

CLAIM DETERMINATION

Claim Number:	UCGPJ22004-RPL001
Claimant:	Western Towboat Company with its Subrogated Insurers
Type of Claimant:	RP
Type of Claim:	Limit of Liability
Claim Manager:	(b) (6)
Amount Requested:	\$647,449.13
Action Taken:	Offer in the Amount of \$ 548,219.95

EXECUTIVE SUMMARY:

On March 21, 2022, the tug WESTERN MARINER (WESTERN MARINER) was towing the deck barge CHICHAGOF PROVIDER (CHICHAGOF PROVIDER) within the Neva Strait, AK,¹ when the tug experienced a steering casualty resulting in the CHICHAGOF PROVIDER colliding with the WESTERN MARINER and the WESTERN MARINER grounding onto the shoreline.² The Neva Strait is a navigable waterway of the United States. The WESTERN MARINER sustained damage to its forward port fuel tank and engine room and released oil into the Neva Strait.³ The discharge of oil was reported to the U.S. Coast Guard (CG) National Response Center.⁴ Western Towboat Company (WTB) was the owner and operator of the WESTERN MARINER.⁵ A representative of WTB arrived on-scene and contracted assets necessary to address the casualty.⁶ Specifically, WTB hired Southeast Alaska Petroleum Research Organization (SEAPRO), Global Diving and Salvage (Global Diving), and Hanson Maritime to respond to the incident.⁷ Oil spill response activities continued through March 28, 2022.⁸ On March 29, 2022, the WESTERN MARINER was successfully removed from the shoreline and refloated within the Neva Strait.⁹ Once afloat and secured to the recovery tug, the CG Federal On-Scene Coordinator (FOSC) determined that the WESTERN MARINER no longer posed a substantial threat to discharge oil into a navigable waterway of the U.S. as the vessel was stabilized, its fuel tanks empty, and was under control of the recovery tug.¹⁰ The WESTERN MARINER was then towed to the Samson Tug and Barge facility in Sitka, AK, in preparation for its planned trip to a shipyard for permanent repairs.¹¹ Steamship Insurance Management Services, Ltd.¹² provided oil pollution insurance while other underwriters provided

¹ Limit of Liability Claim Submission Western Towboat Company and its subrogated insurers dated April 4, 2023 (“Claim Submission”), page 3.

² Claim Submission, page 4.

³ CG-SITREP-POL ONE DTG R 222352Z Mar 22.

⁴ CG National Response Center Report # 1331571 dated March 21, 2022.

⁵ CG National Vessel Documentation Center Certificate of Documentation issued to Western Towboat Company dated February 10, 2022. *See also*, 33 U.S.C. § 2701(32)(A).

⁶ CG-SITREP-POL ONE DTG R 222352Z Mar 22.

⁷ *Id.*

⁸ *See*, multiple CG pollution reports covering this period.

⁹ CG-SITREP-POL EIGHT DTG R 300043Z Mar 22. *See also*, Global Diving & Salvage Daily Operation Brief dated March 29, 2022.

¹⁰ Email from FOSC to NPFC dated June 15, 2023.

¹¹ Global Diving & Salvage Daily Operation Brief dated March 29, 2022.

¹² Steamship Insurance Management Services, Ltd. Certificate of Entry and Acceptance # 126307/1 issued to Western Towboat Company on February 20, 2022. The per occurrence limit as set forth in the policy for an oil spill

protection & indemnity insurance for the vessel.¹³ WTB and their subrogated insurers (Claimants) submitted a claim for entitlement to limited liability¹⁴ 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 Oil Pollution Act of 1990 (OPA), the limit of liability applicable to the WESTERN MARINER was \$997,100.00. Claimants contend that they incurred \$1,644,549.13 in removal costs. As a result, Claimants seek a total of \$647,449.13 as compensation for their removal costs incurred in excess of the limit.¹⁵ The NPFC has thoroughly reviewed all documentation submitted with the claim, 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 \$548,219.95 in removal costs in excess of the limit of liability are compensable and offers this amount as full and final compensation of this claim under the Oil Pollution Act (OPA). The remaining removal costs are denied as explained below.

