

REIMBURSEMENT OF REMOVAL COSTS UNDER THE OIL POLLUTION ACT OF 1990:
WHAT OPA GIVETH, THE FUND TAKETH AWAY

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The Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. §§ 2701 to 2720 (1994 and Supp. III 1997), as amended, was enacted in response to a series of accidents involving the transportation of oil in commerce. The 11 million gallon Exxon Valdez spill in Alaska, combined with three other spills within a 24-hour period several months later in waters off of the coasts of Rhode Island and Delaware and in the Houston Ship Channel, led Congress to conclude that existing oil spill response mechanisms were woefully inadequate. S. Rep. No. 101-94, at 2 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 723. Under the pre-existing regime, at least five statutes addressed oil spill liability and compensation; OPA was intended to replace them with a comprehensive regulatory scheme which would facilitate prompt cleanup of, and ensure compensation related to, environmentally-damaging oil spills. Id. at 3, reprinted in 1990 U.S.C.C.A.N. at 724. When enacting OPA, Congress recognized that “any oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment.” Id. at 2, reprinted in 1990 U.S.C.C.A.N. at 724. With OPA, Congress intended to encourage prompt and voluntary remediation of spills through cooperation with federal and state authorities, while also providing a mechanism for prompt reimbursement of costs. Id. at 10, reprinted in 1990 U.S.C.C.A.N. at 732. OPA complements the federal Clean Water Act, 33 U.S.C. §§ 1251 to 1387 (1994 and Supp. III 1997), as amended, which is intended to prohibit the unpermitted discharge of pollutants to navigable waters.

This article describes OPA’s mechanism for private parties able to assert defenses to liability to obtain reimbursement from OPA’s Oil Spill Liability Trust Fund (the “Fund”). Although the Fund’s reimbursement regulations appear innocuous, recent judicial decisions in the Fourth and Eleventh Circuits concerning those regulations indicate that parties can expect the Fund to part with its resources only reluctantly in some cases, particularly where regulatory requirements are unclear. In order to improve the viability of claims against the Fund, parties able to assert defense to OPA liability should take care to develop extensive documentation concerning their removal activities. That documentation should not be limited to the extent of the costs incurred by a party; it should also include as much evidence as possible concerning the Federal On Scene Coordinator’s (“FOSC’s”) determination of the removal action’s consistency with the National Contingency Plan (“NCP”) and concerning the FOSC’s oversight and direction of private party removal efforts. Absent such evidence, and despite Congress’ expressed intent in creating a reimbursement-friendly program, the Fund appears inclined to deny rather than approve private party claims for removal costs in instances where a party’s response falls within regulatory “gray areas” and where the claims are for substantial sums of money.

Regulatory Background

OPA applies to any “incident” that results in a “discharge” of oil, or that “poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines.” 33 U.S.C. § 2702. OPA defines the term “incident” very broadly to include “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.” 33 U.S.C. § 2701(14). OPA also defines the term “discharge” broadly to mean “any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping.” 33 U.S.C. § 2701(7).

The term “navigable waters” means “waters of the United States.” 33 U.S.C. § 2701(21). It is clear that OPA does not encompass releases that solely impact groundwater. The Fund has indicated in guidance, however, that Fund moneys may be spent “to handle oil discharges in

groundwater which are tributary to surface waters of the United States. . . . [T]he FOSC must have a reasonable basis to conclude that there is a clear hydrological nexus to surface waters before taking removal action to clean up groundwater.” United States Coast Guard National Pollution Funds Center, “Technical Operating Procedures for Determining Removal Costs Under The Oil Pollution Act of 1990,” at 7-1 (Jan. 16, 1996) (“TOP Guidance”). Thus, the Fund contemplates that removal actions undertaken under OPA may extend to groundwater in addition to surface water in those instances where a clear hydrological nexus exists. In this manner, OPA’s approach to removal costs is consistent with its approach to liability. See 33 U.S.C. § 2702(a) (general liability standard).

