the S-2006, and therefore the responsible party for this incident and the claim was submitted to the NPFC on June 21, 2019, and is therefore timely.[40]

A. Limitation of Liability

Claimants assert that they are entitled to limited liability[41] under 33 U.S.C. § 2704 (a). If successful, the responsible party would be permitted to recover from the OSLTF its compensable removal costs that exceeded its OPA limit of liability. As the responsible party, the claimants are only allowed to seek removal costs only if it can demonstrate that it is entitled to limited liability under 33 U.S.C. §§ 2704(a) and 2712(b).[42]

When submitting a claim against the OSLTF, a responsible party must show that the exceptions to limited liability in 33 U.S.C. § 2704 (c) do not apply even though this burden of proof may require proof of a negative contention, (i.e., the incident was not proximately caused by the responsible party's willful misconduct, gross negligence, or regulatory violation). "It is a familiar common-law rule that, where a right to relief is grounded on a negative assertion of a right, the burden of proving the negative rests on the party asserting the right."[43] This is not an impossible burden to carry. [44] A responsible party will meet its burden by showing that its more likely than not that the incident was not proximately caused by willful misconduct, gross negligence, or a regulatory violation.

The quantum of proof required from a responsible party seeking OSLTF reimbursement will vary depending upon the facts of the case. Nevertheless, a responsible party should not be

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NPFC respectfully disagrees with the dicta in *Natures Way, LLC v. U.S.*, 904 F.3d. 416, 421 n.7 (5th Cir. 2018), it has opted to follow it in this determination).

[40] Claim submission dated June 21, 2019.

[41] Limited liability would allow the responsible party to recover from the OSLTF its compensable removal costs that exceeded its OPA limit of liability.

[42] *See*, 33 U.S.C. § 2708.

[43] *United States v. Grogg*, 9 F.2d 424, 426 (W.D. Va. 1925).

[44] The treatise, Corpus Juris Secondum, explains how a party can prove a negative contention with the following:

> The party whose contention requires proof of a negative fact generally has the burden of evidence to prove that fact, except as the rule may be modified by the fact that the evidence as to such issue is peculiarly within the adverse party's knowledge or control. In deciding, however, what quantum of evidence shall be deemed sufficient, the practical limitations on proof imposed by the nature of the subject matter or the relative situation of the parties will be considered.
> The court will more promptly discharge a litigant from the burden of evidence where the proposition is a negative one, and the **burden of evidence is sustained by proof which renders probable the existence of the negative fact**, nothing in the nature of a demonstration being required.
>
> 31A *C.J.S. Evidence* § 200 (2015)(internal footnotes omitted)(emphasis added).

required to conclusively disprove every possible contention supporting unlimited liability. Rather, a responsible party will generally satisfy its burden by showing that OPA's exceptions to limited liability probably do not apply. For example, the NPFC does not require detailed proof of compliance with federal regulations that have no apparent connection to the oil spill. Therefore, in some cases a responsible party's regulatory compliance could be shown by generalized evidence establishing a probability that no regulatory violation occurred. However, if the facts of an OPA incident raise the issue of whether the incident was proximately caused by a regulatory violation, then a responsible party must carry its burden of proving compliance with the specific regulation at issue. If a responsible party fails to carry its burden of proof, then the claim should be denied.[45]

The terms "gross negligence" and "willful misconduct" have distinct meanings under the OPA.[46] The NPFC defines those terms as follows:[47]

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[45] *Bean Dredging, LLC v. United States*, 773 F.Supp.2d 63, (D. D.C. 2011)(affirming NPFC's determination denying limited liability based upon the responsible party's failure to show compliance with a specific regulation).

