CLAIM SUMMARY / DETERMINATION FORM

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| Date | : 09/21/2012 |
| Claim Number | : G05002-001 |
| Claimant | : Egan Marine, Great American Insurance Company, Gulf Coast Marine, L.L.C. and: Service Welding & Shipbuilding |
| Type of Claimant | : Corporate |
| Type of Claim | : Removal Costs |
| Claim Manager | : (b) (6) |
| Amount Requested | : $6,275,075.02 |

## I. FACTS

On January 19, 2005, the tank barge EMC-423 (vin.547814) exploded and caught fire while being towed by the M/V LISA E (vin.29405) on a navigable waterway, the Chicago Sanitary and Ship Canal (the Canal). At the time of the explosion, the EMC-423 was carrying 14,272 barrels (599,424 gallons) of clarified slurry oil ("CSO"), which gives off flammable vapors.

The flammable vapors accrued in the head space of the EMC-423's cargo storage tanks number 3 and 4 in sufficient concentration to be dangerous. The vapors ignited in tank 4, setting off the deflagration event that ignited vapors in tank 3, causing a fire, explosion and the subsequent sinking of the barge, as well as the discharge of 4,718 gallons of CSO into the Canal. Oil also remained trapped in the sunken barge. Alex Oliva, an EMC employee, was onboard the barge, preparing the cargo for offloading at the time of the incident, and died as a result of the explosion.

## II. CLAIMANTS AND THE CLAIM

This determination addresses a request for reconsideration, in part, of a determination dated 11 June 2012 (first determination) in respect to three claims presented by Claimants. [1]

Egan Marine Corporation ("Egan Marine") was an owner of the tank barge EMC-423 and the tugboat LISA E at the time of the incident, and is a responsible party under the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2701 *et seq*. Subrogees of Egan Marine seek reimbursement from the Oil Spill Liability Trust Fund (the Fund) of $5,238,600.49 in uncompensated removal costs, arguing entitlement to a limitation of liability. The first determination found that entitlement to a limitation of liability was not established.

The subrogees are insurers, Great American Insurance Company ("Great American") and Gulf Coast Marine, LLC, as an agent for Northern Assurance Company of America and Markel America Insurance Company (Gulf Coast), subrogated protection and indemnity insurers for Egan Marine (hereinafter, "Claimants"). Claimants assert that they incurred the following amounts of removal costs:

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| Great American: | $6,549,669.58 |
| Gulf Coast: | $688,930.91 |

[1] See, Reconsideration Request dated 11 July 2012 in which Claimants' counsel states, "[a]lthough Claimants do not agree with the NPFC's decision to deny Claimants' request for a complete defense under 33 U.S.C.§2703, Claimants are not requesting reconsideration of that decision.

- $2,000,000.00 in liability
Claimed amount: **$5,238,600.49**

The third claim by Service Welding and Shipbuilding, LLC (Service Welding) is presented as a third party claim for the company's uncompensated oil removal costs as a result of the incident. The first determination denied the claim for $1,372,043.53 because the record did not establish Service Welding's third party status. With the request for reconsideration claimant has provided additional documentation relevant to its alleged third party status and has amended the claimed amount to **$1,036,474.53**.

On reconsideration, the claimed amount totals **$6,275,075.02.**

## III. APPLICABLE LAW

Under 33 C.F.R § 136.115(d) the Director, NPFC, upon written request of the claimant or of a person duly authorized to act on the claimant's behalf, reconsiders any claim denied. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. The request must be received by the Director, NPFC, 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. Reconsideration may only be requested once for each claim denied. This written decision is final. The failure of the Director, NPFC, to make final disposition of reconsideration within 90 days after it is received shall, at the option of the claimant any time thereafter, be deemed a final denial of the reconsideration.

OPA provides that a Responsible Party for a vessel or facility from which oil is discharged or which poses a substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages resulting from such incident. 33 U.S.C. § 2702(a).

In the case of a vessel, "responsible party" means any person owning, operating or demise chartering the vessel." 33 U.S.C. § 2701(32)(A).

"Incident" means 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).

"The Oil Spill Liability Trust Fund is available . . . for . . . the payment of claims in accordance with 33 U.S.C. § 2713 for uncompensated removal costs . . . or uncompensated damages." 33 U.S.C. § 2713(b)(1)(B).

"…[N]o claim against the Fund may be approved or certified for payment during the pendency of an action by the claimant in court to recover costs that are the subject of the claim." 33 U.S.C. § 2713(b)(2).