When an oil spill occurs, a “responsible party” is liable for removal costs incurred in connection with a “facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters.” 33 U.S.C. § 2702(a). The term “responsible party” encompasses, inter alia, owners and operators of vessels, on-shore and off-shore facilities, deepwater ports, and pipelines. 33 U.S.C. § 2701(32). Despite OPA’s general rule of liability, an otherwise “responsible party” is not liable for removal costs resulting from a discharge if the discharge and associated removal costs were caused solely by: (1) an act of God; (2) an act of war; or (3) a third-party and if the responsible party exercised due care with respect to the oil concerned and took precautions against foreseeable acts or omissions of such third party and the foreseeable consequences of those acts or omissions. 33 U.S.C. § 2703(a).

Under OPA, the term “removal” means the “containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines and beaches.” 33 U.S.C. § 2701(30). “Removal costs,” in turn, are “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).

From a regulatory standpoint, OPA contemplates a relatively streamlined oil spill response structure: (1) discovery and notification of the spill pursuant to the Clean Water Act, 33 U.S.C. § 1321(b)(5); (2) preliminary assessment of the spill and its impacts and the initiation of corrective action (i.e., “removal”); (3) implementation of spill containment, countermeasures, cleanup, and disposal; and (4) documentation and cost recovery. See, e.g., TOP Guidance at 1-2; see also 40 C.F.R. §§ 300.300 to 300.335 (1999). When a spill involves a private party, this structure translates into the following series of events. First, the party discovering the spill notifies the National Response Center (“NRC”). 40 C.F.R. § 300.300(b). Second, the NRC informs the FOSC. Id. § 300.300(d). Third, the FOSC, pursuant to its regulatory mandate, investigates the spill and coordinates and directs all removal action at the site. See generally 40 C.F.R. § 300.305. Fourth, if the FOSC so elects, a responsible party may conduct any removal activity subject to FOSC oversight or monitoring. 40 C.F.R. § 300.305(d).

As noted above, OPA imposes only a single affirmative obligation on a responsible party: notify the NRC of the spill. The duties of the FOSC, on the other hand, are significantly greater: although a responsible party must demonstrate that its response efforts were directed by or coordinated with the FOSC in order to recover from the Fund (33 C.F.R. § 136.203(c) (1999)), OPA charges the FOSC with affirmatively directing and coordinating such response efforts. 40 C.F.R. §§ 300.305, 300.105(c)(3). Although, “[w]here practicable” the FOSC should make “continuing efforts . . . to encourage response by responsible parties,” (40 C.F.R. § 300.305(d)), the FOSC may not rely on responsible parties to conduct a removal and must remain ready to “take appropriate response actions” id. related to a spill. The FOSC serves, therefore, as a safeguard for private party efforts. If those efforts are not adequately addressing spill impacts, then the FOSC must take action to ensure that OPA’s objectives are achieved.

Recovery from the Fund

An otherwise “responsible party” under OPA who is able to assert an enumerated defense to liability under OPA may seek to recover its removal costs from the responsible party. See 33 U.S.C. § 2708. Where such an action fails to fully compensate the party bringing it, that party may look to the Fund for reimbursement. Congress created the Fund under the Internal Revenue Code, 26 U.S.C. § 9509 (1994). Specifically, where a party can assert a defense to liability under section 2703 of OPA, that party may seek reimbursement from the Fund of removal costs consistent with the NCP. 33 U.S.C. §§ 2708(a), 2713; see also 33 U.S.C. § 2712(a)(4) (one purpose of Fund is to pay uncompensated “removal costs” that are consistent with NCP). Thus, oil spill response activity involves a mix of private and public funding mechanisms. “The fund has various sources of revenues, including taxes collected from the petroleum industry, interest earned on fund principal from United States Treasury investments, and cost recoveries, fines and civil penalties collected from responsible parties.” United States v. Conoco, Inc., 916 F. Supp. 581, 584 (E.D. La. 1996).

Congress specifically recognized that claims against the Fund should be granted in most instances without the restraints of stringent evidentiary or causation standards. The legislative history of the Act elaborates on this principle and states:

The Fund is to provide compensation for damage claims fully and promptly. While the Fund must require some evidence of loss and the establishment of a causal connection with oil pollution, it should not routinely contest or delay the settlement of damage claims. The Fund will sometimes be providing compensation where there is little chance of subrogation against the discharger. Even so, litigation or lengthy adjudicatory proceedings over liability, defenses, or the propriety of claims should be reserved for subrogation actions against dischargers.

