CLAIM SUMMARY / DETERMINATION

Claim Number:	N13011-0003
Claimants:	Natures Way Marine, LLC (Responsible Party), and Unknown Excess P&I Underwriter (Responsible Party's Insurer)
Type of Claimant:	Corporate (US)
Type of Claim:	Limit of Liability
Claim Manager:	[redacted]
Amount Requested:	$869,738.32

Executive Summary

After a thorough review of the documentation provided by Nature's Way Marine, LLC and an unnamed excess P&I underwriter (collectively referred to as "Claimants"), as presented by the law firm of Duncan & Sevin, LLC ("Duncan & Sevin"), the National Pollution Funds Center ("NPFC") determines that this claim must be denied. This claim arises from an incident where a tug, the M/V NATURE'S WAY ENDEAVOR ("Tug" or "ENDEAVOR"), pushed two tank barges, the MOC-12, and MOC-15, into the Vicksburg Railroad Bridge and caused both an oil spill and a substantial threat of additional discharges of oil into the Mississippi River. Claimants seek reimbursement of all their costs or, alternatively, their costs that exceed the liability limits under the Oil Pollution Act of 1990 ("OPA"). Because the facts of this case do not establish a complete defense to liability under 33 U.S.C. § 2703 (a), Claimants are not entitled under the OPA to be compensated by the Oil Spill Liability Trust Fund ("OSLTF") for all their costs notwithstanding any presentation of costs to any underwriter for Nature's Way. Additionally, under 33 U.S.C. § 2712 (f), the OSLTF may not reimburse a claim when the claimant is unable to subrogate "all" of its rights to recover against a responsible party to the United States. Because Claimants released some or all of their rights to recover against Third Coast Towing LLC ("Third Coast" who is another responsible party in this incident), the OSLTF may not compensate any part of this claim. This claim must also be denied as untimely because Claimants did not follow NPFC claims regulations controlling the submission of a claim against the OSLTF. Under 33 C.F.R. § 136.107 (a), Claimants should have submitted the costs in the current claim with the original claim filed by Nature's Way in May 2015. Because the original claim filed by Nature's Way has been denied and can no longer be reconsidered, this claim is untimely. Finally, even if Claimants could subrogate all their rights and this claim had been properly filed on time, the current claim incorrectly calculates the limit of liability based upon the ENDEAVOR instead of the discharging vessel, MOC-12 and the substantial threat of discharge from the MOC-15.

I. BACKGROUND:

A. OPA Incident

On January 27, 2013, the ENDEAVOR was pushing tank barges MOC-12 and MOC-15, with the MOC-15 as the lead barge, while transiting southbound on the Mississippi River towards the Vicksburg Railroad Bridge located at mile marker 434.5. The ENDEAVOR was owned by Nature's Way Marine, LLC; the MOC-12 and MOC-15 were owned by Third Coast Towing, LLC. At 0120, the ENDEAVOR's tow struck the number four bridge pier of the Vicksburg Railroad Bridge. The lead barge, MOC-15, broke away after alliding with the bridge

pier and sustained damage along the port side. The damage sustained was enough for the Federal On Scene Coordinator ("FOSC") and the Unified Command ("UC") to determine the MOC-15 was a substantial threat of discharge to the navigable waterway. The second barge, the MOC-12, remained attached to the ENDEAVOR and hit the bridge pier head on. MOC-12 sustained significant damage and subsequently discharged an estimated 7,181 gallons of sweet crude oil into the Mississippi River, a navigable waterway of the U.S.

B. Responsible Parties

As required by 33 U.S.C. § 2714 (a), the Coast Guard designated the sources of the discharge and notified the responsible parties and their guarantors of that designation. On January 31, 2013, the Coast Guard's NPFC issued Responsible Party designation letters to: (1) Third Coast, owner of the barges; (2) Great American Insurance Company ("Great American"), guarantor of the barges; (3) Nature's Way, operator of the barges; and, (4) the Environment Protection Group, LLC ("EPG"), the guarantor and the insurer of the tug[1].

On May 12, 2014, the NPFC issued a Notice of Potential Liability letter to Nature's Way identifying it as a responsible party under OPA for oil spill removal costs incurred by the Coast Guard, EPA, and State of Mississippi in the amount of $792,868.98.[2] On September 30, 2014, the NPFC also issued a Notice of Potential Liability to Third Coast.[3] On April 23, 2015, the NPFC issued invoices for recovery costs incurred during this incident to Third Coast, Nature's Way, Great American, and EPG.[4] No payment has been received from any of the parties.

C. The Vessels

MOC-12: At the time of the incident, tank barge MOC-12, was an inspected double-hulled tank vessel, weighing 1,631 gross tons. Third Coast owned the MOC-12.[5] MOC-12 is a "dumb barge,"[6] meaning it has no means of mechanical propulsion. Instead, the MOC-12 is designed to be towed by another vessel.