[46] Because OPA does not define the terms "gross negligence" or "willful misconduct", these terms should be given their plain and ordinary meaning. "Gross negligence" is ordinarily distinguished from "willful misconduct" in that "gross negligence" is a lesser standard that does not require recklessness and "willful misconduct" generally refers to intentional misconduct that can sometimes be established with proof of recklessness. *See, Restatement (Third) of Torts: Phys. & Emotional Harm* § 2 Recklessness, cmt. a (2010). *See also*, W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 34, at 212 (5th ed. 1984)("'gross negligence' falls short of a reckless disregard"); 57a *Am. Jur. 2d Negligence* § 231 (2016)("A distinction is frequently made between gross negligence and willful, wanton, or reckless conduct. While the jurisdictions adopting this distinction consider gross negligence substantially and appreciably higher in magnitude than ordinary negligence, it is still not equivalent to wanton or willful conduct, and it does not encompass reckless behavior.")(footnotes omitted).

The structure of OPA's liability and compensation regime supports giving different meanings to the terms "gross negligence" and "willful misconduct". As discussed above, under 33 U.S.C. § 2712(b) a claimant may not receive OSLTF reimbursement for removal costs or damages caused by the claimant's "gross negligence or willful misconduct". Also, 33 U.S.C. § 2704 (c)(1) precludes limited liability for oil spills caused by the "gross negligence or willful misconduct of" the responsible party. If Congress had intended for "gross negligence" to have the same meaning as "willful misconduct" under the OPA, there would have been no reason to deny OSLTF reimbursement and limited liability for both types of conduct. Moreover, the use of the disjunctive term "or" in both 33 U.S.C. § § 2704 (c)(1) and 2712(b) further suggests that "gross negligence" is a separate and distinct type of wrongdoing from "willful misconduct". *See*, 1A N. Singer, *Statutes and Statutory Construction* § 21:14, p. 189-190 (7th ed.2007)("The disjunctive 'or' usually, but not always, separates words or phrases in the alternate relationship, indicating that either of the separated words or phrases may be employed without the other. The use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately.").

The statutory language used by Congress to impose liability on an OPA guarantor also supports giving "gross negligence" a different meaning from "willful misconduct" Under 33 U.S.C. § 2716 (f)(1)(C), a guarantor can only avoid liability when "the incident was caused by the willful misconduct of the responsible party." In contrast, a claimant will be denied OSLTF reimbursement and unlimited OPA liability will be imposed on a responsible party for either "gross negligence" or "willful misconduct". The fact that OPA only provides guarantors with a defense for "willful misconduct", but not "gross negligence" shows that Congress intended for the two phrases to have separate meanings. If it were otherwise, an OPA guarantor would be exonerated from liability for either "gross negligence" or "willful misconduct" just like 33 U.S.C. § § 2704 (c)(1) and 2712(b). *See, In re Oil Spill by Oil Rig Deepwater Horizon*, 21 F.Supp.3d 657, 734 (E.D. La. 2014)("Because only 'willful misconduct' creates this [guarantor's] defense, OPA treats 'willful misconduct' as distinct from, and more egregious than, 'gross negligence.'"). *See also*, 2A N. Singer, *Statutes and Statutory Construction* § 46:6, p. 249-252 (7th ed.2007)("The same words used twice in the same act are presumed to have the same meaning. Likewise, courts do not construe different terms within a statute to embody the same meaning. ... In like manner, where the legislature has employed a term in one place and excluded it in another, it should not be implied where excluded.").

[47] *See*, *In re Kuroshima Shipping S.A.,* 2003 AMC 1681, 1693. *See also, Water Quality Insurance Syndicate v. United States*, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009)(relying on NPFC's definition of "gross negligence"); and *Water Quality Insurance Syndicate v. United States*, 522 F.Supp.2d 220, 228-29 (D.D.C. 2007)(holding that

Gross Negligence: Negligence is a failure to exercise the degree of care which a person of ordinary caution and prudence would exercise under the circumstances. A greater degree of care is required when the circumstances present a greater apparent risk. Negligence is "gross" when there is an extreme departure from the care required under the circumstances or a failure to exercise even slight care.[48]

Willful Misconduct: An act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences.[49]

"willful" misconduct under the OPA could also be established by a series of negligent acts that amount to recklessness).