S. Rep. No. 101-94, at 10 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 732. Thus, although not a comprehensive “oil spill insurer,” OPA’s legislative history indicates that the Fund was intended to err on the side of reimbursement when evaluating claims.

The Fund has prepared some guidance concerning the requirements for a party to obtain reimbursement of removal costs. The National Pollution Funds Center (“NPFC”), which manages the Fund, has published the TOP Guidance, which establishes “procedures necessary to determine oil spill removal costs” and which is meant to guide NPFC employees in their review and approval of removal costs. TOP Guidance, at 1 (Jan. 16, 1996). The TOP Guidance emphasizes two points: (1) the need for private party removal costs to be consistent with the NCP to be reimbursable by the Fund; and (2) the importance of FOSC participation in removal activities. A component of both requirements is proper documentation of removal activity. If the requirements set forth in the TOP Guidance are met, “any action necessary to contain or remove oil from water or shorelines, or otherwise necessary to minimize or mitigate damage to the public health and welfare may be deemed removal . . . payable from the” Fund. Id. at 1-1.

Consistency with the NCP

The TOP Guidance recognizes that, under OPA, and “[a]lthough not necessary for [responsible party] liability, removal costs must be ‘consistent with the NCP’ to be payable from the” Fund. Id. at 1-1. The determination of consistency is, as an initial matter, [apparently] the responsibility of the FOSC. Significantly, the FOSC’s determination of whether particular costs are consistent with the NCP is not a final, appealable administrative decision. See, e.g., United States v. Hyundai Merchant Marine Co., No. A94-0391-CV (HRH), 1996 U.S. Dist. LEXIS 21219, at *8 (D. Alaska Jan. 26, 1996). Such determinations may be evaluated by a court under an arbitrary and capricious standard, however, if the Fund’s denial of a claim for reimbursement is appealed. See id. Judicial review of adverse Fund claim decisions may be available under OPA, see Gatlin Oil Co. v. United States, 169 F.3d 207, 209 (4th Cir. 1999) (noting that district court had jurisdiction over Fund’s claim denial pursuant to OPA section 2717(b)), and the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706 (1994). See, e.g., Plantation Pipeline Co. v. Oil Spill Liab. Trust Fund, 47 Env’t Rep. Cas. (BNA) 1598, 1600-02 (N.D. Ga. 1998), aff’d, 189 F.3d 486 (11th Cir.

1999); International Marine Carriers v. Oil Spill Liab. Trust Fund, 903 F. Supp. 1097, 1102-03 (S.D. Tex. 1994).

OPA's implementing regulations do not define what constitutes consistency with the NCP for purposes of reimbursement from the Fund. The TOP Guidance, however, sets forth three criteria intended to clarify the concept of "consistency":

- 1) The removal activity was deemed necessary for the cleanup or the prevention of an oil spill and not otherwise contrary to the NCP.
- 2) The removal activity was authorized by a federally-approved response plan, the FOSC or the responsible party, or was condoned by the FOSC or responsible party. If there is no FOSC or responsible party involvement in the incident, then good cause must be shown for the lack of coordination with the FOSC.
- 3) The removal activity was within the scope of the tasking, either in the federally approved response plan or given by the FOSC or responsible party. Absent clear tasking, it must be shown that the activity conducted was a customary removal action under the circumstances or there was good cause for the deviation from the norm. The FOSC may terminate authorized activities and may ratify unauthorized ones for good cause if they are otherwise consistent with the NCP.

TOP Guidance at 1-2. These standards appear to establish a flexible regime for determining consistency for purposes of reimbursement from the Fund, in which the practical exigencies of spill responses take precedence over a formalistic application of OPA and its implementing regulations.

Coordination with the FOSC

The Fund's reimbursement regulations require only that the removal activities at a site be coordinated with and/or directed by the FOSC. See 33 C.F.R. § 136.205 (1999). At the same time, the regulations specifically recognize that, in some instances, removal activities need not be coordinated with the FOSC. Id. Thus, although coordination by the FOSC is the general rule, action may be taken independent of the FOSC (i.e., without coordination) under "exceptional circumstances." Id. The regulations do not define the term "exceptional circumstances."

