CLAIM DETERMINATION

Claim Number:	J17008-0001
Claimant:	Samson Tug & Barge with its Subrogated Insurers
Type of Claimant:	RP
Type of Claim:	Limit of Liability
Claim Manager:	(b) (6)
Amount Requested:	$2,889,804.08
Action Taken:	Approved

EXECUTIVE SUMMARY:

On April 19, 2017, the tug POWHATAN sank at its berth at the Samson Tug & Barge dock, Sitka, AK, and released oil into the Starrigavan Bay, a navigable waterway of the United States.[1] The discharge of oil was reported to the U.S. Coast Guard (CG) National Response Center.[2] Samson Tug and Barge Company, Inc. (Samson), the owner and operator of the POWHATAN, arrived on-scene and assumed responsibility for the incident. Samson hired Southeast Alaska Petroleum Research Organization (SEAPRO) to conduct the pollution removal activities and Alaska Commercial Divers (ACD) to conduct diving and salvage operations.[3] On June 14, 2017, the POWHATAN was removed from Starrigavan Bay and placed onto a deck barge where it was secured and drained of all liquids. Once the oil was removed, the CG Federal On-Scene Coordinator (FOSC) determined that the POWHATAN no longer posed a substantial threat to discharge oil into a navigable waterway of the United States.[4] Great American Insurance Company provided oil pollution insurance[5] while other underwriters provided protection & indemnity insurance for the vessel.[6] Samson and their subrogated insurers (Claimants) submitted a claim for entitlement to limited liability[7] to the CG National Pollution Funds Center (NPFC). 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 POWHATAN was $939,800.00. Claimants contend that they incurred $3,829,604.08 in removal and natural resource damage costs. As a result, Claimants seek a total of $2,889,804.08 as compensation for their removal and natural resource damage costs incurred in excess of the limit.[8] The NPFC has thoroughly reviewed all documentation submitted with the claim,

[1] Coast Guard Pollution Report Message (CG POLREP/CG-SITREP-POL) 1 DTG P 250114Z Apr 2017.
[2] CG National Response Center Report # 1176144 dated on April 19, 2017.
[3] CG-SITREP-POL 1 DTG P 250114Z Apr 2017.
[4] CG SITREP-POL 7 (F) DTG 162000Z Jun 2017.
[5] Great American Insurance Company policy #OHM 3492755 14 issued to Samson Tug and Barge via Venneberg Insurance, Inc. effective June 1, 2016, page 15. The per occurrence limit as set forth in the policy for an oil spill incident was $5,000,000.00.
[6] Policy of Insurance #VI 1611 issued by Navigators Insurance Company (35%), Liberty International Underwriters (10%), Zurich North America (20%), New York Marine & General Insurance Company (15%) and Travelers Insurance (20%) to Samson Tug and Barge via Venneberg Insurance, Inc. effective June 1, 2016, pages 1-2. The per occurrence limit as set forth in the policy for protection and indemnity was $1,000,000.00.
[7] *See*, 33 U.S.C. § 2704.
[8] Claim submission cover page dated April 29, 2019 with a sum certain identified as $2,799,357.79. *See also*, email from Claimant to NPFC dated September 5, 2019, citing their payment of a CG issued invoice in the amount of $85,848.79 and amending their sum certain to include payment of that invoice to $2,885,206.58. *See also*, email from Claimant to NPFC dated October 29, 2019, citing to their payment of two additional contractor invoices totaling $4,597.50 and amending their sum certain to include the payment of those invoices to $2,889,804.08.

analyzed the applicable law and regulations, and concluded that Claimants have demonstrated an entitlement to limited liability. Additionally, the NPFC has determined that removal costs totaling $2,727,526.71 in removal costs in excess of the limit of liability are compensable and offers this amount as full and final compensation of this claim[9] under the Oil Pollution Act (OPA).[10] Other removal costs and natural resource damage costs claimed by the Claimants are denied as explained below.