I. INCIDENT, RESPONSE OPERATIONS, AND THE RESPONSIBLE PARTY:

Incident and Response Operations

On March 20, 2022, the WESTERN MARINER departed Petersburg, AK, enroute Sitka, AK, with the CHICHAGOF PROVIDER in a stern tow.¹⁶ The purpose of the voyage was to deliver supplies in Sitka via the Neva Strait which was a regularly scheduled delivery occurring four times a week year-round.¹⁷ The captain of the WESTERN MARINER maintained a CG issued license¹⁸ and had transited the Neva Strait hundreds of times in the position of either Chief Mate or Captain of the vessel.¹⁹ The WESTERN MARINER was carrying approximately 43,500 gallons of diesel fuel within its integral fuel tanks.²⁰ The CHICHAGOF PROVIDER was not carrying any petroleum products as cargo.²¹

incident was \$1,000,000,000.00.

¹³ Atlantic Specialty Insurance Company, as the lead underwriter for Subscription Hull Policies HDB-53226 (60%) issued by Atlantic Specialty Insurance Co (20%), Navigators Insurance Co (12.5%), US Specialty Insurance Co (10%), Aspen American Insurance Co (10%), Endurance American Insurance Co (7.5%), to Western Towboat Company effective October 20, 2021, with a hull insured amount as set forth in the policy for protection and indemnity of \$1,120,000.00. *See also*, CN-53227 (40%) issued by Price Forbes (40%) to Western Towboat Company effective August 20, 2021, with a hull insured amount as set forth in this policy for protection and indemnity of \$1,120,000.00.

¹⁴ *See*, 33 U.S.C. § 2704.

¹⁵ Claim Submission, page 19 with a sum certain of \$568,549.13. *See also*, letter from Claimants to the NPFC dated May 23, 2023, page 12 acknowledging that the WESTERN MARINER's limit of liability on March 21, 2022, was \$997,100.00 and not \$1,076,000.00 as originally stated within their claim submission dated April 4, 2023. As a result, Claimants amended their sum certain to \$647,449.13 after applying the vessel's correct limit of liability to their total claimed costs of \$1,644,549.13.

¹⁶ Letter from Claimants to NPFC dated May 23, 2023, page 1.

¹⁷ Letter from Claimants to NPFC dated May 23, 2023, page 3.

¹⁸ Signed declaration of Captain (b) (6), dated February 24, 2023, provided as Appendix 8 within the Claimant's limit of liability claim submission dated April 4, 2023.

¹⁹ Letter from Claimants to NPFC dated May 23, 2023, page 3.

²⁰ Claim Submission, page 3.

²¹ *Id.*

On March 21, 2022, the WESTERN MARINER was transiting southeast within the Neva Strait with the CHICAGOF PROVIDER in a stern tow.²² The vessel was traveling at approximately 9.5 knots²³ with the vessel's autopilot engaged.²⁴ As the vessel approached buoy #22 within the Neva Strait's navigational channel, the captain attempted to adjust the vessel's heading to port, but the vessel's steering failed to respond.²⁵ The captain responded by switching the vessel's steering to jog mode in high-speed²⁶ which disengaged the vessel's autopilot.²⁷ The captain then made a manual course correction to port and ordered the release of the CHICAGOF PROVIDER to free the WESTERN MARINER from the restrictions of the barge²⁸ in an effort to prevent the barge from colliding with the tug.²⁹ The WESTERN MARINER began to respond to the captain's course correction to port but was struck on its port quarter by the CHICAGOF PROVIDER as the barge maintained its steady course after being released.³⁰ The WESTERN MARINER grounded on the western side of the Neva Strait as a result of the collision³¹ and sustained damage to its forward port fuel tank³² and engine room.³³ Diesel fuel and oil were discharged into the Neva Strait, a navigable waterway of the United States.³⁴

A representative from WTB responded and contracted assets necessary to address the casualty.³⁵ Specifically, WTB hired SEAPRO to respond to the ongoing discharge of diesel fuel from the WESTERN MARINER's damaged fuel tank.³⁶ Pollution removal activities included the deploying and tending of boom, deploying and replacing sorbent pads, handling waste management, conducting shoreline assessments, and deploying skimmers.³⁷ WTB also hired Global Diving to prepare and execute a salvage plan to remove the WESTERN MARINER from the shoreline³⁸ and Hanson Maritime to provide support services related to oil removal and salvage operations.³⁹ CG Sector Juneau, the Alaska Department of Environmental Conservation (ADEC) and WTB established a Unified Command (UC) to oversee all response operations.⁴⁰ CG Sector Juneau also issued an Administrative Order to WTB which required them to continuously monitor any discharge of oil from the WESTERN MARINER and to take measures

²² *Id.*

²³ A knot is approximately 1.15 miles per hour.