The TOP Guidance presumes active FOSC management of removal activities. FOSCs "are responsible for effective financial management and costs controls during the response, including verification of removal costs and certification of consistency with the NCP." TOP Guidance at 1-1. As noted above, the FOSC's active participation does not foreclose private parties from taking the initiative in oil spill cleanups. To the contrary, the TOP Guidance states that if federal "removal costs can be avoided by encouraging the [responsible party] to clean up their spills, that is always the preferred course of action." Id. Thus, the TOP Guidance envisions responses in which the FOSC exercises significant control over the types of costs incurred to clean up oil spills and, at the same time, relies on private party funding of those costs. See, e.g., United States v. Conoco, Inc., 916 F. Supp. 581, 585 (E.D. La. 1996) ("Before the OPA, the Federal Water Pollution Control Act ('FWPCA') authorized, but did not require, federal removal of oil spills and approval of oil spill response plans. The OPA amended the FWPCA to require such efforts and to expand the oversight and cleanup responsibilities of the federal government." (footnote omitted)).

OPA's reimbursement regulations do not specify the form of the FOSC's coordination or direction. The NCP, to which the reimbursement regulations refer, however, authorizes the FOSC to either direct or monitor a removal action. 40 C.F.R. § 300.305(d)(1)(ii). The FOSC may also "determine [] that effective and immediate removal [or] mitigation . . . can be achieved by private party efforts." 40 C.F.R. § 300.320(a)(3). In such circumstances, the FOSC

may allow the responsible party to voluntarily and promptly perform removal actions, provided the [FOSC] determines such actions will ensure an effective and immediate removal of the discharge or mitigation or prevention of a substantial threat of a discharge. If the responsible party does conduct the removal, the [FOSC] shall ensure adequate surveillance over whatever actions are initiated.

40 C.F.R. § 300.305(d). A removal is being properly carried out by a private party for purposes of 40 C.F.R. § 300.320(a)(3) if: (1) the responsible party is applying the resources necessary to remediate the release; and (2) the removal efforts comply with applicable regulations, including the NCP. 40 C.F.R. § 300.320(a)(3)(i), (ii). A removal will be considered complete only when the FOOSC has so determined in consultation with an appropriate state agent. 40 C.F.R. § 300.320(a)(b)(4).

Documentation of Claims Against the Fund

A private party that asserts a claim against the Fund has the burden of establishing both consistency with the NCP and coordination with the FOOSC. 33 C.F.R. § 136.105(a) (1999). As a practical matter, a claimant should support its claim with documentary evidence to the extent possible. The Fund's discussions of its reimbursement regulations emphasize, however, that the documentary burden for issues other than the extent of damages should be minimal. Claims Under the Oil Pollution Act of 1990, 57 Fed. Reg. 36314, 36315 (Aug. 12, 1992); accord NPFC publication, "Oil Pollution Act of 1990, Interim Claim Regulations," at *6 (Oct. 28, 1992) <<http://www.uscg.mil/hq/npsc/regs.pdf>>. OPA has a bias in favor of reimbursement, S. Rep. 101-94, at 10 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 732. Accordingly, documentation which only indirectly substantiates a claim or circumstantial evidence should be sufficient to establish a valid claim against the Fund. See, e.g., Dana Corp. v. American Standard, Inc., 866 F. Supp. 1481, 1489 (N.D. Ind. 1994); United States v. Midwest Suspension & Brake, 824 F. Supp. 713, 730 (E.D. Mich. 1993), aff'd, 49 F.3d 1197 (6th Cir. 1995). Much of the documentation related to a claim may come from the FOOSC, who, it should be recalled, bears the responsibility for gathering documentation related to a claim sufficient to support full cost recovery. According to the TOP Guidance, "NCP Sections 300.315 and 5.7 of Appendix E to the NCP require the FOOSC to collect and maintain documentation 'to support full cost recovery.'" TOP Guidance at 2-1.