[48] Under the OPA, a finding of "gross negligence" requires proof of a departure from the standard of care beyond what would constitute ordinary negligence because simple negligence is established by showing a failure to exercise the degree of care that someone of ordinary prudence would exercise in the same circumstance. *See generally*, *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005). "Taken at face value, [gross negligence] simply means negligence that is especially bad." *Restatement (Third) of Torts (Physical and Emotional Harm)* § 2 Recklessness, cmt. a (2010). "[M]ost courts consider that 'gross negligence' … differs from ordinary negligence only in degree, and not in kind." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 34, at 212 (5th ed. 1984). *See also, Milwaukee & St. P.R. Co. v. Arms*, 91 U.S. 489, 495 (1875)("'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence;' but, after all, it means the absence of the care that was necessary under the circumstances…").

Gross negligence should be determined based upon the same objective reasonable-person standard as ordinary negligence, and therefore requires no showing of any mental state or scienter. The facts of each case must control the degree of care required to prevent an oil spill. As a result, a greater degree of care will be required when the facts of a case establish an increased risk. *See e.g., Water Quality Ins. Syndicate v. United States*, 632 F.Supp.2d 108, 112 (D. Mass. 2009). *See also*, W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 34, at 208-09 ("As the danger becomes greater, the actor is required to exercise caution commensurate with it.").

[49] When deciding whether "willful misconduct" has been established under the OPA, courts have relied upon FWPCA cases analyzing the same issue. *See generally, Water Quality Ins. Syndicate v. United States*, 522 F.Supp.2d 220, 229-30 (D.D.C. 2007). Relying on FWPCA authorities when interpreting the OPA is consistent with Congress' legislative intent that OPA's definitions should have the same meaning as those same terms have been given under the FWPCA. See, H.R. Conf. Rep. 101-653, *reprinted in* 1990 U.S.C.C.A.N. 779. Under both OPA and the FWPCA, proof of recklessness will establish "willful misconduct". For example, in *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1162-63 (2nd Cir. 1978), the court considered whether the vessel owner's willful misconduct precluded limited liability for an oil spill under the FWPCA. In its analysis, the court defined "willful misconduct" as follows:

> [A]n act intentionally done, with knowledge that the performance will probably result in injury, or ***done in such a way as to allow an inference of reckless disregard of the probably consequences***. [citation omitted]. If the harm results from an omission, the omission must be intentional, and the actor must either know the omission will result in damage or the ***circumstances surrounding the failure to act must allow an implication of a reckless disregard of the probable consequences***. [citation omitted]. The knowledge required for a finding of willful misconduct is that there must be either actual knowledge that the act, or the failure to act, is necessary in order to avoid danger, or if there is no actual knowledge, the ***probability of harm must be so great that failure to take the require action constitutes recklessness***. *Id*. (emphasis added).

The test for determining "willful misconduct" under the OPA is an objective test, not a subjective test. Thus, a determination of "willful misconduct" under the OPA does not always require proof of specific intent to harm. Rather, "willful misconduct" can be established with facts showing recklessness. These concepts are illustrated in

In this case, Claimants satisfied their burden of proving an entitlement to limited liability. Seabridge timely accepted responsibility for the incident and provided appropriate cooperation and assistance with respect to the removal action. Additionally, NPFC finds that none of the exceptions to the limitation of liability found at 33 U.S.C. § 2704(c) apply based on the facts of this incident.