MOC-15: At the time of the incident, tank barge MOC-15, was an inspected double-hulled tank vessel, weighing 1,897 gross tons. Third Coast owned the MOC-15.[7] MOC-15 is a "dumb barge,"[8] meaning it has no means of mechanical propulsion. Instead, the MOC-15 is designed to be towed by another vessel.

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[1] *See,* NPFC RP Notice of Designation Letters dated January 31, 2013.

[2] *See,* NPFC Letters dated May 12, 2014.

[3] *See*, NPFC Letters dated September 30, 2014.

[4] *See*, NPFC's Bills dated April 23, 2015.

[5] *See*, Certificate of Financial Responsibility for MOC-12

[6] A "dumb barge" is a non-self-propelled barge designed to be towed by another vessel. The MOC-12 was such a vessel by construction and practice.

[7] *See*, Certificate of Financial Responsibility for MOC-15

[8] Just like the MOC-12, the MOC-15 was a dumb barge.

D. Contract of Towage

In October, 2012, Third Coast entered into a contract with Nature's Way who agreed to use its tug, the ENDEAVOR, to tow the MOC-12 and another yet to be identified tank barge from Caloosa, Oklahoma to Louisiana.[9] The unnamed tank barge was later identified as the MOC-15.

E. Related Litigation Between Third Coast and Nature's Way

In 2013, Third Coast sued Nature's Way for causes of action arising from this incident. The parties eventually entered into a Settlement Agreement in which both parties released each other of "all claims for losses and damages of whatever nature and kind" that the parties had against each other from the "damage allegedly sustained and the spill, cleanup, salvage and related efforts . . . ." The case was dismissed with prejudice on December 31, 2014.[10]

F. Original Claim Submission by Nature's Way and Its Insurers.

On May 27, 2015 the NPFC received a claim submission from the law firm Jones Walker, on behalf of Nature's Way and EPG. The letter was signed by claimants' counsel and both claimants.[11] The NPFC assigned this claim the number N13011-0002. On August 4, 2015 the NPFC received a letter from Jones Walker providing supplemental information concerning the claim.[12] With these submissions, Nature's Way and its insurer, EPG, argued that they were entitled to be reimbursed by the OSLTF for removal costs incurred during the same incident at issue in this claim.

On March 16, 2016, the NPFC both emailed and mailed via U.S. Postal Service ("USPS") Certified Mail the claim determination to Claimants' counsel denying the submitted claim. The NPFC denied the claim because Nature's Way had released Third Coast from any future liability and could no longer subrogate all of its rights against a responsible party as required by 33 U.S.C. § 2712 (f). The NPFC also denied the claim because Nature's Way had not based the claim upon the discharging vessel's limit of liability.

On March 17, 2016, Nature's Way filed a counterclaim against the United States in the case of *United States v. Third Coast Towing, LLC, et al.*, CN: 3:16cv34 CWR-FKB (S.D. MS 2016)[13]

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[9] *See*, Letter from Jones Walker, LLP ("Jones Walker"), attorney representing Nature's Way and EPG dated July 31, 2015, Exhibit C, Contract of Towage provided under claim N13011-0002.

[10] *See*, Letter from Jones Walker, attorney representing Nature's Way and EPG dated July 31, 2015, Exhibit F, Receipt, Release, Indemnification and Assignment Agreement provided under claim N13011-0002.

[11] *See*, Letter from Jones Walker, attorney representing Nature's Way and EPG dated May 22, 2015, provided under claim N13011-0002.

[12] *See*, Letter from Jones Walker, attorney representing Nature's Way and EPG dated July 31, 2015, provided under claim N13011-0002.

[13] On January 22, 2016, the United States filed a lawsuit to recover its unreimbursed removal costs arising from this oil spill against Nature's Way (barges' operator), Third Coast (barges' owner), and Great American (barges' guarantor). That lawsuit is currently pending.

arguing that NPFC arbitrarily and capriciously denied the claim. Nature's Way also alleged that NPFC's denial of the claim amounted to final agency action under the Administrative Procedure Act.[14]

On March 21, 2016, the USPS delivered NPFC's claim determination to counsel for Nature's Way, who acknowledged the delivery on PS Form 3811. After that point in time, neither Nature's Way nor its counsel has sent any correspondence to NPFC requesting reconsideration of the March 16, 2016 determination. As a result, under 33 C.F.R. § 136.115(d), any right of Nature's Way to request that NPFC reconsider its denial of the claim expired at least by April 20, 2016.