Although the Fund's reimbursement regulations specify particular pieces of documentation that must accompany a claim, the regulations nowhere require that a claimant provide documentation of the FOOSC's determination of consistency with the NCP. See generally 33 C.F.R. § 136.105. Despite the foregoing, the NPFC has stated informally that claimants must submit with their claim either a "[r]eport from the FOOSC that actions were necessary, appropriate and consistent with the NCP" or a "justification why there is no [FOOSC] report." NPFC, "Guidance on Completing Standard Claims Forms," at *3 (July 18, 1997) <<http://www.uscg.mil/hq/npsc/regs.pdf>>. Thus, while there is no formal regulatory requirement that the FOOSC's determinations of consistency and coordination be documented, the NPFC clearly expects that a claimant provide such documentation as part of its claim.

Practical Considerations When Submitting a Claim

Although few courts have had occasion to review the Fund's implementation of its reimbursement regulations, two recent decisions, Gatlin Oil Company v. United States, 169 F.3d 207 (4th Cir. 1999), and Plantation Pipeline Company v. Oil Spill Liability Trust Fund, 47 Env't Rep. Cas. (BNA) 1598 (N.D. Ga. 1998), aff'd, 189 F.3d 486 (11th Cir. 1999), provide important guidance concerning private parties' abilities to obtain reimbursement for their removal activities. In particular, Gatlin Oil emphasizes the need for potential claimants to develop an extensive evidentiary record related to their removal action's consistency with the NCP and coordination with the FOOSC. Plantation underscores the need for claimants to supply the NRC, and, through the NRC, the FOOSC, with accurate, comprehensive spill notification information on an ongoing basis.

Documentation of Removal Activities

In Gatlin Oil, the United States Court of Appeals for the Fourth Circuit adopted the Fund's narrow interpretation of its reimbursement regulations, with the result that a claimant who took prompt action to remediate an oil spill caused by a third party was forced to absorb its removal costs, rather than having those costs reimbursed by the Fund. There, the appellant Gatlin Oil submitted a request for reimbursement to the Fund for certain costs arising from an oil spill incident caused when a vandal opened several of Gatlin Oil's fuel storage tanks, spilling 20,000-30,000 gallons of oil. 169 F.3d at 208-09. Vapors from the spill ignited, resulting in a fire that destroyed substantial portions of Gatlin Oil's facility. Id. at 209. Although the vast majority of the spilled oil was contained on land, approximately ten gallons reached a nearby creek. Id. The FOSC arrived on-site, directed Gatlin Oil to perform specific tasks related to the spill, and then turned the site over to state authorities for further monitoring. Id. at 209-10. The state, in turn, ordered Gatlin Oil to perform additional spill-related activities. Id. at 210.

On appeal from the Fund's denial of Gatlin Oil's claim for reimbursement, the parties debated the scope of the damages that Gatlin Oil was entitled to recover from the Fund as a result of the spill. Id. As an initial matter, the Fourth Circuit adopted the Coast Guard's narrow interpretation of OPA and concluded that a party may only recover removal costs and damages that result from an OPA incident, *i.e.*, that result from a discharge of oil or from a substantial threat of a discharge of oil into navigable waters or adjacent shoreline. Id. at 211. The court's holding limited Gatlin Oil's recovery on remand to those costs determined by the FOSC to be consistent with the NCP or specifically directed by the FOSC, rather than authorizing Gatlin Oil to recover all costs and damages resulting from the oil spill. Id. Gatlin Oil's reimbursement request encompassed all cleanup costs associated with the spill as well as damages caused by the resulting fire, plus interest. Id. at 210.

The court next rejected, for several reasons, Gatlin Oil's efforts to recover removal costs incurred as a result of state directives when such directives were not also required by the FOSC. Id. at 212. First, although Gatlin Oil asserted that the entire oil spill posed a substantial threat of reaching navigable waters, the Fourth Circuit noted the lack of evidence that the soil or groundwater contamination addressed by the state directives threatened navigable waters. Id. at 212-13. Second, the court disagreed with Gatlin Oil's argument that the FOSC assumed responsibility for the entire cleanup by virtue of his position. Id. at 212. Specifically, the court noted the absence of evidence that Gatlin Oil complied with the OPA or its implementing regulations when obeying the state directives, the absence of a determination by the FOSC that Gatlin Oil's activities were consistent with the NCP, and the fact that the FOSC had not directed Gatlin Oil to comply with the state's directives. Id. at 213. Based on those factors, the court concluded that Gatlin Oil could not recover from the Fund for costs incurred in responding to the state's directives. Id.