B. OSLTF Compensable Response Costs

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).[50] The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.[51] The claimant bears the burden of providing all evidence, information, and documentation deemed relevant and necessary by the Director of the NPFC, to support and properly process the claim.[52]

Before reimbursement can be authorized for uncompensated removal costs, the claimant must demonstrate by a preponderance of the evidence:

(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 directed by the FOSC or determined by the FOSC to be consistent with the National Contingency Plan.
(d) That the removal costs were uncompensated and reasonable.[53]

In this case, Claimants seek reimbursement of removal costs incurred in excess of the limit of liability under 33 U.S.C. § 2704. Under the OPA, the limit of liability applicable to the S-2006 was $1,052,700.00 and Claimants contend that they incurred $7,546,934.53 in removal costs. As a result, Claimants seek a total of $6,494,234.53 as compensation for their removal costs incurred in excess of the limit. The NPFC reviewed the documentation submitted by Claimants to adjudicate whether the claimants had incurred all costs claimed. NPFC's adjudication focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined to be consistent with the NCP, and (4) whether the costs were adequately documented and reasonable.

Safeco v. Burr, 551 U.S. 47, 57 (2007) where the Court analyzed how a statute should be construed when its standard for liability turns on a finding of willfulness. In that case, the Court concluded that "where willfulness is a statutory condition to civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well, [citations omitted]. This construction reflects common law usage, which treated actions in 'reckless disregard' of the law as 'willful' violations." *Id*. *See also, Fryer v. A.S.A.P.*, 658 F.3d 85, 91 (1st Cir. 2011), *quoting Safeco*, 551 U.S. 47, 57 (2007)("In a series of decisions beginning in 1985, the Supreme Court has repeatedly held that, 'where willfulness is a statutory condition of civil liability, … [the term] cover[s] not only knowing violations of a standard, but reckless ones as well.").

[50] *See generally,* 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

[51] 33 CFR Part 136.

[52] 33 CFR 136.105.

[53] 33 CFR 136.203; 33 CFR 136.205.

The NPFC analyzed each of these factors and determined the majority of the costs incurred by the claimants and submitted herein are compensable removal costs based on the supporting documentation provided. The NPFC determined all approved costs invoiced at the appropriate rate sheet pricing were billed in accordance with the rate schedule provided. All approved costs were supported by adequate documentation which included invoices, proofs of payment, and/or FOSC statements.

The amount of compensable costs is $5,548,655.26 while $945,579.27 was deemed not compensable for the following reasons:

1. Charges in the amount of $152,010.00 for 1.5" Dyneema, 3" Dyneema and 3" blue steel mooring lines were denied, as these costs were not on the Resolve rate schedule or contract. Additionally, these charges were not supported by any type of purchase invoice or receipt;

2. Daily charges in the amount of $250,412.50 for the tugs AMERICAN EMERALD and AMERICAN CONTENDER were denied, as the American Marine rate schedule does not identify a daily rate for these vessels. Instead, the NPFC utilized the hourly rate of $800.00 as identified within the American Marine rate schedule and approved the hourly rate based upon the maximum number of hours worked by vessel personnel on the given day. The amount denied represents the difference between what was claimed and what the NPFC approved;

3. Daily charges in the amount of $390,000.00 for the Weeks Barge 192 were denied, as the American Marine rate schedule does not identify a daily rate for this vessel. Instead, the NPFC utilized the hourly rate of $175.00 as identified within the American Marine rate schedule for a barge and approved that hourly rate for a 24-hour day. The amount denied represents the difference between what was claimed and what the NPFC approved;

4. Fuel charges in the amount of $94,536.53 for the tugs AMERICAN EMERALD and AMERICAN CONTENDER were denied, as the American Marine rate schedule documents fuel costs for those vessels are included in their hourly rate;

5. Fuel charges in the amount of $6,114.15 for the tug MOANO HOLO were denied, as the cost charged were in excess of the unit price established within the charter between GP Energy Company and American Marine;

6. Uplift charges applied to the purchase of fuel in the amount of $20,130.14 were denied, for fuel charges incorrectly claimed by the Claimants;

7. Purchase charges in the amount of $24,708.23 for a new diaphragm pump, air compressor and accessories were denied, as there was no justification for the purchase of this equipment;

8. Repair charges in the amount of $2,856.30 for equipment rented by the Claimants were denied, as there was no justification for the repair of the equipment;

9. Receipts that lacked itemization in the amount of $2,027.77 as well as other denied charges in the amount of $2,783.65 to include but not limited to the miscalculation of hours and/or rates, response costs incurred after the demobilization date and the recalculation of Resolve's markup charges for NPFC approved expenditures.