I. BACKGROUND, INCIDENT AND RECOVERY OPERATION, AND THE RESPONSIBLE PARTY:

Background

The POWHATAN was acquired by Samson in the early 1980s and operated in coastwise tug and barge operations, primarily in Alaska, but also between Washington and Alaska.[11]

In 2004, the POWHATAN was placed in layup at Samson's freight dock on the Starrigavan Bay in Old Sitka but was used on occasion to perform local assist tows in and around Sitka Harbor. The tug was maintained in a serviceable condition such that it would be easy to take her out of layup for temporary service. This service included keeping the engines, propulsion machinery, bilge pumps, tow winch, and other equipment in good working order. The tug was last used to perform a local assist tow in Sitka in 2013.[12] On December 27, 2013, Coast Guard Sector Juneau issued a letter to Samson acknowledging their request to place the POWHATAN in a layup status as the vessel had been taken out of service and was no longer being operated as a towing vessel. Pursuant to Samson's request, Sector Juneau exempted the POWHATAN from future Coast Guard uninspected towing vessel inspections until such time that the vessel was brought back into active service.[13] Between December 27, 2013, and the date of the vessel's sinking, Samson employees inspected the POWHATAN on a weekly basis. These inspections included a visual inspection of both the interior and exterior of the tug as well as checking the vessel's bilge for water ingress.[14]

Incident and Recovery Operations

On April 19, 2017, the tug POWHATAN sank at its berth at the Samson Tug & Barge dock in Sitka, AK, with approximately 2,200 gallons of diesel fuel in its fuel tanks. After sinking, the tug slid down a submarine slope until it came to rest in 160 feet of water approximately 250 yards from the dock.[15] Samson responded and activated SEAPRO to deploy boom and clean up the oil being discharge from the vessel; Meredith Management to manage to the spill response; Hanson Maritime to provide initial response and dive services; SEAADS Drone Services to

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[9] 33 CFR 136.115.
[10] 33 U.S.C. § 2703(a) and 33 U.S.C. § 2704(a).
[11] Declaration of Mr. (b) (6), principle marine surveyor for Alaska Marine Surveyors, undated and provided by Claimants as part of their claim submission, page 8.
[12] Declaration of Mr. (b) (6), principle marine surveyor for Alaska Marine Surveyors, undated and provided by the Claimants as part of their claim submission, page 9.
[13] CG Sector Juneau layup letter issued to Mr. (b) (6), Samson Tug & Barge Company, Inc. dated December 27, 2013.
[14] Declaration of Mr. (b) (6), principle marine surveyor for Alaska Marine Surveyors, undated and provided by the Claimants as part of their claim submission, page 9.
[15] CG-SITREP-POL 1 DTG P 250114Z Apr 2017.

provide drone services in support of the response; O'Brien's Group for invoice auditing; Polaris Applied Services for shoreline assessments and interactions with the natural resource damages trustees and ACD for pollution mitigation work and wreck removal.[16]

Removal operations over the next several weeks involved source control from the vessel and included plugging and patching all possible points of discharge from the vessel and mechanically tapping the fuel vents in an effort to vacuum the fuel tanks.[17] However, due to a continuing source of discharge and the inability to successfully remove all of the fuel from the vessel's fuel tanks, CG Sector Juneau issued Amin Order 03-2017 to Samson that required:[18]

a. By 1200 on May 22, 2017, provide the FOSC a comprehensive salvage plan and proof of a contract for the removal of the POWHATAN.
b. This plan must include details on how the mitigation, removal, continued monitoring and disposal of all fuel, oil, hazmat, and miscellaneous contaminants from the vessel will occur.

On May 22, 2017, Samson complied with Admin Order 03-217 by providing a wreck removal plan and signed wreck removal contract to CG Sector Juneau.[19] Assets to safely remove the POWHATAN were identified and mobilized from Seattle WA, to Sitka, AK.