II. THE CURRENT CLAIM:

In a letter dated April 26, 2016, Duncan & Sevin submitted a claim which was received at the NPFC on May 4, 2016.[15] The claim alleges to be submitted on behalf of Claimants. The claim was not signed by any party other than counsel from Duncan & Sevin.[16] The claim stated that the unnamed excess P&I underwriter paid OPA compensable oil recovery costs to Third Coast Towing.[17] With the letter, Claimants submitted invoices totaling $1,119,738.32 as proof of their costs paid to remove oil spilled by MOC-12 and to prevent the substantial threat of oil discharges from the MOC-15.[18]

The Claimants theory of recovery is that EPG was the proper guarantor of pollution costs, not the unnamed excess P&I underwriter. Claimants reason that the OSLTF should compensate all their costs under 33 U.S.C. § 2713 because EPG, insurer for Nature's Way, refused to pay after presentment.[19] The letter states that the unnamed excess P&I underwriter presented these total costs to EPG, but does not provide any proof of presentment or any proof that the invoices were actually paid. EPG allegedly denied reimbursement for the costs, except for making an alleged partial payment of $250,000.00, though there is no proof of this payment in the record either. Claimants subtracted this alleged partial payment from their total costs, which leaves the claimed costs at $869,738.32.[20]

As an alternative basis for compensation from the OSLTF, Claimants argue that under 33 U.S.C. §§ 2704, 2708 and 2713, they are entitled to reimbursement by the Fund for sums paid in excess of their claimed statutory limitation on liability. Relying on the ENDEAVOR's vessel type and gross tonnage, Claimants argue that their liability should be limited at $854,400.00.

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[14] *See*, Answer and Affirmative Defenses and Counterclaims of Nature's Way Marine, LLC Against the United States and Cross-Claim Against Third Coast Towing, LLC, paragraph 14 of the Counterclaim (March 17, 2016).

[15] *See*, Duncan & Sevin, L.L.C. letter dated April 26, 2016.

[16] Under 33 C.F.R. § 136.107(a), a claim submitted by an insurer *must* be signed by the insured party. The signature of the insured party provides proof that the claim is authorized.

[17] *See*, Duncan & Sevin, L.L.C. letter dated April 26, 2016, page 2.

[18] *See*, Duncan & Sevin, L.L.C. letter dated April 26, 2016, Attached Invoices

[19] *See*, Duncan & Sevin, L.L.C. letter dated April 26, 2016, page 1.

[20] *See*, Duncan & Sevin, L.L.C. letter dated April 26, 2016, page 1.

Claimants argue that the pollution underwriter covering Nature's Way has paid more than this amount and Claimants request compensation totaling $869,738.32.[21]

III. NPFC's ANALYSIS:

A. Claimants' Presentment to EPG Does Not Support OSLTF Compensation.

When adjudicating a claim, NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence, whether provided by the Claimant or obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim. If there is conflicting evidence, the NPFC will make a determination as to what evidence is more credible or deserves greater weight.

OPA provides that each responsible party for a vessel or facility is liable for removal costs and damages resulting from the incident.[22] An incident means the discharge or substantial threat of a discharge of oil into a navigable water of the United States.[23] Under the OPA, responsible parties for a vessel oil spill include both the owners and operators of the vessel that discharged oil or created a substantial threat of discharge into a navigable waterway.[24]

The undisputed facts of this case show that Third Coast was a responsible party for this incident because it owned both the MOC 12 and MOC 15. Because the OPA broadly defines who can be liable as a responsible party, more than one entity can be liable for an oil spill.[25] As a result, the mere fact that Third Coast is liable as an owner of the discharging vessels does not preclude Nature's Way from being liable so long as it satisfies OPA's definition of a responsible party.

In order for operator liability to attach, a defendant "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of [oil], or decisions about compliance with environmental regulations."[26] In this case, the oil spill resulted from navigational errors committed by Nature's Way when its employees pushed the barges into the bridge. Because the MOC 12 and MOC 15 were dumb barges without any means of propulsion to safely navigate the Mississippi River, Nature's Way exercised absolute control over the navigational decisions that resulted in the barges striking the bridge. The level of control over the barges exercised by Nature's Way satisfies OPA's test for operator

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[21] *See*, Duncan & Sevin, L.L.C. letter dated April 26, 2016, page 1-2.

[22] 33 U.S.C. § 2702(a).

[23] 33 U.S.C § 2701 (14).

[24] 33 U.S.C. § § 2701 (32)(A) and 2702 (a).

[25] *See, U.S. v. Bois D'Arc Operating Corp.*, 1999 WL 130635 (E.D. LA 1999). *See also, Smith Property Holdings v. U.S.*, 311 F.Supp.2d 69, 81 (D.D.C. 2004).