Gatlin Oil underscores the importance of developing an extensive record in support of claims against the Fund for removal costs. As noted above, the court repeatedly referred to the absence of evidence in the record which indicated either that certain costs were related to an actual or threatened discharge of oil or that

the FOSC had affirmatively directed that the actions resulting in those costs be undertaken. Despite the NCP's mandate that the FOSC lead response activities and accumulate appropriate documentation, the Fund was successfully able to argue that the evidentiary burden lay entirely on the claimant.

In order to avoid similar negative outcomes in the future, a claimant should develop as much documentation as possible. Indeed, to ensure, to the extent possible, the viability of a claim, a potential claimant should request a formal, written FOSC determination as part of the claimants' spill response activities. Certainly, a claimant cannot require the FOSC to record its determination or to take any other action. A claimant should, however, make every effort to

create a paper trail and ensure that the FOSC does not act in a paper vacuum, verbally requiring or implying through its actions that a private party take actions in furtherance of OPA. Gatlin Oil indicates that, absent clear documentation of the FOSC's determination and directives, a private party who later seeks reimbursement from the Fund for those actions can expect to have its claim denied. The NPFC may request additional information from a claimant in order to evaluate a claim, see 33 C.F.R. § 136.105(d)(13); see also [NPFC "Claimant's Information Guide," at *568 (Sept. 1993) (noting informal NPFC policy of requesting that claimant supply missing information within sixty days after NPFC verifies that information is, indeed, missing). A claimant, however, should not rely on the NPFC to exercise its discretion in that manner. Instead, given the aggressive positions the Fund has taken in litigation involving its claim denials, a claimant should assume that the Fund will simply deny a claim based on the absence of certain materials rather than provide the claimant with an opportunity to supplement its record.

Gatlin Oil also teaches that, despite the NCP's mandate that a FOSC take over spill response if a private party is not properly carrying out removal activities, courts may be unwilling to assume that a private party has engaged in appropriate spill response activities in the absence of explicit evidence of consistency with the NCP. Stated differently, private parties should not rely on the FOSC to carry out its obligations under either OPA or the NCP, and cannot presume that the FOSC's failure to object to particular removal activities constitutes approval of those activities. Indeed, as Gatlin Oil makes clear, a party's reliance on the FOSC's expertise and compliance with the NCP merely opens the door for the Fund to deny that party's claim. See 169 F.3d at 213 (stating that "Gatlin's theory that the [FOSC] is deemed to have directed all state and federal removal costs is contrary to" the Fund's reimbursement regulations).

Spill Notification

The importance of coordinating removal activities with the FOSC cannot be over-emphasized. One important component of that coordination involves a party's initial notification to the NRC of the spill event. Failure to properly notify the NRC of a spill may result in denial of a claim, regardless of whether the claimant's removal activities were otherwise consistent with the NCP. Whether notice is sufficient, however, is not as simple as may first appear.

In Plantation, a pipeline operated by Plantation was breached, allegedly by real estate development contractors engaged in new home construction, resulting in an oil spill close to navigable waters. 47 Env't Rep. Case. (BNA) at 1599. Plantation notified the NRC of the spill and the FOSC's representative visited the site to determine the spill's status. Id. at 1603. After performing an assessment of the spill, the FOSC's representative turned the site over to state authorities "for further monitoring." Id. Several days later, Plantation discovered that the spill had, in fact, impacted navigable waters and informed the state, but not the FOSC or NRC, of that fact. Id. "At the time the [FOSC's representative] left the scene, it had not yet been discovered that the spill threaten[ed] navigable waterways." Id. at 1599. The parties' filings indicated that the spill occurred only 100 feet from surface waters. See, e.g., Brief for Appellant at 5, Plantation Pipeline Co. v. Oil Spill Liab. Trust Fund, 189 F.3d 486 (11th Cir. 1999). After performing extensive removal activities, Plantation presented a claim to the Fund seeking reimbursement of uninsured removal costs associated with the spill which Plantation had been unable to recover from a responsible party. 47 Env't Rep. Case. (BNA) at 1599. The Fund denied the claim, concluding, among other things, that Plantation failed to adequately coordinate its removal activities with the FOSC. Id. at 1602-03.