On June 12, 2017, the POWHATAN was successfully raised, placed onto a barge and drained of approximately 7,000 gallons of oily water into a sorbent lined containment berm located on the deck of the barge.[20]

On June 13, 2017, the sorbent lined containment berm was pumped into a tank and transferred to shore for disposal. In addition, all of the oiled sorbents within the berm were recovered and all containment boom deployed around the barge was recovered and secured.[21]

On June 14, 2017, with the POWHATAN safely secured to the barge and drained of all liquid, the CG FOSC determined that the POWHATAN no longer presented a substantial threat of oil pollution discharge in the navigable waterways and declared the vessel safe for transit to Seattle, WA.[22]

Responsible Party

The POWHATAN was owned and operated by Samson Tug and Barge, Inc. Samson is the designated responsible party (RP) for the oil spill incident.[23]

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[16] Limitation of Liability Claim of Samson Tug & Barge Company dated April 26, 2019, pages 34-44.
[17] CG Incident Action Plan for operational period May 13, 2017 – May 22, 2017 dated May 13, 2017, page 3.
[18] CG Sector Juneau Admin Order 03-2017 for an Imminent Oil Pollution Threat issued to Samson Tug and Barge dated May 19, 2017.
[19] Wreck Removal and Pollution Mitigation Agreement between Samson Tug and Barge and American Commercial Divers, Inc. dated May 21, 2017.
[20] CG SITREP- POL 7 (F) DTG 162000Z Jun 2017.
[21] *Id*.
[22] *Id*.
[23] CG National Vessel Documentation Center Certificate of Documentation issued to Samson Tug and Barge Company, Inc. dated June 13, 2013 and expired on July 31, 2014.

Great American provided oil pollution insurance to Samson[24] while Navigator's Insurance Company, Liberty International Underwriters, Zurich North American, New York Marine & General Insurance Company and Travelers Insurance provided protection & indemnity insurance to Samson.[25] Pursuant to the terms of the insurance policies, the respective insurers on the policy are subrogated to Samson's rights of recovery for any amounts paid by the insurer under the policy.[26] As such, Samson as the RP and Great American and the interested underwriters through subrogation have submitted a claim for entitlement to limited liability with the NPFC.

II. DISCUSSION

A. Adjudication of Claims Against the OSLTF

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.[27] As a result, 5 U.S.C. § 555(e) requires the NPFC to provide a brief statement explaining the basis for a denial. This determination is issued to satisfy that requirement.

The claims adjudication process is also subject to the regulations at 33 CFR Part 136. During the adjudication of claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence and weighs its probative value when determining the facts of the claim. If there is conflicting evidence in the record, the NPFC will make a determination as to what evidence is more credible or deserves greater weight, and finds facts based on the preponderance of the credible evidence.

B. Claims Against the OSLTF by Responsible Parties

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.[28] Further, a responsible party's liability is strict, joint, and several.[29] In the case of a vessel, the responsible party includes any person owning, operating or demise chartering the

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[24] Great American Insurance Company policy #OHM 3492755 14 issued to Samson Tug and Barge via Venneberg Insurance, Inc. effective June 1, 2016, page 15. The per occurrence limit as set forth in the policy for an oil spill incident was $5,000,000.00.

[25] *See*, Policy of Insurance #VI 1611 issued by Navigators Insurance Company (35%), Liberty International Underwriters (10%), Zurich North America (20%), New York Marine & General Insurance Company (15%) and Travelers Insurance (20%) to Samson Tug and Barge via Venneberg Insurance, Inc. effective June 1, 2016, pages 1-2. The per occurrence limit as set forth in the policy for protection and indemnity was $1,000,000.00.

[26] Great American Insurance Company policy #OHM 3492755 14 issued to Samson Tug and Barge via Venneberg Insurance, Inc. effective June 1, 2016, General Conditions Applicable to the Entire Policy #9, pages 21-22. *See also* Policy of Insurance #VI 1611 issued by Navigators Insurance Company, Liberty International Underwriters, Zurich North America, New York Marine & General Insurance Company and Travelers Insurance to Samson Tug and Barge via Venneberg Insurance, Inc. effective June 1, 2016, General Conditions and/or Limitations of Policy page 6.

[27] The court in *Bean Dredging, LLC v. United States*, 773 F. Supp. 2d 63, 75 (D.D.C. 2011), characterized the informal adjudication process for OSLTF claims with the following: "[W]hile the OPA allows responsible parties to present a claim for reimbursement to the NPFC, they do not confer upon such parties a right to a formal hearing, a right to present rebuttal evidence or argument, or really any procedural rights at all, *see* 33 U.S.C. §§ 2704, 2708, 2713, an entirely unremarkable fact given that Congress' overarching intent in enacting the OPA was to 'streamline' the claims adjudication process . . . ."