²⁴ Letter from Claimants to NPFC dated May 23, 2023, page 3.

²⁵ Claim Submission, page 4.

²⁶ *Id.*

²⁷ Letter from Claimants to NPFC dated May 23, 2023, page 4.

²⁸ Claim Submission, page 4.

²⁹ Letter from Claimants to NPFC dated May 23, 2023, page 5.

³⁰ Letter from Claimants to NPFC dated May 23, 2023, pages 4-5. *See also*, Claim Submission, page 4.

³¹ Claim Submission, page 4.

³² The WESTERN MARINER's forward port fuel tank had a maximum capacity of 13,000 gallons.

³³ Claim Submission, page 4. *See also*, CG-SITREP-POL ONE DTG R 222352Z Mar 22.

³⁴ CG-SITREP-POL ONE DTG R 222352Z Mar 22.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Signed declaration of (b) (6), WTB President of Operations, dated March 7, 2023, provided as Appendix 16 within the Claimant's limit of liability claim submission dated April 4, 2023, page 12.

³⁸ Signed declaration of (b) (6), WTB President of Operations, dated March 7, 2023, provided as Appendix 16 within the Claimant's limit of liability claim submission dated April 4, 2023, page 7.

³⁹ Signed declaration of (b) (6), WTB President of Operations, dated March 7, 2023, provided as Appendix 16 within the Claimant's limit of liability claim submission dated April 4, 2023, page 8.

⁴⁰ CG-SITREP-POL ONE DTG R 222352Z Mar 22.

to remove any discharge and to mitigate or prevent the threat of any discharge from the WESTERN MARINER, including the removal of all fuel, hydraulic, waste, and lubricating oils in the vessel and vessel bilges prior to moving the vessel from its current location.⁴¹

On March 22, 2022, oil pollution removal activities were suspended due to weather⁴² but Global personnel were able to access the WESTERN MARINER to conduct a damage assessment of the vessel's hull.⁴³

On March 23, 2022, oil pollution responders resumed their on-water pollution removal activities.⁴⁴ Additionally, Global personnel discovered a crack in the vessel's aft port fuel tank⁴⁵ that was discharging diesel fuel into the vessel's engine room.⁴⁶ Multiple patches were placed on the vessel's hull⁴⁷ and a water-tight door was sealed in the engine room to prevent the continued discharge of oil into the Neva Strait.⁴⁸

On March 24, 2022, oil pollution responders continued their on-water pollution removal activities.⁴⁹ Additionally, Global personnel were able to seal the port aft diesel fuel tank internal fractures that opened into the engine room.⁵⁰ Temporary repairs to the vessel's hull continued⁵¹ and lightering of the vessel's internal fuel tanks commenced.⁵²

On March 25, 2022, oil pollution responders continued their on-water pollution removal activities⁵³ and shoreline cleanup, and assessment (SCAT) activities were initiated.⁵⁴ Global personnel continued to make temporary repairs to the vessel's hull.⁵⁵

On March 26, 2022, oil pollution responders continued their on-water pollution removal activities and SCAT surveys.⁵⁶ Additionally, Hanson personnel were able to complete their vessel lightering operations and reported that all fuel tanks onboard the WESTERN MARINER had been opened, inspected and were now free of oil.⁵⁷ A total of 32,080 gallons of clean diesel fuel and 11,625 gallons of diesel fuel/oil mixed with water were recovered from the vessel.⁵⁸

⁴¹ CG-SITREP-POL THREE DTG R 250102Z Mar 22. *See also*, CG Sector Juneau Administrative Order issued to Western Towboat Company dated March 24, 2022.