"The responsible party for a vessel or facility from which oil is discharged or which poses the substantial threat of 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 33 U.S.C. § 2703; or

(2) the responsible party is entitled to a limitation of liability under 33 U.S.C. § 2704." 33 U.S.C. § 2708(a) [emphasis added].

"(a) . . . [T]he total of the liability of a responsible party under 33 U.S.C. § 2702 and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident, shall not exceed –

(1) for a tank vessel, the great of-

(A) with respect to a single-hull vessel, including a single-hull vessel fitted with double sides only for a double bottom only, $3,000 per gross ton; . . .

(B) with respect to a vessel other than a vessel referred to in subparagraph (A), $1,900 per gross ton; or

(C) . . (ii) in the case of a vessel of 3,000 gross tons or less, $2,000,000;

(2) for any vessel, $600 per gross ton or $500,000, whichever is greater."

"Subsection (a) does not apply if the incident was proximately caused by –

(A) gross negligence[2] 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 relationship with the responsible party . . ."
33 U.S.C. § 2704(c)(1).

OPA provides for a limitation on the complete defense if certain conditions are not met by the responsible party, as follows:

"Subsection (a) does not apply with respect to a responsible party who fails or refuses –

(1) to report the incident as required by law if the responsible party knows or has reason to know of the incident;

(2) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(3) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title, the Federal Water Pollution Control Act, as amended by the Act, . . . " 33 U.S.C. § 2703(c).

The Claimant bears the burden of providing to the NPFC, all evidence, information and documentation deemed necessary by the Director, NPFC, to support the claim."
33 C.F.R. § 136.105(a), and § 136.105(e)(6).

"The amount of compensation allowable is the total of uncompensated reasonable removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal activities for which costs are being claimed must have been coordinated with the FOSC."
33 C.F.R. § 136.205.

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[2] See, Kuroshima Shipping S.A. Act of God Defense and Limit of Liability Analysis, 2003 AMC 1681(2003). "Negligence is defined as a failure to exercise the degree of care that 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."

## IV. REQUEST FOR RECONSIDERATION

1. On reconsideration, Claimants specifically argue that the holding of the Court in *United States v. Egan Corporation, in personam, Motor Vessel LISA E, in rem, and Tank Barge ENC-423, in rem,* case number 08 cv 3160, as well as documentation included in the Claimants' original submission entitle Claimants to a limitation of liability.
2. The Claimants' point to the appendix attached to the initial claim determination and assert that the NPFC 's initial denial determination was based on a predisposed prejudice held by the United States Coast Guard against the Claimants.
3. The Claimants dispute the NPFC's interpretation of OPA and argue that the OPA creates a default presumption limiting claimants' liability except under certain conditions; and that specifically, 33 U.S.C. § 2703, requires the responsible party to carry the burden to establish a defense to liability in contrast to §2704 which grants Claimants entitlement to a limitation of liability subject to its provisions. Claimants also argue that the NPFC impermissibly required that the Claimants prove the source of the ignition in order to recover costs.
4. The Claimants assert that Service Welding was not an owner/operator of the M/V LISA E or the EMC-423 at the time of the incident, and therefore, as established by additional documentation provided, is not a responsible party under OPA.

## V. ANALYSIS

On reconsideration, the NPFC performed a *de novo* review of the complete claim submission and the entire record. This included all evidence presented by the Claimants and other evidence in respect to the civil action by the United States to recover costs associated with this incident.

For the reasons discussed below, the NPFC affirms its earlier determination in regard to the Claimants' failure to demonstrate it is entitled to a limitation of liability, as required by OPA § 1008 (33 USC §2708). In regard to the claim for removal costs submitted by Service Welding, the NPFC finds that Service Welding has provided documentation sufficient to establish its third party status, that it was not an owner or operator of the barge at the time of the incident. Further, upon review of the cost documentation Service Welding is entitled to reimbursement of its claim to the Fund in the amount of **$1,036,474.53**.

Claimants' arguments presented on reconsideration are addressed:

### 1. Failure to demonstrate entitlement to limitation of liability.

In their request for reconsideration, the Claimants did not present any additional evidence that might demonstrate entitlement to a limitation on liability. Rather, the Claimants focus on the outcome of the earlier civil action in which the United States sought to recover costs from defendant, Egan Marine.