[28] 33 U.S.C. § 2702(a).

[29] *See*, H.R. Conf. Rep. No. 101-653, 102, *reprinted in* 1990 U.S.C.C.A.N. 779 (August 1, 1990).

vessel.[30] 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."[31] OPA was intended to cure these deficiencies in the law.

Notwithstanding the above, under limited circumstances the OSLTF may reimburse a responsible party for its uncompensated removal costs and damages. In order to receive OSLTF reimbursement a responsible party must show an entitlement to either a defense or limited liability under the OPA. Specifically, 33 U.S.C. § 2708(a) (emphasis added) provides that:

> The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 2713 of this title ***only if the responsible party demonstrates*** that--
>
> (1) the responsible party is entitled to a defense to liability under section 2703 of this title; or
>
> (2) the responsible party is entitled to a limitation of liability under section 2704 of this title.

Under the plain meaning of 33 U.S.C. § 2708(a), a responsible party must demonstrate that either a defense or limited liability 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. [32] Therefore, just like 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 establish an entitlement to compensation from the OSLTF, or fails to establish the elements by a preponderance of the credible evidence, the NPFC must deny the claim.[33]

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[30] 33 U.S.C. § 2701(32)(A).

[31] *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.).

[32] *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).

[33] OPA's legislative history supports NPFC's conclusion 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 the owner of oil on a tank vessel, or a guarantor for that responsible party or owner of oil, to assert a claim for removal costs and damages ***only if the responsible party or owner can show that the responsible party or owner has a defense to liability, or is entitled to a limitation of liability***. In the latter case, a claim may be submitted only to the extent amounts paid by the responsible party or owner, or by a guarantor on the responsible party's or owner's behalf, exceeds the applicable limit on liability.

H.R. Conf. Rep. 101-653, 110, *reprinted in* 1990 U.S.C.C.A.N. 779 (August 1, 1990) (emphasis added). *See also*, *Apex Oil Co., Inc. v. United States*, 208 F.Supp.2d 642 (E.D. La., 2002)(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); *Bean Dredging, LLC v. United States*, 773 F.Supp.2d 63, 86 (D.D.C. 2011)(the responsible party "had the burden of proof of establishing its entitlement to reimbursement on the administrative level" …); and *Water Quality Ins. Syndicate v. United States*, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009)(holding that it is the responsible party, not the NPFC,

The administrative record in this case unequivocally resolves several important issues. Specifically, the Starrigavan Bay was a navigable waterway of the United States and the oil spill at issue here was an incident under the OPA. In addition, Samson was the owner and operator of the tug POWHATAN, and therefore the responsible party for this incident. Because this claim was submitted to NPFC on April 29, 2019, it is a timely claim. The remaining issues are discussed below.

C. Limitation of Liability

Under 33 U.S.C. § 2704 (a), a responsible party may limit its liability for removal costs and damages. However, OPA's limited liability will not apply if the incident was proximately caused by the responsible party's willful misconduct, gross negligence, or violation of a federal regulation.[34] Also, under 33 U.S.C. § 2704 (c)(2), limited liability will not apply when the responsible party fails:

> (A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;
> (B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or
> (C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title or the Intervention on the High Seas Act (33 U.S.C. § 1471 et seq.).

Claimants assert that they are entitled to limited liability under 33 U.S.C. § 2704 (a). If successful, Claimants would be permitted under 33 U.S.C. § 2708 to recover from the OSLTF their compensable removal costs and damages that exceed the applicable OPA limit of liability. Before the OSLTF can reimburse any costs or damages, Claimants must carry their burden of proving an entitlement to limited liability[35]

When submitting a limit of liability 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

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which has the burden to prove it [or in the case of an insurance company-claimant, its ensured] is entitled to a limitation of liability when making a claim against the OSLTF under 33 U.S.C. § 2708).