[26] *In re Oil Spill by Oil Rig Deepwater Horizon*, 21 F.Supp.3d 657, 756 (E.D. LA 2014), *quoting U.S. v. Bestfoods*, 524 U.S. 51, 66-67 (1988). *See also, U.S. v. Jones*, 267 F.Supp.2d 1349, 1355-56 (M.D. GA 2003)(holding a principal stockholder personally liable as an operator under the OPA because he exercised direction over the facility's activities and was directly involved in decisions involving environmental compliance).

liability and Nature's Way is a responsible party liable for this oil spill and substantial threat of a spill.

Further, the evidence in this administrative record fails to establish any complete defense to liability under 33 U.S.C. § 2703 (a). In particular, the facts of this case fail to establish a third party defense under 33 U.S.C. § 2703 (a) (3) in favor of either Third Coast or Nature's Way. Nature's Way cannot demonstrate an entitlement to this defense because its navigational errors were a proximate cause of this oil spill. Additionally, even if Nature's Way was completely at fault, Third Coast cannot establish a third party defense because this incident occurred in connection with its contract with Nature's Way. As a result, both Third Coast and Nature's Way are responsible parties jointly and severally liable for this incident.[27]

In addition to the above, an insurance company stands in the shoes of a responsible party after being subrogated to the responsible party's rights by paying removal costs covered by an insurance policy.[28] In such a case, the subrogated insurance company will have no greater right to OSLTF reimbursement than its insured, the responsible party. Thus, the unnamed excess P&I underwriter in this claim stands in the shoes of its insured, Nature's Way, and cannot be compensated by the OSLTF unless Nature's Way demonstrates an entitlement to compensation.

Because Nature's Way is a responsible party and the unnamed excess P&I underwriter stands in the shoes of Nature's Way, Claimants must demonstrate an entitlement under 33 U.S.C. § 2708 before any part of this claim can be compensated by the OSLTF. Specifically, the OPA provides:

> 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.[29]

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[27] 33 U.S.C. §§ 2702 (a), 2702 (d) and 2704.

[28] *See*, 33 U.S.C. § 2715 (a). *See also, American National Fire Ins. Co. v. Yellow Freight Systems, Inc.*, 325 F.3d 924, 936 (7th Cir. 2003) *quoting Westchester Fire Ins. Co. v. Gen. Star Indem. Co.*, 183 F.3d 578, 583 (7th Cir. 1999)("It is settled that, as a general rule, an insurer steps into the shoes of the insured and 'acquires no greater or lesser rights than those of the insured.'"); *California Dept. of Toxic Substances Control v. City of Chico, California*, 297 F.Supp. 2d 1277, 1233-34 (E.D. Ca. 2004)(holding that a subrogated insurer stepped into the shoes of its insured when seeking to recover contribution under CERCLA); and 16 *Couch on Ins. 3d* § 224:180 (2015)("Since a subrogee stands in the shoes of its subrogor, a subrogated insurer has no greater rights against a third party than those of the insured, and its claims are subject to all defenses the third party could have asserted against the insured. Consequently, a defendant sued by a subrogated insurer may raise all defenses which would be available had he or she been sued by the insured, but not defenses only the insured could raise against the insurer. As a result, if the insured has no right of recovery, the insurer has no right of subrogation.")(footnotes omitted).

[29] 33 U.S.C. § 2708 (a)(emphasis added). *See also, Bean Dredging, LLC v. United States*, 773 F.Supp.2d 63, 86 (D.D.C. 2011)(holding that the responsible party "had the burden of proof of establishing its entitlement to

Because Claimants have not demonstrated an entitlement to a complete defense under 33 U.S.C. §2703 (a), they are not entitled to recover all their costs. Contrary to Claimants' theory of recovery, 33 U.S.C. § 2708 does not provide a responsible party with OSLTF compensation based upon presentment to its insured or guarantor. Thus, Claimants' presentment to EPG (insurer and guarantor for Nature's Way) did not create any entitlement to OSLTF compensation under the OPA.[30] Claimants request for full compensation of all costs must be denied.

B. Claimants Cannot Subrogate All Their Rights.

Before any claim against the OSLTF can be compensated, the claimant must be able to subrogate all of its rights against the responsible party to the OSLTF. Specifically, OPA provides that "[p]ayment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party."[31] Under this statute, the NPFC must deny a claim against the OSLTF if the claimant's right of recovery against a responsible party has been prejudiced and the claimant can no longer subrogate all its rights to the OSLTF. As a result of this rule, Claimant's claim must be denied because Nature's Way prejudiced its right of recovery against Third Coast Towing (a responsible party because it owned the barges) through a settlement agreement and the dismissal with prejudice of a lawsuit arising from this OPA incident.