Claimants state, in part, that

> Claimants demonstrated that Egan Marine was not guilty of gross negligence, willful misconduct or the violation of an applicable Federal safety regulation by providing the NPFC with the decision of the court in the civil action filed by the

> United States, on behalf of the NPFC . . . Furthermore, in its original submission to the NPFC, Claimants provided substantial evidence that the explosion was not caused by gross negligence, willful misconduct, or the violation of a safety regulation.[3]

Claimants assert that the doctrine of collateral estoppel requires that the NPFC uphold Claimants' limitation of liability, without requiring that Claimants demonstrate entitlement to the limit. The collateral estoppel doctrine can be applied under certain circumstances to prevent re-litigation of issues previously decided by a court of competent jurisdiction.[4] Under a collateral estoppel framework, the differing evidentiary standards, burden of proof, identity of parties and nature of the relief sought, would prevent the application of collateral estoppel.[5]

The issue of this claim determination, whether or not Claimants had demonstrated an entitlement to a limitation of liability, has not been decided in Court. Rather, the Court held that the Government had failed to prove its theory of the cause of the incident by a preponderance of the evidence, and therefore could not recover costs from defendant, Egan Marine.[6] The Court did not find that the Claimants had demonstrated an entitlement to a limitation of liability as required by OPA section 1008 when presenting a claim to the Fund.[7] Specifically, the Court held that, because the Government was unable to prove that the explosion was proximately caused by [the defendant's] gross negligence or the violation of a safety regulation, the limitation of liability *does* apply in this case, and *the Government is not entitled to recover additional funds* from [the defendant]." [first emphasis contained in original; second emphasis added].[8]

The government's failure to prove its case, however, does not substitute for the requirement that a *responsible party may assert a limit based claim to the Fund "only if"* it demonstrates it is entitled to a limitation of liability. The Court's holding does not demonstrate Claimants' entitlement to a limitation of liability and we are not re-litigating that case, as Claimants argue, in making this determination. Claimants' counsel seems to acknowledge that the cause of the explosion remains unknown and the record as a whole establishes that the cause remains unknown. Under OPA sections 1004(c) and 1008 it is fundamental that the cause of an incident must be explained in order to demonstrate entitlement to a limitation of liability. The Claimants presume that the Fund should compensate a responsible party when the cause of an incident is unknown.[9] This is the fundamental point on which we disagree.

Under the OPA when a responsible party has been identified, that responsible party is strictly liable for costs and damages, and the benefit of a claim against the Fund is available only if the responsible party can demonstrate the circumstances of the incident to satisfy the criteria for an affirmative defense or a limitation of liability.[10]

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[3] Reconsideration request letter, at 5.

[4] See e.g., Freeman v. Lester Coggins Trucking, Inc., 771 F.2d 860, 862 (5th Cir. Miss. 1985).

[5] See Steward v. Summerville, 1992 WL 300986 citing Crot v. Byne, 957 F.2d 394, 396 (7th Cir. 1992.)

[6] See Memorandum Opinion and Order, at 5, 8.

[7] Furthermore, the costs that are the subject of this claim are not the costs that were the subject of the civil action, and that the burden of proof, being dispositive under these circumstances, creates a different legal analysis, so that collateral estoppel would not apply for purposes of the NPFC adjudication of this claim. See, e.g., Kosakow v. New Rochelle Radiology Assocs., *P.C.*, 274 F.3d (2d. Cir. N.Y. 2001)(citing, Nesbitt v. Nimmich, 30 N.Y.2d 622, 331, N.Y.S.2d 438, 282 N.E.2d 328 (1972). See also, EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc., 746 F.2d 375, 377 (7th Cir. Ill.1984).

[8] Memorandum and Opinion Order at 15.

[9] Reconsideration Request at 6.

[10] "(A) limitation on liability is a "benefit" rather than a right". S. Rep. No. 101-94, at 14 (1989)).

## 2. Egan Marine perceives United States Coast Guard predisposed to deny claim.

The Claimants assert that the first determination denying the Egan Marine claim(s) was a result of the United States Coast Guard's prejudice against the Claimants, which caused the NPFC to be predisposed to deny this claim. In support of this contention, the Claimants reference statements contained in the appendix to the NPFC's Claim Summary Determination dated 11 June 2012.