⁴² CG-SITREP-POL TWO DTG R 240111Z Mar 22.

⁴³ Global Daily Operations Brief dated March 22, 2022, page 2.

⁴⁴ CG-SITREP-POL TWO DTG R 240111Z Mar 22.

⁴⁵ The WESTERN MARINER's aft port fuel tank had a maximum capacity of 8,000 gallons.

⁴⁶ Global Daily Operations Brief dated March 23, 2022.

⁴⁷ CG-SITREP-POL TWO DTG R 240111Z Mar 22.

⁴⁸ *Id.*

⁴⁹ CG-SITREP-POL THREE DTG R 250102Z Mar 22.

⁵⁰ Global Daily Operations Brief dated March 24, 2022, page 3.

⁵¹ *Id.*

⁵² *Id.*

⁵³ CG-SITREP-POL FOUR DTG R 260035Z Mar 22.

⁵⁴ *Id.*

⁵⁵ Global Daily Operations Brief dated March 25, 2022, page 3.

⁵⁶ Global Daily Operations Brief dated March 26, 2022, page 3.

⁵⁷ Global Daily Operations Brief dated March 26, 2022, page 2.

⁵⁸ Alaska Department of Environmental Conservation SITREP 5 dated March 29, 2022.

Global personnel continued to make temporary repairs to the vessel's hull⁵⁹ and a draft salvage plan was submitted to the UC for review.⁶⁰

On March 27, 2022, oil pollution responders continued their on-water pollution removal activities and SCAT surveys.⁶¹ Global personnel positioned lift bags around the hull of the WESTERN MARINER in preparation of re-floating the vessel.⁶²

On March 28, 2022, oil pollution responders continued their on-water pollution removal activities and SCAT surveys.⁶³ Additionally, the UC approved the vessel salvage plan⁶⁴ and a salvage tug arrived in Sitka with intentions of removing the WESTERN MARINER from the shoreline of the Neva Strait on March 29, 2022.⁶⁵ Global personnel continued their preparations to re-float the vessel.⁶⁶

On March 29, 2022, the WESTERN MARINER was successfully removed from the shoreline and refloated within the Neva Strait.⁶⁷ Once afloat and secured to the recovery tug, the CG FOOSC determined that the WESTERN MARINER no longer posed a substantial threat to discharge oil into a navigable waterway of the U.S. as the vessel was stabilized, its fuel tanks empty, and was under control of the recovery tug.⁶⁸ The WESTERN MARINER was then towed to the Samson Tug and Barge facility in Sitka, AK, in preparation for its planned trip to a shipyard for permanent repairs.⁶⁹

From March 30, 2022, - April 3, 2022, oil contaminated shoreline flushing continued in and around the area of the WESTERN MARINER grounding site.⁷⁰ SCAT surveys of impacted shorelines continued occasionally through March 19, 2023.⁷¹

Responsible Party

WTB owned and operated the WESTERN MARINER at the time of the incident⁷² and is the responsible party (RP).⁷³

Steamship Insurance Management Services, Ltd. (Steamship) provided oil pollution insurance provided oil to WTB.⁷⁴ Additionally, Atlantic Specialty Insurance Company,

⁵⁹ Global Daily Operations Brief dated March 26, 2022, page 3.

⁶⁰ CG-SITREP-POL SIX DTG R 271923Z Mar 22.

⁶¹ Global Daily Operations Brief dated March 27, 2022, page 2.

⁶² *Id.*

⁶³ CG-SITREP-POL SEVEN DTG R 290028Z Mar 22.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Global Daily Operations Brief dated March 28, 2022.

⁶⁷ CG-SITREP-POL EIGHT DTG R 300043Z Mar 22. *See also*, Global Diving & Salvage Daily Operation Brief dated March 29, 2022.

⁶⁸ Email from FOOSC to the NPFC dated June 15, 2023.

⁶⁹ Global Diving & Salvage Daily Operation Brief dated March 29, 2022.

⁷⁰ *See*, associated CG Pollution Reports.

⁷¹ *Id.*

⁷² CG National Vessel Documentation Center Certificate of Documentation issued to Western Towboat Company dated February 10, 2022.