The issue of a claimant's inability to subrogate all its rights under 33 U.S.C. § 2712 (f) was addressed in *Rick Franklin Corp. v. U.S. Department of Homeland Security*, Civil No. 06-1647-SU, 2008 WL 337978 (D. Or.). In that case, the court upheld the NPFC's denial of a claim based upon the claimant's inability to subrogate all its rights to the OSLTF due to a release. The claimant was a clean-up contractor hired by a responsible party. After a fee dispute arose, claimant sued both the responsible party and its primary insurance carrier. As part of the subsequent settlement agreement, the claimant received a stipulated judgment against the responsible party, but released any right to enforce that judgment. The claimant intended to pursue an assigned claim against responsible party's secondary insurer to collect the amount not covered by the settlement. After the secondary insurer refused to pay, the claimant submitted a claim against the OSLTF. The NPFC denied the claim because the settlement released at least some of the claimant's rights against the responsible party.

In response to NPFC's denial of the claim, the claimant in *Rick Franklin Corp.*, filed suit against the NPFC arguing that 33 U.S.C. § 2712 (f) only required it to subrogate the rights held at the time of OSLTF payment. Relying on an Eleventh Circuit decision, the *Rick Franklin Corp.* court explained why this argument was incorrect with the following:

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reimbursement on the administrative level" ...); and *Water Quality Insurance Syndicate v. United States*, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009)(holding that Water Quality Insurance Syndicate must prove that its insured was entitled to limited liability when making a claim against the OSLTF under 33 U.S.C. § 2708).

[30] Claimants must generally present their claim to the responsible party or its guarantor prior to submitting the claim to the NPFC under 33 U.S.C. § 2713 (a). However, because Nature's Way is a responsible party, 33 U.S.C. § 2713 (b)(1)(B) eliminates the presentment requirement when Claimants seek compensation under 33 U.S.C. § 2708.

[31] 33 U.S.C. § 2712 (f).

The government contends that its interpretation of 33 U.S.C. § 2712 (f), the disputed section of the OPA, is supported by *Kenan Transport Co., v. U.S. Coast Guard*, No. 1:04-CV_3186-WSD, 2006 WL 1455658 (N.D. Ga. May 19, 2006), aff'd, No. 06-13876, 2006 WL 3749570 (11th Cir. Dec. 21, 2006), a recently decided case addressing this same issue. In *Kenan,* the District Court in the Northern District of Georgia held that "[r]eimbursement is allowed only if claims against the third party are preserved so they may be asserted by the Government as subrogee of the claims." *Kenan*, 2006 WL 1455658 at *4. The court found that, under Georgia law, the release the claimant signed with the responsible party was sufficiently broad that the condition of § 2712 (f) was violated, and that the decision to deny the claimant's reimbursement claims was not arbitrary, capricious, an abuse of discretion or not in accordance with applicable law. *Id.* at *5. On appeal, the Eleventh Circuit Court of Appeals affirmed the district court's interpretation of the disputed section and the government's denial of the claimant's reimbursement claim "because *Kenan* was unable to transfer its rights to clean-up costs to the government as required by § 2712 (f)." 2006 WL 3749570 at *3.

RFC [Rick Franklin Corp.] argues that claimants should not be required to "preserve" subrogation claims against responsible parties as the court found in *Kenan.* RFC attempts to distinguish *Kenan* from the case at bar by pointing to *Kenan's* focus on Georgia contract law. RFC contends that adding the preservation requirement into the statute harms the purpose of the Fund which is to pay the claims of parties that expeditiously remediate oil spills. RFC advocates a reading of § 2712 (f) that would provide the government with all the subrogation rights a claimant possessed at the time of payment of the claim. RFC claims that the NPFC could have acquired by subrogation the excess insurance policy, the only asset Larkin Transport had at the time RFC made its claim to the Fund. Finally, RFC argues that the NPFC's reading of § 2712 (f) creates a defense to liability and that the OPA's section addressing defenses to liability, where a claimant is grossly negligent or exhibits willful misconduct, is exclusive. *See* § 2712 (f).

RFC's arguments are not persuasive. The plain language of § 2712 (f) uses the words "all rights" when describing what subrogation rights will be acquired by the government when a claimant is compensated by the Fund. No time limitation or any other limitation is contained in that section. The language of the statute gives no indication that Congress intended any limitation on the government's subrogation rights. The statute clearly provides that a claimant must be able to supply the government with *all* of its subrogation rights against a responsible party. RFC's interpretation that the statute should be read to mean that all rights actually means the subrogation rights a claimant possessed *at the time of payment of the claim* is not supported by the plain language of the statute.[32]

In this claim, Claimants acknowledge litigation between Third Coast Towing and Nature's Way; however, they do not discuss the settlement agreement between the parties and their

[32] *Rick Franklin Corp. v. U.S. Department of Homeland Security*, 2008 WL 337978 (D. Or.).

insurers.[33] The parties to the settlement agreement, included Natures Way, Third Coast, and Atlantic Specialty Insurance Company.[34] Among other things, the agreement released any right of recovery by Nature's Way against Third Coast and its insurers for this OPA incident.