The first determination's appendix was drafted as a rough summary of evidence reviewed prior to the initial determination of this claim and was intended to indicate the breadth of the evidence considered. It was not intended to represent a complete and accurate distillation or analysis of the evidence in the record that was considered. Also, to the extent the appendix includes conjecture as to what violations may have occurred if the cause of the explosion had been established, it is irrelevant to the determination. In hindsight, it is an unnecessary appendix and to the extent it has created confusion, it was ill-advised. As Claimants rightly state, the appendix failed to include a list of all evidence available for review, including the deposition testimony of an eyewitness.[11] In reconsidering the first determination, the NPFC reviewed again all evidence in the record.

Notwithstanding the apparent confusion created by the appendix the first determination was soundly based on the record as a whole when it concluded that, "[t]his determination does not make findings as to all the circumstances of the incident, in particular, the cause of the explosion and fire. In our view of the record, the cause remains unclear, and where the cause is unclear, the Fund is not available to compensate the responsible party under OPA, 33 USC § 2708." [12] Accordingly "the claimants have not met their burden to establish entitlement to a limit on liability."[13]

## 3. OPA requirements for limitation of liability claims.

In enacting OPA, Congress assigned strict liability for oil spill response costs to the owners and operators of the vessels or facilities responsible for the discharge. In relevant part, OPA provides that "each responsible party for a vessel or facility from which oil is discharged . . . is liable for removal costs and damages . . . that result from such incident."[14] Under certain circumstances, a responsible party may seek to limit its liability for costs and damages by submitting a claim to the NPFC for reimbursement from the OSLTF.[15] However, in order to recover, the responsible party is required to demonstrate entitlement to a limitation of liability.[16]

The Claimants argue that the plain language of OPA creates a default presumption that a responsible party is entitled to a limitation of liability, unless the NPFC can prove applicability of an exception listed in the statute. In making this assertion, Claimants focus on the language of 33 U.S.C. § 2704, which Claimants quote in part as follows.

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[11] All deposition and trial testimony including the security camera footage was indeed reviewed, considered, analyzed and weighed by NPFC in the adjudication and reconsideration of this claim. On the record as a whole the cause of the explosion remains a matter of speculation and is not established.
[11] 33 U.S.C. § 2702(a).
[12] Claim Summary Determination, G05002-001, at 4.
[13] Claim Summary Determination, G05002-001, at 6.
[14] 33 U.S.C. § 2702(a).
[15] Id. at §2713(b)(1)(B).
[16] 33 U.S.C. § 2708.

> [T]he total of the liability of a responsible party under 33 U.S.C. § 2702 and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident *shall not exceed*-..." [Claimants' emphasis added].[17]

Importantly, this section of the statute also includes the preceding language, "[e]xcept as otherwise provided in this section."[18] On its face, the language of the statute does not grant a presumption of entitlement to a limitation of liability. Rather, entitlement to a limitation is subject to certain restrictions "otherwise provided in this section." Section 2704(c) lists exceptions which would prevent a claimant from entitlement to the benefit of a limit on a claimant's liability. This section states that a claimant is not entitled to the benefit of the limit,

> 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...[19]

Claimants' presumption argument fails to give due consideration to OPA section 1008. When a responsible party seeks to recover costs and damages, that party is expressly and unequivocally required under OPA, to "demonstrate" entitlement to a limitation of liability. Recovery of costs and damages by a responsible party is specifically addressed in 33 U.S.C. § 2708, which states that,

> [t]he 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* - ...
>
> (2) the responsible party is entitled to a limitation of liability under section 2704 of this title [emphases added].

Clearly then, OPA requires that in order for a responsible party to recover costs and damages exceeding its limitation of liability, the party must *demonstrate* that exceptions listed in the statute do not apply. Claimants state that "nowhere in either sections 2704 or 2708 is there any statement regarding the burden of proof to be applied in establishing a claimants' right to limit liability."[20] However, OPA does provide guidance for a responsible party seeking to recover costs insofar as it requires that the party "demonstrate" entitlement to a limit of liability.

Although "demonstrate" is not statutorily defined, it is commonly defined as "to show clearly," "to prove or make clear by reasoning or evidence" and "to illustrate and explain, especially with many examples."[21] Furthermore, the Guidelines for Claim Submission by Responsible Parties, published by the NPFC in January 2007 indicate that in order to demonstrate an entitlement to a limitation of liability, a responsible party must present everything necessary for the NPFC to fully understand the situation, circumstances and events leading up to and through the incident and release, in order to make a reasonable determination as to the cause(s) and contributing factors to the incident and release.[22]

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[17] Reconsideration Request at 4.
[18] 33 U.S.C. § 2704(a).
[19] 33 U.S.C. § 2704
[20] Reconsideration Request at 4.
[21] See, e.g., Miriam-Webster, definition of "demonstrate" available at www.merriam-webster.com/dictionary/demonstrate. Accessed on 6 August 2012.
[22] NPFC, Responsible Party Claim Submission Guidance, January 2007, at 5.