Placing the burden of proof on a responsible party claimant seeking compensation under 33 U.S.C. § 2708 is consistent with the general rule that a party seeking relief bears the burden of proving an entitlement to that relief. Requiring a responsible party claimant to prove its entitlement to OSLTF compensation is also consistent with the general rule that a party with particular knowledge of the facts ought to bear the burden of proving those facts. As the owner and operator of the tug POWHATAN, Samson had unique access to the facts surrounding this incident because it was in control of the operations resulting in the discharge and had dominion and control over the discharging vessel. This unique access to the discharging vessel makes Claimants particularly well-positioned to actually know or discover the facts surrounding the incident. Placing the burden of proof on a responsible party and its insurers seeking compensation under 33 U.S.C. § 2708 incentivizes full disclosure of all relevant facts by Claimants who are well-positioned to know or learn what happened during an OPA incident.

[34] 33 U.S.C. § 2704 (c)(1).

[35] *See*, 33 U.S.C. § 2708.

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."[36] This is not an impossible burden to carry. [37] 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 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.[38] When analyzing whether a responsible party has met its burden of

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

[37] 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).

[38] *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).

proof, it is important to note that the terms "gross negligence" and "willful misconduct" have distinct meanings under the OPA.[39] The NPFC defines those terms as follows:[40]

> ***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.[41]

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[39] 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.").

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

[41] 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

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.
[42]

In this case, Claimants satisfied their burden of proving an entitlement to limited liability. For the purposes of this claim determination, the NPFC finds that the incident was not proximately caused by the gross negligence or willful misconduct of Samson. Further, there is no evidence in the administrative record that indicates the incident was proximately caused by a violation of an

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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.").

[42] 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 probable 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 *Safeco v. Burr*, 551 U.S. 47 (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.").

applicable federal safety, construction, or operating regulation by Samson. Additionally, Samson timely accepted responsibility for the incident and provided appropriate cooperation and assistance with respect to the removal action. Accordingly, 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.

D. *OSLTF Compensable Removal Costs*

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).[43] The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.[44] 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.[45]

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.[46]

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 POWHATAN was $939,800.00. Claimants contend that they incurred $3,810,523.83 in removal costs. As a result, Claimants seek a total of $2,870,723.83 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.

The NPFC analyzed each of these factors and determined the majority of the removal 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.

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[43] *See generally,* 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.
[44] 33 CFR Part 136.
[45] 33 CFR 136.105.
[46] 33 CFR 136.203; 33 CFR 136.205.

The amount of compensable removal costs totals $2,727,526.71, while $143,197.12 of the claimed removal costs were deemed not compensable for the following reasons:

1. Charges in the amount of $48,062.13 for State of Alaska Department of Environmental Conservation (ADEC) personnel as the rates charged were not supported. In addition, since all ADEC labor charges were denied, all ADEC charges in support of ADEC personnel were also denied.

2. Charges in the amount of $1,607.09 for duplicate billings. Tools and supplies in the amount of $563.46 and lodging costs for Mr. (b) (6) in the amount of $1,043.63 were submitted twice;

3. Charges in the amount of $42,518.43 for personnel costs that were not supported by daily worksheets, logs or rate schedules;

4. Charges in the amount of $9,667.88 for expenditures with redacted explanations and not otherwise supported in the record;

5. Charges in the amount of $41,341.59 for miscellaneous expenditures that either lacked any type of supporting documentation (including an unsupported finance charge from American Commercial Divers in the amount of $27,128.99), or were the result of unidentified differences on invoiced amounts, billing rate errors and rounding errors as documented in Enclosure 3.