The agreement entitled, "Receipt, Release, Indemnification and Assignment Agreement", reads in part:

> "Nature's Way and Third Coast enter into this Settlement Agreement in order to fully and completely settle, satisfy, compromise, and ***discharge any and all claims for losses and damages of whatever nature and kind that the Parties here raised, or could have raised, against each other from the damage allegedly sustained and the spill, cleanup, salvage, and related efforts***, ("the Events") on or about January 29, 2013."[35]

The agreement also provides:

> "1. Release and Discharge
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> BE IT KNOWN TO ALL MEN that for and in consideration of the settlement described in Part 2 below (entitled "Payments"), the receipt of which is hereby acknowledged by Third Coast, and other valuable consideration, the ***Parties do hereby release, remise, and forever discharge each other***, and each Parties' vessels, agents, underwriters, ***insurers***, employees, crews, directors, officers, predecessors, parents, successors, affiliated/related corporations, partnerships, joint venture interests, and/or operating entities, vessel operators and/or vessel managers, and the underwriters of all the entities listed above, in any capacity, (the "Released Parties") ***who/which may be, or may later become, liable from any and all manner of actions, suits and/or claims for damages which the Parties, in any capacity, now have or may hereafter acquire, whether known or unknown, against each other, arising out of or in any way related to the Events,*** and all other rights and causes of action under the maritime laws or statutes of the Unites States of America and /or, if necessary, the law of the State of Louisiana, and/or any other law or laws of any other state or country which may afford a right or cause of action for any other legally recoverable category of loss or damage arising out of or in any way, directly or indirectly, related to the Events.
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> ***The Parties acknowledge and agree that the release and discharge set forth in this document is a general release. They further agree that payment of the sums specified herein, or other valuable consideration, is accepted as a complete compromise and discharge of all losses or claims. The Parties assume the risk***

[33] *See*, Duncan & Sevin L.L.C. letter dated April 26, 2016, page 2.

[34] *See*, Letter from Jones Walker, attorney representing Nature's Way and EPG dated July 31, 2015, Exhibit F, Receipt, Release, Indemnification and Assignment Agreement, page 1, provided under claim N13011-0002.

[35] *See*, Letter from Jones Walker, attorney representing Nature's Way and EPG dated July 31, 2015, Exhibit F, Receipt, Release, Indemnification and Assignment Agreement, page 1, second paragraph (emphasis added), provided under claim N13011-0002.

that the facts or law may be other than believed. Moreover, the Parties understand and agree that this settlement is a compromise of disputed losses or claims, and the payments, or other valuable consideration, are not to be construed as admissions of liability on the part of any Party, by whom liability is expressly denied.."[36]

In addition to the settlement agreement, the lawsuit between Third Coast and Nature's Way in the United States District Court for the Southern District of Alabama was dismissed with prejudice on December 31, 2014. Because this lawsuit arose from the OPA incident at issue here, Nature's Way is precluded from bringing another lawsuit against Third Coast to recover the costs claimed by Claimants. Just like the release in the settlement agreement, the dismissal with prejudice prevents Nature's Way from bringing another lawsuit against Third Coast to recover damages resulting from this oil spill. As a result of this dismissal with prejudice, Nature's Way cannot subrogate their rights for recovery to the U.S. Government.

Because Claimants cannot satisfy the requirement of 33 U.S.C. § 2712 (f) to subrogate all of their rights against Third Coast, a responsible party, this claim is denied.

C. This Claim Must Be Denied As Untimely.

Even if Claimants had not prejudiced their subrogation rights, the OSLTF still could not compensate the costs sought in this claim.[37] The Duncan & Sevin claim letter identifies the Claimants as Nature's Way and an unnamed excess P&I underwriter. Assuming that Duncan & Sevin has authority to act on behalf of the Claimants, [38] the costs claimed here should have been included in the original claim by Nature's Way (N13011-0002), which was submitted on May 27, 2015 and denied by NPFC on March 16, 2016.

Under 33 C.F.R. § 136.107 (a), an insured's claim must include all costs claimed by its insurers and all claimants must sign the claim.[39] In order to satisfy this regulation, Nature's Way's original claim should have: 1) included all costs incurred by Nature's Way and all of its insurers when it was submitted to the NPFC in May 2015; and 2) the original claim should have

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[36] *See*, letter from Jones Walker, attorney representing Nature's Way and EPG dated July 31, 2015, Exhibit F, Receipt, Release, Indemnification and Assignment Agreement, page 2, third paragraph through page 3 (emphasis added), provided under claim N13011-0002.