The plain language of the statute, along with established NPFC policy supports a reading of OPA which requires that a responsible party affirmatively demonstrate an entitlement to a limitation of liability prior to seeking recovery for costs and damages expended above that limit.

Furthermore, the requirement that a responsible party demonstrate entitlement to a limit of liability has been upheld through case law, including, for example, Water Quality Insurance Syndicate v. United States of America, 632 F. Supp.2d 108 (D. Mass. 2009). In this case, the insurer of a capsized tug boat sought review of an NPFC determination which denied the claimant's petition to a limitation of liability under OPA. The responsible party, like Claimant here, argued that OPA grants a "presumption" that a responsible party is entitled to a limitation of liability unless the NPFC proves that an exception listed in §2704 should apply.[23]

The Court rejected this argument, relying on the plain language of the statute to determine that OPA did not grant a presumption of entitlement to the responsible party, but rather that the responsible party carried the burden to prove that the limit should be upheld. In its holding, the Court noted that "the plain language of the statute" places the burden of proof on the claimant.[24]

This position was adopted in Bean Dredging, LLC, et al v. United States of America, 773 F.Supp.2d 63 (D.C. 2011). In this case, not only did the court confirm that OPA did *not* grant a responsible party a presumption of entitlement to a limitation of liability, but rather, in enacting OPA, "Congress *created a default presumption assigning liability* to the owners and operators of vessels that discharge oil into the navigable waters of the United States [emphasis added]."[25] The Court went on to clarify the NPFC's determination of this claim, stating that,

> [t]he NPFC did not determine that [the oil spill incident] was proximately caused by [the responsible party's] violations of the applicable regulations . . . Rather, the NPFC found, after weighing the evidence in the record and assessing its probative value, that [the claimant] had simply failed to carry its burden of proving that it was entitled to a limitation of liability.[26]

The Court confirms that such a position is consistent with the clear language of the statute, as well as with Congress' intent in enacting the statute, noting that it was "Congress' intent to impose *strict liability* on responsible parties."[27] The Court also stated that this is "in accordance with Congress' view that a limitation on liability is a "benefit" rather than a right".[28]

Therefore, as made clear by the plain language of OPA, established NPFC policy, OPA's legislative history, and relevant case law, in order for a responsible party to recover costs and damages, that party must first demonstrate an entitlement to a limitation of liability. Because Claimants have failed to provide evidence to demonstrate Claimants' entitlement to limitation of liability, either in their original submission or now on reconsideration, this portion of the claim is denied.

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[23] Water Quality Insurance Syndicate v. United States of America, 632 F.Supp.2d 108, 113-114.
[24] Id.
[25] Id. at 86.
[26] Id. at 87.
[27] Id. citing H.R.Rep. No. 101-653, at 102 (1990).
[28] Id., citing S.Rep. No. 101-94, at 14 (1989)).

*4*.**Status of Service Welding at the time of the incident.**

Claimant asserts that, despite some indications in the record, Service Welding was not an owner or operator of the barge at the time of the incident and, therefore, is not a responsible party and is eligible to seek reimbursement for removal costs. In support of this assertion, Claimant provides Certificates of Documentation, General Abstracts of Title, and Bills of Sale, recording the ownership of the EMC-423, prior to and following the incident.

This new documentation provided by the Claimant establishes that Service Welding, as an entity distinct from Egan Marine, was not an owner or operator of the barge at the time of the incident. By providing documentation sufficiently tracking the ownership of the barge, particularly, from August 2, 1994 until the incident, Claimant has sufficiently established that Service Welding was not an owner or operator of the barge at the time of the incident and is not a responsible party.

Therefore, Service Welding is a third party claimant for this claim seeking removal costs in the amended claimed amount of $1,036,474.53. Further, upon review of the cost documentation provided by Service Welding the claimed amount of **$1,036,474.53** is compensable from the Fund.

Claim Supervisor: *Thomas S. Morrison*

Date of Supervisor's Review:

Supervisor's Action:

Supervisor Comments: