

US Federal court to address issues of gross negligence and wilful misconduct in BP Gulf of Mexico oil spill litigation



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The judge overseeing the BP Gulf of Mexico oil spill litigation has directed the parties to address key issues from the first phase of the multi-district civil trial, including the concepts of gross negligence and wilful misconduct. The first phase of the trial, which concluded on 17 April 2013, lasted eight weeks and featured testimony about whether BP or its drilling partners should be held liable for the 2010 incident.

The litigation was commenced by the federal government and other parties, including the states of Alabama and Louisiana, and lawyers representing Gulf Coast businesses and residents, under the Oil Pollution Act of 1990 (OPA) and the Clean Water Act (CWA). The OPA authorises the imposition of all removal costs and damages of up to \$75m, including damages for injury to property, natural resources, revenues, profits and public services. However, the \$75m limitation does not apply if the incident was proximately caused by the responsible party's 'gross negligence or wilful misconduct' or the violation of an applicable federal safety, construction or operating regulation. The CWA provides two levels of civil penalties. The standard level is \$1,100 per barrel of oil discharged. That number rises to \$4,300 per barrel if the incident was the result of 'gross negligence or wilful misconduct'.



- the judge has issued an order asking each party to address a list of issues regarding gross negligence
- the OPA and CWA have no clear standard for negligent actions that rise above the level of ordinary negligence, i.e. gross negligence
- this litigation is an opportunity to develop a framework for applying these terms to future toxic spills
- the judge has stated that he may not issue a judgment on fault and gross negligence before phase two of the trial which is scheduled to begin on 16 September 2013

The regulatory regimes under the OPA and the CWA have no clear standard for negligent actions that rise above the level of ordinary negligence.

The court directed the parties to address the following questions:

1. What is the standard for finding 'gross negligence' or 'wilful misconduct' under the CWA and the OPA?
2. What is the standard for a finding of punitive damages under general maritime law? Is this a different standard than under the CWA or the OPA, and if so, how is it different?
3. In order to find that a party acted with gross negligence, is it necessary to find that there was at least one single act or omission that equates to gross negligence, or can such a finding be based upon an accumulation or a series of negligent acts or omissions?
4. Can an act or omission that is not itself causal of the accident nevertheless be considered in determining whether a party engaged in conduct constituting gross negligence?
5. In order to find gross negligence, is it sufficient if only employees on the rig are guilty of such conduct, or is it necessary to find that this level of conduct was attributable to shore-based or management-level employees?
6. Does compliance with Minerals Management Service (or other applicable) regulations preclude a finding of gross negligence regardless of whether a defendant knew or should have known that its conduct or equipment was unsafe or violated accepted engineering standards?
7. Does the fact that a party acted in accordance with 'industry standards' preclude a finding of gross negligence?

Whether the defendants were grossly negligent will have a significant impact on the extent of damages or fines assessed. The uncertainty surrounding the definition of 'gross negligence' and 'wilful misconduct' has made it difficult for defendants to make informed decisions about defences and settlement offers. For the oil and gas industry, the decision will be significant as these same terms are included in a variety of insurance contracts, as well as other states statutes, and also in private contracts between parties in the industry.