⁷³ 33 U.S.C. § 2701(32)(A).

Navigators Insurance Company, US Specialty Insurance Company, Aspen American Insurance Company, Endurance American Insurance Company, and Price Forbes (interested underwriters), provided protection & indemnity insurance to WTB.⁷⁵ WTB, Steamship, and interested underwriters provided proof that they incurred removal costs pursuant to this claim. As such, WTB as the RP and Steamship 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. § 555.⁷⁶ 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 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.⁷⁷ Further, a responsible party's liability is strict, joint, and several.⁷⁸ In the case of a vessel, the responsible party includes any person owning, operating or demise chartering the vessel.⁷⁹ When enacting OPA, "Congress explicitly recognized that the existing federal and

⁷⁴ Steamship Insurance Management Services, Ltd. Certificate of Entry and Acceptance # 126307/1 issued to Western Towboat Company on February 20, 2022. The per occurrence limit as set forth in the policy for an oil spill incident was \$1,000,000,000.00.

⁷⁵ Atlantic Specialty Insurance Company, as the lead underwriter for Subscription Hull Policies HDB-53226 (60%) issued by Atlantic Specialty Insurance Co (20%), Navigators Insurance Co (12.5%), US Specialty Insurance Co (10%), Aspen American Insurance Co (10%), Endurance American Insurance Co (7.5%), to Western Towboat Company effective October 20, 2021, with a hull insured amount as set forth in the policy for protection and indemnity of \$1,120,000.00. *See also* CN-53227 (40%) issued by Price Forbes (40%) to Western Towboat Company effective August 20, 2021, with a hull insured amount as set forth in this policy for protection and indemnity of \$1,120,000.00.

⁷⁶ 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"

⁷⁷ 33 U.S.C. § 2702(a).

⁷⁸ *See*, H.R. Conf. Rep. No. 101-653, 102, *reprinted in* 1990 U.S.C.C.A.N. 779 (August 1, 1990).

⁷⁹ 33 U.S.C. § 2701(32)(A).

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."⁸⁰ 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.⁸¹ 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.⁸²

⁸⁰ *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.).

⁸¹ 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).

⁸² 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

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.⁸³ 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.⁸⁴

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 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."⁸⁵ This is not an impossible burden to carry.⁸⁶ A responsible party will meet its

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, which has the burden to prove it [or in the case of an insurance company-claimant, its insured] 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 WESTERN MARINER, Western Towboat Company 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.

⁸³ 33 U.S.C. § 2704 (c)(1).

⁸⁴ See, 33 U.S.C. § 2708.

⁸⁵ *United States v. Grogg*, 9 F.2d 424, 426 (W.D. Va. 1925).

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.⁸⁷ When analyzing whether a responsible party has met its burden of proof, it is important to note that the terms "gross negligence" and "willful misconduct" have distinct meanings under the OPA.⁸⁸

⁸⁶ The treatise, *Corpus Juris Secundum*, 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).

⁸⁷ *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).

⁸⁸ 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

The NPFC defines those terms as follows:⁸⁹

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.⁹⁰

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.⁹¹

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.”).

⁸⁹ 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).

⁹⁰ 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.”).

⁹¹ 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

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 WTB.⁹² Further, there is no evidence in the administrative record that indicates the incident was proximately caused by a violation of an applicable federal safety, construction, or operating regulation by WTB.⁹³ Additionally, WTB timely accepted responsibility for the incident and provided appropriate cooperation and assistance with respect to the removal actions. 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 administrative record of this incident.

D. *OSLTF Compensable Removal Costs*

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.’”).

⁹² As part of the claim adjudication process, the NPFC reviewed the actions of the WESTERN MARINER’s Captain and crew leading up to and during the vessel’s grounding and subsequent oil spill along with the material and operating condition of the WESTERN MARINER immediately before and during the casualty and did not find any evidence that the incident was proximately caused by the gross negligence or willful misconduct of WTB personnel.