E. ***OSLTF Compensable Natural Resource Damages***

The RP claimed $19,080.25[47] in damages that the RP describes in its claim as being related to natural resource damages (NRD) for the incident. To clarify the type of damages claimed, the NPFC asked the Claimants on August 29, 2019, to specify "the type of damage as defined under 33 U.S.C. §2702 for which you seek reimbursement". [48] In the response to the NPFC, the RP did not specifically state that the costs were for NRD, but reiterated that these costs were "damages for services related to the NRDA claim".[49,50] As more fully discussed below, the $19,080.25 claimed for NRD is denied. To the extent that the RP is claiming for reimbursement of NRD[51] for past assessment costs, the NPFC has determined that the RP failed to prove that they have the authority to independently incur and/or recover its own assessment costs related to a natural resource damage assessment (NRDA). Further, the RP failed to prove that its claimed costs were eligible to be treated as trustee assessment costs. Lastly, even if the RP had established its

[47] The RP originally claimed $14,482.75, but then claimed an additional $4,597.50 on October 23, 2019.
[48] Email from NPFC to (b) (6), dated August 29, 2019.
[49] Email from (b) (6) to NPFC, dated September 4, 2019.
[50] 33 CFR 136.109(b) requires that a claimant specifically identify a category for all damages claimed.
[51] 33 U.S.C. § 2704(a) provides that an RP's OPA liability cannot exceed "the total of the liability of a responsible party under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party." Accordingly, even if a RP had incurred compensable NRD costs, those costs could still not be counted towards its liability limit. Only those NRD costs incurred pursuant to § 2702(a), (i.e., NRD costs incurred by a trustee and reimbursed by the RP) would count towards the satisfaction of a RP's liability limit.

claimed costs were eligible to be treated as OPA-compensable trustee assessment costs, the RP failed to provide the evidence required by 33 CFR 136.209.

Legal Authorities Controlling OSLTF Reimbursement of NRD

33 U.S.C. § 2706(a) establishes the general principle that liability for NRD under OPA shall only be to the United States government, a State, any Indian tribe, or a foreign government. This exclusive liability follows directly from OPA's definition of natural resources themselves, which provides that natural resources are those resources "belonging to, managed by, appertaining to, or otherwise controlled by" the United States, any State or local government or Indian tribe, or any foreign government.[52] OPA further directed NOAA, with consultation from other agencies, to promulgate regulations that provide guidance on how trustees conduct NRDAs. These regulations state that "reasonable assessment costs" means "for assessments conducted under this part, assessment costs that are incurred by trustees in accordance with this part."[53] Collectively, these legal principles demonstrate the singular authority and role that designated trustees are endowed with pursuant to OPA. As intended by OPA, trustees have the sole responsibility to "act on behalf of the public" and the exclusive authority to conduct NRDAs for those natural resources "under their trusteeship".[54]

This restrictive authority to incur **OPA-compensable** NRD assessment costs is further evidenced by the manner in which claimant eligibility was structured in OPA. 33 U.S.C. § 2702(b)(2)(A) specifies that NRD "shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee." Correspondingly, 33 CFR 136.207 provides that claims for uncompensated NRD may be presented to the Fund by an appropriate natural resource trustee. Trustees are the only authorized claimants in OPA who may submit a claim for NRD because, quite clearly, they are the only entities authorized to incur **OPA-compensable** NRD.

Further, proving an entitlement to limited liability under 33 U.S.C. §§ 2704 and 2708 does not authorize OSLTF reimbursement of a RP's NRD costs. While § 2708(b) states that a RP may recover for "removal costs and damages incurred by the responsible party," that language does not establish a right of OSLTF reimbursement of a RP's own costs associated with NRDA. As described above, the RP has no authority to independently "incur" **OPA-compensable** NRD costs. Thus, a RP's limit is irrelevant to their ability to submit claims for its own assessment costs associated with NRD. Stated another way, if a RP has no authority to independently incur or recover such costs prior to the granting of a limit, there is no basis in § 2708 that transforms RP assessment costs into reimbursable trustee NRD costs after a limit has been granted.

Notwithstanding the trustee-focused context of NRD established by OPA and associated regulations, the NPFC acknowledges that, if a trustee seeks to conduct a NRDA pursuant to

[52] 33 U.S.C. §2701(20).
[53] 15 CFR 990.30. Congress's intent to give trustees sole NRDA authority is supported by the contemporaneous record of OPA's enactment, where it was stated "Assessments, of course, must be conducted by trustees, not by responsible parties." S. Rep. No. 101-94 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722).
[54] 33 U.S.C. §§ 2706(b)(1) & (c). These exclusive natural resource trustee authorities and responsibilities are also discussed in detail in the National Contingency Plan. 40 CFR 300, Subpart G.