[37] Claimants contend that they have spent a total of $1,119,738.32 in removal costs. However, Claimants' have not submitted adequate evidence to support this contention. The OSLTF is authorized to reimburse removal costs only when they are uncompensated. *See*, 33 U.S.C. § 2712 (a)(4). In order to show that removal costs are uncompensated, Claimants must submit proof that they actually paid the claimed costs. In this case, Claimants have submitted copies of invoices, but have not submitted any proof that Claimants actually paid these invoices. Without proof of Claimants' actual payment of the claimed costs, this claim would have to be denied even if the Claimants had otherwise shown an entitlement to OSLTF compensation.

[38] Neither Nature's Way nor the unnamed excess P&I underwriter have signed the claim or provided written acknowledgement that Duncan and Sevin are authorized to present this claim to the Fund as required by 33 C.F.R. § 107 (a). As such, the NPFC cannot validate the authenticity of the claim. On this basis alone, the claim must be denied.

[39] 33 C.F.R. § 136.107 (a) states: "[t]he claims of subrogor (e.g. insured) and subrogee (e.g. insurer) for removal costs and damages arising out of the same incident should be presented together and must be signed by all claimants."

been signed by all claimants including all of Nature's Way's insurers. As an insurer of Nature's Way, the unnamed excess P&I underwriter should have been part of the original claim submission and the costs sought in this claim should have been included in the original claim. The unnamed excess P&I underwriter should have also identified itself by signing the claim.

At this point, NPFC's denial of the original claim by Nature's Way is final agency action and not subject to reconsideration. Under 33 C.F.R. § 136.115 (d), a claimant must request reconsideration of a claims determination "within 60 days after the date the denial was mailed to the claimant or within 30 days after receipt of the denial by the claimant, whichever date is earlier." NPFC mailed its determination denying the original claim (N13011-0002) on March 16, 2016 to Jones Walker. The very next day, Nature's Way filed a Counter Claim in federal court under the Administrative Procedure Act contesting the determination and characterizing it as final agency action on the claim by Nature's Way. On March 21, 2016, Jones Walker further acknowledged receipt of NPFC's determination on behalf of Nature's Way and EPG. These facts show that Nature's Way received NPFC denial as early as March 17, 2016, but certainly no later than March 21, 2016. Based upon the preponderance of the credible evidence in this administrative record, NPFC determines that, as a factual matter, Nature's Way intentionally declined to request reconsideration of NPFC's March 16, 2016 determination before the deadline.

Based upon the above, NPFC's denial of the original claim (N13011-0002) became final agency action by the latest on April 20, 2016. Even though any right to request reconsideration of NPFC's denial had expired, NPFC received Claimants' claim on May 4, 2016. Because the costs at issue here should have been submitted with the original claim and Nature's Way intentionally declined to request reconsideration of NPFC's denial of the original claim, this claim must be denied as untimely. Nature's Way is not allowed under the claims regulations to decline reconsideration of a denial and then submit additional costs for review after its deadline for requesting reconsideration has expired.

D. Claimants Claim the Wrong Limit of Liability.

Under 33 U.S.C. § 2708, responsible parties and their subrogated insurers may receive OSLTF compensation upon establishing a complete defense to liability under 33 U.S.C. § 2703 or an entitlement to limited liability under 33 U.S.C. § 2704. Among other things, Claimants claim an entitlement of $869,738.32[40] under the theory that this amount represents their costs incurred in excess of the $854,400.00 (the limit of liability for ENDEAVOR) spent by pollution underwriter for Nature's Way. However, even if the Claimants had not prejudiced their rights against Third Coast and properly requested reconsideration, this claim is still flawed because Claimants rely on the wrong vessels to calculate the limit of liability for these incidents.

For vessels, OPA's liability limits are, with certain exceptions,[41] based upon the type and gross tonnage of the vessel that discharged the oil or posed a substantial threat of discharging oil.

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[40] Because this claim is denied for several other reasons, the NPFC did not adjudicate whether the costs identified by the Claimants should be compensable under the OPA and therefore count against any limit of liability. If this determination is later overturned, the NPFC will adjudicate each cost to determine whether it should be counted against the Claimants' limit of liability.

[41] 33 U.S.C. §2702 (d).

Under 33 U.S.C. § 2702 (a)(emphasis added) "... each responsible party for a vessel or facility *from which oil is discharged, or which poses the substantial threat of a discharge of oil*...is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident." In a vessel case, a responsible party's liability under 33 U.S.C. § 2702 can, under certain circumstances, be limited by 33 U.S.C. § 2704 based upon the vessel's type and gross tonnage. However, liability will not be limited when the incident resulted from the responsible party's violation of a federal regulation, gross negligence, or willful misconduct.[42] The liability caps also will not apply if the responsible party fails to: 1) properly report the incident; 2) reasonably cooperate and provide assistance; or 3) properly comply with an order issued under 33 U.S.C. § 1321.[43]