⁹³ As part of the claim adjudication process, the NPFC considered applicable regulations specific to the operation of the WESTERN MARINER (93GT towing vessel) in Alaskan waters to include Navigation Rules – International and Inland COLREGs, 33 CFR Part 164 – Navigation Safety Regulations, and 46 CFR Parts 136-144 – Subchapter M / Towing Vessels Regulations as well as information provided by the Claimants (e.g., CG licensing information for the vessel’s Captain and crew, post casualty drug testing results, and the crew’s 96 hour work/rest history) and did not find any evidence that the incident was proximately caused by a violation of an applicable federal safety, construction, or operating regulation.

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).⁹⁴ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁹⁵ 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.⁹⁶

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.⁹⁷

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 WESTERN MARINER was \$997,100.00. Claimants contend that they incurred \$1,644,549.13 in removal costs. As a result, Claimants seek a total of \$647,449.13 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 and each of the four factors above were met.

The NPFC analyzed each of these factors and determined most 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.

The amount of compensable removal costs totals \$548,219.95, while \$99,229.18 of the claimed removal costs were deemed not compensable for the following reasons:⁹⁸

1. Charges in the amount of \$73,981.41 for activities (e.g., vessel survey, vessel fabrication and repair, and vessel tank cleaning) that occurred on-board the WESTERN MARINER after the vessel was refloated on March 29, 2022, secured to a recovery tug, and declared by the CG FOSC to no longer pose a substantial threat to discharge oil into a navigable waterway of the United States.⁹⁹

⁹⁴ See generally, 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁹⁵ 33 CFR Part 136.

⁹⁶ 33 CFR 136.105.

⁹⁷ 33 CFR 136.203; 33 CFR 136.205.

⁹⁸ Enclosure 3 provides a detailed accounting of the amounts denied.

⁹⁹ See, email from FOSC to NPFC dated June 15, 2023. Specifically, charges in the amount of \$3,340.43 for American Bureau of Shipping (ABS) vessel survey costs incurred on March 30, 2022; charges in the amount of

2. Charges in the amount of \$3,025.62 for Charles Taylor, via Bowditch Marine, for costs incurred between March 22 – April 1, 2022. According to the Claimants, Charles Taylor, via Bowditch Marine, provided a survey of the barge, CHICHAGOF PROVIDER, to ensure it was also not a pollution threat. This ensured the pollution incident was limited to the tug itself, and not the barge, as well.¹⁰⁰ However, the CHICHAGOF PROVIDER was not carrying any petroleum products as cargo and there was no indication that at any time the barge discharged any petroleum product that contributed to the pollution event.¹⁰¹ The NPFC inquired with the CG FOSC as to whether the CHICHAGOF PROVIDER posed a substantial threat to discharge oil into a navigable waterway of the U.S. after its collision with the WESTERN MARINER. The FOSC responded that it was aware that the barge was carrying containerized cargo and cargo handling equipment that contained oil. However, the FOSC did not believe the barge posed a substantial threat to discharge oil into a navigable waterway.¹⁰²
3. Charges in the amount of \$5,204.50 for MR & Associates, LLC, (MR) for the management of the claims process associated with the response. According to the Claimants, MR is an environmental cleanup and auditing company. MR was hired to assess, address, and evaluate any claims made by local interest to WTB in WTB's role as RP. MR also assessed losses and damage to local Sitka-area fisheries as a result of the pollution incident.¹⁰³ The NPFC asked the Claimants to better support MR's costs by providing MR daily reports and an explanation of MR's primary purpose and nature of work performed.¹⁰⁴ The Claimants responded that MR's primary purpose and nature of work was related to providing claim services to respond to any person or entity alleging that they may have been impacted or otherwise sustained a loss relative to the spill at issue in this matter. They also provided 51 emails generated by or addressed to MR that documented MR's involvement in the generation and publication of an advertisement for claims, the payment for that advertisement, and news articles/advisories specific to the oil spill or potential closure resulting from the oil spill.¹⁰⁵ As presented, the costs incurred by MR resulted from their generation of a claims advertisement and third-party claims

\$5,718.06 for Coastal Transport SE, LLC, vessel fabrication/repair costs incurred between March 30 – March 31, 2022; charges in the amount of \$32,254.67 for Marine Fluid Systems, Inc. vessel fabrication/repair costs incurred between May 16 - May 30, 2022; charges in the amount of \$3,725.40 for Marine Vacuum Service, Inc. vessel tank cleaning costs incurred on April 26, 2022; Global Diving personnel charges, equipment charges, and purchases totaling \$26,822.85 for fabrication and repair work incurred between March 30 – April 2, 2022; and Hanson Maritime personnel and equipment charges totaling \$2,120.00 for fabrication and repair work incurred on March 30, 2022.