The district court upheld the Fund's determination concerning the lack of adequate coordination. Id. at 1603. The court distinguished between Plantation's notification to the NRC concerning the initial soil contamination proximate to navigable waters and the discovery, after the FOSC's representative had left the site, of direct impacts to navigable waters. According to the court, when the FOSC's representative left the site,

the spill was believed by all involved to affect soil and air only. There was no indication at that time that water was in any way threatened. Therefore, when [the FOSC] delegated authority to the state it was doing so only for the purpose of soil and air pollution, not water pollution. Plantation, a sophisticated company whose oil transporting business requires it to know relevant federal regulations, had a duty under the OPA to notify the federal authorities when the threat to water was discovered.

Id. Because Plantation failed to notify the NRC and FOSC of the impact to waters upon discovery, and despite its earlier notification concerning the spill to those same parties, the court held that the Fund properly denied Plantation's claim for reimbursement. Id. at 1603, 1605.

After Plantation, a party taking a proactive approach to spill response in the form of "early" notification to the NRC (i.e., notice of a spill proximate to navigable waters, including on an adjoining shoreline) may ultimately find itself foreclosed from reimbursement if the FOSC fails to perform an adequate assessment of the spill. Instead of rewarding Plantation's efforts to involve the FOSC in spill response activities when navigable waters were threatened, the Fund instead denied all reimbursement based on Plantation's failure to keep the FOSC informed of the spread of the spill to navigable waters.

The Fund's approach is at odds with OPA's and the Clean Water Act's goal of preventing discharges of oil to navigable waters. If implemented in all cases, the Fund's approach to spill notification and subsequent reimbursement could weigh in favor of delaying notification to the NRC until an oil spill impact to navigable waters has been confirmed. In other words, Plantation supports a narrow interpretation of OPA's notification obligation – "don't call until you know you've hit water" – and disregards a party's obligation to notify the NRC when both navigable waters and adjoining shorelines are impacted by a discharge. See 33 U.S.C. § 1321(b)(3), (5) (requiring notification in event of discharge to, or which threatens, navigable water). This approach runs counter to OPA's and the Clean Water Act's commandment that notification occur at more or less the same time as liability arises, i.e., for actual discharges to navigable waters as well as for discharges which merely threaten navigable waters. See id.

Unfortunately for parties confused about when, or whether, to notify of a spill, delaying notification also has its problems: a party's failure to notify the NRC can result in both civil and criminal punishment. See, e.g., United States v. Fredericks, 38 F. Supp. 2d 396, 401 (D.V.I. 1999) (discussing conviction of defendant for failure to notify of oil spill in accordance with 33 U.S.C. § 1321(b)(5)). Although no case law yet addresses whether the United States may prosecute or penalize parties who "should have known" that a release would reach navigable waters but did not notify, such prosecution is not beyond the realm of possibility. Thus, the standard established by Plantation places parties between a rock and a hard place: delay notification in order to ensure, to the extent possible, that response costs can be recovered from the Fund; or risk imprisonment, among other things, for failure to notify of a threat to navigable waters.

The approach taken by the Fund is troublesome for two additional reasons. First, if multiple notifications are required as the character of a spill changes, then the NRC may well be deluged with such notifications as parties not responsible for oil spills attempt to ensure that their response costs are reimbursable, i.e., that the FOSC is completely informed of the status of a spill. Second, this approach runs counter to the scheme established by OPA and the NCP, in which the FOSC, and not private parties, is responsible for determining the scope and extent of an oil spill. Indeed, the Fund's approach supports a lesser, rather than greater, degree of FOSC involvement in spills. Decisions like Plantation may legitimize poor spill assessment on the part of the FOSC, at the expense of the regulated community. This discussion does not disregard the fact that multiple notifications to the NRC may be appropriate in some cases. For example, a spill to soil where no threat or impact to navigable waters is implicated may be reportable as an initial matter under the Pipeline Safety Act; if that spill spreads and threatens or impacts navigable waters, it would be prudent to provide a second notice pursuant to the Clean Water Act. The submittal of multiple notifications is not, in and of itself, unduly burdensome. Requiring multiple notifications becomes problematic, however, where that requirement is not stated explicitly in

OPA or its implementing regulations and where the Fund utilizes the resulting regulatory ambiguity as a mechanism for defeating otherwise appropriate claims.