The OPA provides a limited exception that allows some responsible parties to claim limited liability based upon the vessel type and gross tonnage of a vessel other than the vessel discharging oil or posing a substantial threat of discharge. If a third party described in 33 U.S.C. § 2703 (a)(3) solely causes an OPA incident, then the third party will be treated as a responsible party under 33 U.S.C. § 2702 (d). In such a case, the sole-fault third party may claim a limit of liability based upon its vessel instead of the discharging vessel or vessel posing s substantial threat of discharge when the incident "occurs in connection with a vessel or facility owned or operated by the third party . . ."[44] In all other cases, the responsible party's (including sole-fault third parties) liability limits are based upon "*the vessel or facility from which the discharge actually occurred ...*"[45]

The limited exception to liability limits provided by 33 U.S.C. § 2702 (d)(2) does not apply here because Nature's Way is not a third-party described in 33 U.S.C. § 2703 (a)(3). That statute specifically excludes third parties "whose act or omission occurs in connection with any contractual relationship with the responsible party."[46] It is undisputed that this incident occurred in connection with Third Coast's contract with Nature's Way. Nature's Way contracted with Third Coast to tow both the MOC-12 and MOC-15. During the course of that towage, Nature's Way pushed the barges into the bridge and caused these OPA incidents. Because 33 U.S.C. § 2703 (a)(3) excludes third parties like Nature's Way, the third party liability provisions in 33 U.S.C. § 2702 (d) do not apply.

This incident includes the discharging vessel, the MOC-12, and the vessel which posed a substantial threat of discharge, the MOC-15, and as such under § 2702 (a) each responsible party is liable for removal and damage costs that resulted from each incident. Thus, in this case the OPA limit of liability is controlled by the MOC-12 and MOC-15, which is $4,272,000.00 for each vessel. The costs submitted in support of this claim are not in excess of the statutory limitation on liability for either vessel.

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[42] *See*, 33 U.S.C. § 2704 (c)(1).

[43] Because this claim is denied for several other reasons, the NPFC did not adjudicate whether the limits of liability under 33 U.S.C. § 2704 apply in this case. If this determination is overturned, the NPFC will adjudicate whether limited liability applies in this case.

[44] 33 U.S.C. § 2702 (d)(2)(A).

[45] 33 U.S.C. § 2702 (d)(2)(B)(emphasis added).

[46] 33 U.S.C. § 2703 (a)(3).

IV. CONCLUSION:

Based upon the foregoing reasons, this claim must be denied.

Claim Supervisor: [redacted]

Date of Supervisor's review: ***08/04/16***

Supervisor Action: ***Denial Approved***

Supervisor's Comments:

Glossary of Terms:

APPLICABLE LAW & DEFINITIONS:

The elements liability under OPA, provide that "...each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines...is liable for the removal costs and damages specified in subsection (b) that result from such incident." 33 U.S.C. § 2702(a).

"Liable" or "Liability" shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act (33 USC 1321);" OPA §1001(17)(33 USC §1001(17)). The standard of liability under section 311 of the FWPCA has been determined repeatedly to be strict, joint and several. Conference Report, House Report No. 101-653 (August 1, 1990), p. 102.

"Responsible Party" in the case of a vessel is defined as any person owning, operating, or demise chartering the vessel. 33 U.S.C. § 2701(32) (A).

"Operator" in the case of a vessel is defined as any person owning, operating, or chartering by demise, the vessel. 33 U.S.C. § 2701(26) (A).

"Removal costs" are defined as the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident. 33 U.S.C. § 2701(31).

"Incident" is defined as any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil, the costs to prevent, minimize or mitigate oil pollution from such an incident. 33 U.S.C. § 2701(14).

"Claim" The responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of a discharge of oil, may assert a claim for removal costs and damages under 33 U.S.C. § 2713 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. 33 U.S.C. § 2708(a)(1) and (2).

"Rights of subrogation" Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party. 33 U.S.C. § 2712(f).

"Limitation of Liability" A responsible party who is entitled to a limitation of liability may assert a claim under section 2713 of this title only to the extent that the sum of the removal costs and damages incurred by the responsible party plus the amounts paid by the responsible party, or by the guarantor on behalf of the responsible party, for claims asserted under section 2713 of this title exceeds the amount to which the total of the liability under section 2702 of this title and removal costs and damages incurred by, or on

behalf of, the responsible party is limited under section 2704 of this title. 33 U.S.C. § 2708(b).

Subsection (1) (a) of section 2704 does not apply if the incident was proximately caused by (A) gross negligence or willful misconduct of, or (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual arrangement with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail, or (2) if the responsible party fails or refuses (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. § 2704(c)(1) and (2).

The President shall promulgate, and may from time to time amend, regulations for the presentation, filing, processing, settlement, and adjudication of claims under this Act against the Fund. 33 U.S.C. § 2713(e). The claims regulations are found at 33 C.F.R. Part 136.

"Burden" The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. 33 CFR 136.105(a).