¹⁰⁰ Signed declaration of (b) (6), WTB President of Operations, dated March 7, 2023, provided as Appendix 16 within the Claimant's limit of liability claim submission dated April 4, 2023, page 6.

¹⁰¹ Claim Submission, page 3.

¹⁰² Email from FOSC to NPFC dated June 15, 2023.

¹⁰³ Signed declaration of (b) (6), WTB President of Operations, dated March 7, 2023, provided as Appendix 16 within the Claimant's limit of liability claim submission dated April 4, 2023, page 10.

¹⁰⁴ NPFC request for additional information to the Claimants dated June 16, 2023.

¹⁰⁵ Letter from Claimants to NPFC dated July 13, 2023, page 12. See also Appendix 28 containing 51 emails generated by or addressed to MR Associates, LLC, provided in support of Claimants letter dated July 13, 2023.

- process and not a damage that is reimbursable from the Oil Spill Liability Trust Fund (Fund).¹⁰⁶ The NPFC determines that these claimed costs are administrative and dedicated to the advertisement for claims and management of WTB's claims process; as such they are denied.¹⁰⁷
4. Charges in the amount of \$4,550.00 for the services provided by Polaris Applied Sciences, Inc, specific to the costs incurred under Polaris invoices #4791, 4801, and 4809. According to the Claimants, Polaris provided environmental planning, shoreline assessments, daily reports, and on-scene coordination. It also monitored impacts to the local fishing population and effects on the local fisheries. Polaris regularly took part in Incident Command meetings, participated in overflights of the scene, and assessed the potential damage resulting from the pollution incident.¹⁰⁸ However, the Polaris activities documented within invoices #4791, 4801, and 4809 as presented are not uncompensated removal costs necessary to prevent, minimize, or mitigate the effects of the incident and are therefore not reimbursable from the Fund.¹⁰⁹ The NPFC determines that these are not uncompensated removal costs; as such they are denied.
 5. Personnel charges in the amount of \$5,452.29 for State oversight provided by Alaska Department of Natural Resources (ADNR) from March 21 – May 15, 2022. The NPFC notified the Claimants that they needed to support these charges by providing straight time and over-time pay rates for ADNR personnel involved in the response.¹¹⁰ The Claimants responded but only provided the hours worked by ADNR personnel and not their straight time and over-time pay rates. These costs are denied as unsupported by the administrative record.
 6. Charges in the amount of \$7,015.36 for miscellaneous charges to include replacement of equipment damaged during the response without an explanation of how the equipment was damaged, expenditures that lacked supporting documentation, duplicate billings, travel costs for personnel who were not part of the pollution response, drug & alcohol testing, public notices, and excessive travel upgrades.

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 **\$548,219.95**. The amount remaining totaling \$99,229.18 in claimed removal costs are denied.¹¹¹

¹⁰⁶ 33 U.S.C. § 2702(b)(A)-(F).

¹⁰⁷ 33 CFR 136.105(d)(8)

¹⁰⁸ Signed declaration of (b) (6), WTB President of Operations, dated March 7, 2023, provided as Appendix 16 within the Claimant's limit of liability claim submission dated April 4, 2023, page 11.

¹⁰⁹ 33 CFR 136.203(a)

¹¹⁰ See, email from NPFC to Claimants dated August 3, 2023 requesting additional information.

¹¹¹ Enclosure 3 provides a detailed accounting of the amounts denied.

This determination is a settlement offer;¹¹² the claimants have 60 days in which to accept this offer. Failure to do so automatically voids the offer.¹¹³ The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.¹¹⁴ 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: September 25, 2023

Supervisor Action: *Claim Approved*

¹¹² 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).

¹¹³ 33 CFR 136.115(b).

¹¹⁴ *Id.*