NOAA's NRDA regulations[55], it is required to invite the RP to participate in the NRDA.[56] However, this invitation to participate does not transfer any inherent trustee authority or responsibility over to the RP to conduct a NRDA. There is nothing in OPA, or elsewhere, that suggests that participation in a NRDA is compulsory for a RP. If a RP elects to participate in a NRDA, generally, the RP carries the financial burden of this voluntary participation without expectation of relief via the OPA claims process. Even during a "cooperative" trustee/RP NRDA, the trustee still retains full authority and responsibility to assess and determine the magnitude of injury and plan appropriate restoration. Given that a RP does not obtain any independent trustee authority during a cooperative NRDA, costs incurred by the RP during a cooperative assessment do not automatically become OPA-compensable.

NRD Claims Process for OSLTF Reimbursement

Based on the legal authorities discussed above, the NPFC describes a path forward for adjudicating NRD claims presented to the Fund from RP claimants. While the RP does not have authority to incur NRD independently, under some circumstances, if an RP evidences that it incurred costs at the explicit direction of a trustee and on behalf of the trustee for activities determined by the trustee to be necessary to support the trustee-led NRDA, then those RP costs may be reimbursed by the NFPC as OPA-compensable NRD damages with respect to a limit of liability claim. Stated another way, these are costs that would have been incurred by the Trustee for NRDA activities **and** the trustee authorized that the RP could fund those activities directly. In this instance, pursuant to 33 CFR 136.105(a), the RP bears the burden of establishing that the trustee, at its direction and on its behalf, authorized the costs and that the costs were necessary to support the trustee-led NRDA.

This standard for RP reimbursement of NRD assessment costs, which relies on the explicit direction of the Trustees, is identical for restoration costs as well. An RP has no authority to plan and implement restoration on its own, independent of the trustees. Thus, in order for an RP to be reimbursed for restoration costs, the RP must evidence that it funded the restoration project at the explicit direction of the trustee and the project was identified and described in the trustee's restoration plan for making the public whole for injuries resulting from an OPA incident.

The NPFC recognizes that this standard for RP reimbursement may differ from previous NPFC NRD adjudicative actions, which relied primarily on the general existence of a cooperative NRDA between the trustees and RP. An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing course must supply a reasoned analysis.[57]

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[55] The NPFC notes that RP participation in NRDA is not mentioned anywhere in OPA or the NPFC claims regulations and that that the use of NOAA's NRDA regulations are not required by the NPFC.

[56] 15 CFR 990.14(c). At the trustees' sole discretion, this participation may be limited to notice of trustee determinations under 15 CFR 990 and opportunity to comment on significant trustee documents. 15 CFR 990.14(c)(4).

[57] *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983) (*quoting Greater Bos. Television Corp. v. FCC*, 444 F. 2d 841, 852 (D.C. Cir. 1971). *See also*, *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (An agency is free to change its existing policies and standards as long as it displays an awareness of the change and provides a reasoned explanation for the change. The reason justifying the need not be more substantial than that required to adopt a policy in the first instance. It suffices that the new policy is permissible under the statute and the agency believes it to be better.).

Based upon the legal authorities described above, the NPFC believes that this change in standard more faithfully adheres to the language and intent of OPA, the NPFC Claims Regulations, and the NRDA Regulations. For the POWHATAN incident, the Claimants' claimed costs were with respect to observing the collection of water; sheen and tissue samples; sending samples to a laboratory (Newfields) for analysis; sharing and discussing the results of the sample analyses with the NRDA Trustees;[58] meeting with the NRDA trustees to discuss pre-assessment issues; commenting on the notice of intent; obtaining chain of custody for samples; and meetings between the RP and its consultants.[59] Claimants also claimed costs "to develop comments to the NRDA Trustees' Draft Assessment and Restoration Plan, its review of the NRDA Trustees' invoice that the NPFC paid (for which the NPFC then sought and obtained reimbursement from Samson)[60], and its review and assessment of a letter from the NRDA Trustees relating to Polaris' comments on a sheen sample that the Trustees have been treating as a water sample in the NRDA."[61]

Claimants did not provide any documentation to support that these claimed costs were incurred at the request of and on behalf of the Trustees. A report written by NOAA, which references the RP's participation in NOAA's NRDA activities following the incident, reflects that some activities conducted by Claimants were coordinated with the Trustees. [62] As stated in the report, "the RP and its contractor shared information gathered on the scene, as well as source samples and tissue chemistry data with the Trustees."[63] While this language reflects a level of coordination between the RP and Trustees, the report directly refutes that Claimants costs were incurred on the Trustees' behalf. Specifically, the report stated that "the RP declined the opportunity to cooperatively fund study planning and implementation of field collection efforts targeting ephemeral data."[64]

In summary, an RP may choose to participate in activities related to NRDA, however they bear the financial burden of this participation unless they can prove that the costs incurred were at the explicit request of, and on behalf of, the trustees. Claimants' claimed activities for this incident, such as commenting on trustee documents, meetings between the RP and its consultants, and observing the Trustees' sampling efforts, were conducted at the RP's discretion and were not requested by the Trustees to support their NRDA. While the Trustees may have invited the RP to comment on their plans, all trustees are required to make this invitation to all RPs pursuant to 15 CFR 990.14(c); thus, the simple existence of an invitation to comment in no way establishes that these costs were actually requested by the Trustees and necessary to support their NRDA. Similarly, with respect to sampling activities and analysis conducted by the RP, these activities were undertaken without consultation with, or direction from, the Trustees and the results were later shared with the Trustees as a courtesy.

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[58] Email from (b) (6) to NPFC, dated September 4, 2019.
[59] Email from (b) (6) to (b) (6), dated April 26, 2019.
[60] The costs claimed to review costs billed to the RP by the NPFC are particularly outside the scope of NRDA and OPA. These activities do not support the NRDA in any way and the underlying Trustee costs have already been reviewed, adjudicated, and paid by the NPFC. These activities are part of the cost recovery process and there is no legal basis in OPA for RP's to recover costs to review bills issued by the NPFC.
[61] Email from (b) (6) to NPFC, dated October 23, 2019.
[62] Tug Powhatan, Sitka, Alaska - Natural Resource Damage Assessment Summary of Emergency Response and Pre-assessment Efforts, March 2018.
[63] *Id.*
[64] Tug Powhatan, Sitka, Alaska - Natural Resource Damage Assessment Summary of Emergency Response and Pre-assessment Efforts, March 2018, at page 1-5.

Additionally, Claimants failed to provide the proof necessary to support a claim for NRD as required by 33 CFR 136.209. Most significantly, pursuant to 33 CFR 136.209(a), Claimants did not submit an assessment plan that forms the basis for the claimed costs. The requirement for a plan is reinforced by 33 U.S.C. § 2706(d)(2) which established that claimed NRD costs are determined by the NPFC with respect to plans. Therefore, even if Claimants had successfully established that their costs were eligible to be treated as trustee assessment costs, Claimants' claimed costs would be denied for lack of supporting proof.

In conclusion, Claimants failed to prove that the RP has independent authority to incur and be reimbursed for its own costs to conduct NRDA. Further, Claimants failed to prove that any of the damages claimed were eligible to be treated as OPA-compensable trustee assessment costs. Lastly, Claimants failed to provide the proof required to support a claim for NRD. Accordingly, for all these reasons, costs claimed in the amount of $19,080.25 for NRD are denied.

III. CONCLUSION

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Claimants' request to limit liability is approved. Claimants' request for uncompensated removal costs is approved in the amount of **$2,727,526.71.** However, $162,277.37 in claimed removal costs and NRD are denied.[65]

This determination is a settlement offer;[66] the Claimants have 60 days in which to accept this offer. Failure to do so automatically voids the offer.[67] The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.[68] Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

(b) (6)

Claim Supervisor: (b) (6)

Date of Supervisor's review: ***January 16, 2020***

Supervisor Action: ***Claim Approved***

[65] Enclosure 3 provides a detailed accounting of the amounts denied.
[66] 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).
[67] 33 CFR 136.115(b).
[68] *Id.*