Overall Denied Costs: **$945,579.27**[54]

IV. CONCLUSION

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, the claimant's request to limit its liability is approved and its request for uncompensated removal costs is approved in the amount of **$5,548,655.26**

This determination is a settlement offer;[55] the claimants have 60 days in which to accept this offer. Failure to do so automatically voids the offer.[56] The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.[57] Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

Claim Supervisor: (b) (6) [redacted]

Date of Supervisor's review: ***November 26, 2019***

Supervisor Action: ***Claim Approved***

[54] Enclosure 3 provides a detailed accounting of the amounts denied.
[55] Payment in full, or acceptance by the claimant of an offer of settlement by the Fund, is final and conclusive for all purposes and, upon payment, constitutes a release of the Fund for the claim. In addition, acceptance of any compensation from the Fund precludes the claimant from filing any subsequent action against any person to recover costs or damages which are the subject of the uncompensated claim. Acceptance of any compensation also constitutes an agreement by the claimant to assign the Fund any rights, claims, and causes of action the claimant has against any person for the costs and damages which are the subject of the compensated claims and to cooperate reasonably with the Fund in any claim or action by the Fund against any person to recover the amounts paid by the Fund. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for the same costs and damages and providing any documentation, evidence, testimony, and other support, as may be necessary for the Fund to recover from any person. 33 CFR § 136.115(a).
[56] 33 CFR § 136.115(b).
[57] *Id*.

ACCEPTANCE / RELEASE AGREEMENT

Claim Number: H18007-0001	Claimant Name: Seabridge, Inc./ Shipowners' Mutual Protection and Indemnity Assoc.

I, the undersigned, ACCEPT the National Pollution Funds Center's settlement offer of $5,548,655.26 as full, final and complete settlement and satisfaction by the Oil Spill Liability Trust Fund (Fund) of the removal costs claimed by me in the specific claim number identified above. With my signature below, I also acknowledge that I accept as final agency action all amounts paid by the Fund for my claim, and all amounts submitted with subject claim that were denied in the National Pollution Funds Center's determination and for which I will receive no compensation.

This settlement represents full and final release and satisfaction of the amounts claimed by me against the Fund under the Oil Pollution Act of 1990 (33 U.S.C. 2701, *et seq*.). I hereby assign, transfer, and subrogate to the United States all rights, claims, interest and rights of action that I may have against any person (including any firm or corporation) that may be liable for the amounts paid to me by the Fund under this claim. I authorize the United States to bring suit, compromise or settle in my name and for the United States to be fully substituted for me and subrogated to all of my rights arising from, and associated with, the amounts paid by the Fund for which I am compensated under this settlement . I warrant that no legal action has been brought regarding this matter, and no settlement has been or will be made, by me or any person acting on my behalf with any other party for amounts which are paid to me by the Fund.

This settlement is not an admission of liability by any party.

I agree by my signature below that I will cooperate fully with the United States in any claim and/or action on behalf of the Fund against any person or party to recover the amounts so compensated. My cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received by me, or on my behalf, from any other source for those amounts the Fund has compensated me under this settlement and providing any documentation, evidence, testimony, and other support, as may be necessary for the United States to recover such amounts from any other person or party.

I also certify by my signature below that, to the best of my knowledge and belief, the information contained in this claim represents all material facts and is true and accurate. I understand that misrepresentation of facts is subject to prosecution under federal law (including, but not limited to 18 U.S.C. §§ 287 and 1001).

Title of Person Signing	Date of Signature
Printed Name of Claimant or Authorized Representative	Signature

Title of Witness	Date of Signature
Printed Name of Witness	Signature

*DUNS registered in SAM.gov	Payee
Bank Routing Number	Bank Account Number