Although these outcomes may, at first blush, seem far-fetched, the decisions described above reflect the reality in which the regulated community operates insofar as the Fund is concerned. Rather than serving as a reimbursement-friendly mechanism for parties who act responsibly when faced with an oil spill that they have not caused, the Fund is, instead, arguing in litigation that it has no obligation to provide reimbursement in cases where the regulatory requirements are unclear. While the Fund's approach may preserve its resources for future oil spill response activities, it is inconsistent with Congress' intent and penalizes, rather than compensates, private parties who take action pursuant to OPA to preserve the environment and reduce the impacts of oil spills.

Unless and until changes are made to the law, the practical approach mandated by the Plantation decision is for a claimant to provide notice early and often. The best course is to notify the NRC immediately about any significant spill, even if there is no apparent threat to navigable waters, and then give "supplemental" notice to the NRC and FOSC each time there is a substantial change in the claimant's understanding of the nature or scope of the release. The claimant also would do well to stay in close touch with the FOSC and insist that the FOSC "check off" on every stage of the spill assessment and remediation. The goal should be to leave no doubt that there was adequate coordination with the FOSC. In extreme cases, the claimant may need to go so far as to bring a mandamus action to preserve its rights to reimbursement, if the FOSC will not carry out his duty to coordinate with the responding party.

Conclusion

OPA is an ambitious effort to address the environmental impacts of oil spills. Although, and perhaps because, OPA broadly imposes liability, Congress attempted, through the provision of certain defenses and the establishment of the Fund, to temper OPA's liability scheme and enable parties not "responsible" for spills to recover costs incurred in cleaning up those spills. The recent Gatlin Oil and Plantation decisions indicate that, despite Congress' intent, parties can expect the Fund to part with its reimbursement resources only reluctantly in some cases.

The Fund's successes in preserving its OPA-derived resources in the context of litigation may have serious consequences for both FOSCs and potential claimants. For example, the Fund's emphasis on formality and abundant documentation may transform the FOSC into an entity which is both master of all and master of nothing for purposes of reimbursement. In terms of OPA and the NCP, the FOSC has sweeping, substantive responsibility for spill response and environmental restoration. In terms of the Fund's reimbursement scheme, however, after Gatlin Oil and Plantation, the FOSC has no real substantive role to play. Instead, in order to safeguard the viability of a claim against the Fund, a private party claimant must proactively ensure that the FOSC carries out its responsibilities in order to obtain reimbursement, and may not assume that the government's mere involvement in spill response activities is sufficient to support its claim.

In addition, after Gatlin Oil, a party's failure to obtain formal, written determinations of consistency with the NCP or to have the FOSC pre-approve every step in the removal process may result in the Fund later denying a claim for reimbursement. Similarly, the Plantation decision implies that the Fund prefers that claimants notify the NRC of spill events only after those events have impacted navigable waters, rather than when such waters are merely threatened. The manner in which the Fund is approaching litigation involving claim denials undermines Congress' goals of prompt, private party remedial action by forcing potential claimants to focus on evidentiary concerns rather than environmental remediation. The Fund's litigation approach also undermines the Fund's expressed goal of encouraging private parties to clean up spills associated with their facilities. See, e.g., United States Coast Guard Federal On Scene Coordinator (FOSC) Finance and Resource Management Field Guide, at 30, <www.uscg.mil/hq/npsc/ffarm.htm>. Such cleanups will be discouraged, rather than encouraged, if the regulated community is forced by the

Fund to absorb removal costs rather than obtaining reimbursement in otherwise appropriate cases.

The NPFC should carefully examine the manner in which it is currently implementing OPA, and reevaluate whether its approach to reimbursement, both inside and outside the context of litigation, is consistent with OPA's goals and Congress' expressed intent. Private parties, for their part, must exercise caution when engaging in spill response in order to increase the viability of any claims they may choose to assert against the Fund. Under the current state of affairs, private parties able to assert a defense to liability may be better served by deferring leadership of removal activity to the FOSC, rather than attempting to conduct an appropriate removal on their own initiative. If private parties defer to the FOSC, however, those parties should continue to monitor the FOSC's removal effort and should seek to participate in the formulation of a cost-effective response to the spill.

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