CLAIM SUMMARY / DETERMINATION FORM

Claim Number	:	B13013-0002
Claimants	:	Boston Marine Transport/Great American Insurance Company of New York/The American Steamship Owners Mutual Protection and Indemnity Association
Type of Claimant	:	Corporate
Type of Claim	:	Sole Cause Act of God/Sole Cause Third Party/Limit of Liability
Claim Manager	:	[redacted]

Executive Summary

This claim arises out of an oil spill that occurred on December 14, 2102 from the BOSTON No. 30 (BOSTON 30), which was a tank barge moored at Mayship Repair in Staten Island, New York. The claimants include Boston Marine Transport, Inc. (BMT) as the owner, operator, and responsible party (RP) of BOSTON 30, Great American Insurance Company of New York (Great American)[1] as the primary insurer of BMT and the BOSTON 30, and the American Steamship Owners Mutual Protection and Indemnity Association (American Club)[2] as the excess insurer of BMT and the BOSTON 30 (hereinafter collectively referred to as "Claimants").[3] Both Great American and American Club assert rights as subrogees of BMT.

On December 9, 2015, the Claimants submitted a claim to the National Pollution Funds Center (NPFC), pursuant to the Oil Pollution Act of 1990 (OPA) (33 U.S.C. § 2708(a)(l)), seeking reimbursement of removal costs and damages resulting from the oil spill. Initially, Claimants seek full reimbursement from the Oil Spill Liability Trust Fund (OSLTF or the Fund) in the sum certain amount of $17,330,833.46[4], asserting two defenses to liability under OPA 33

[1] See, Great American Insurance Company policy OMH 3491446 05 issued to Boston Marine Transport dated 25 Jul 2012 providing primary pollution coverage to the BOSTON 30. Great American asserts that it paid $5 million dollars in pollution removal costs.

[2] See, American Steamship Owners Mutual Protection & Indemnity Association Certificate 01136000, dated 28 Feb 2012 providing pollution coverage in excess of what was allowed under Great American Policy OMH 3491446 05 up to $1 billion dollars for any one accident or incident. The American Club paid the remainder of the pollution removal costs once the Great American had policy was exhausted. See, Email from Mr. [redacted], Great American, to Mr. [redacted] NPFC, dated 13 Jun 2016.

[3] BMT appears by and through its designated counsel, the firms of Duane Morris LLP and Freehill Hogan & Mahar. *See*, Letter from [redacted], President, Boston Marine Transport, Inc., dated January 5, 2016. Great American is represented by the firm of Duane Morris LLP. See, Letter from [redacted] Assistant Vice President, Great American Ocean Marine Division, dated February 2, 2016. The American Club is represented by the firm of Freehill Hogan & Mahar. See, Letter from [redacted], Senior Vice President – Claims Director & General Counsel, American Club, dated January 5, 2016.

[4] With their original claim submission dated 9 Dec 2015, Claimants assert that they incurred removal costs of $16,573,913.71, and paid third party property damages of $2,052,158.64. In addition, the Claimants also included unbilled CG response costs in the amount of $305,618.01. After a thorough review of the cost documentation submitted with the claim, the NPFC determined that the Claimants had mistakenly claimed GRS contractor costs as both removal and damage costs. Upon notification of their mistake, the Claimants withdrew the portion of charges erroneously submitted as removal costs and now claim to have incurred $15,190,226.83 in removal costs and paid $2,140,606.83 in third party property damage costs. The Claimants also removed the $305,618.01 in unbilled CG

U.S.C. § 2703(a). Specifically, Claimants assert that the incident was solely caused by an act of God or an act or omission of a third party. In the alternative, Claimants assert an entitlement to limited liability under 33 U.S.C. § 2704(a), and seek a payment total of $10,922,833.46[5] under the theory that this amount equals their uncompensated removal costs and damages in excess of the limit of liability.

After carefully reviewing all the evidence, NPFC concludes that Claimants have not demonstrated an entitlement to an act of God or third party defense. As explained in more detail below, Claimants' request for reimbursement of all their removal costs and damages must be denied. However, Claimants have demonstrated an entitlement to limited liability and will be reimbursed their uncompensated removal costs and damages under the OPA that exceed the limit of liability. This determination also addresses what amount of the claimed removal costs are compensable under the OPA. After analyzing a total of $15,190,226.82 in claimed removal costs, NPFC denies $429,508.69 of the those costs. The NPFC further deducts the liability limit of $6,408,000 and offers to settle the removal cost portion of this claim with a payment of $8,352,718.14.

Although this determination concludes that Claimants are entitled to limited liability and the amount of removal costs that can be reimbursed by the OSLTF, this determination does not adjudicate whether the OPA damages sought by Claimants can be reimbursed by the OSLTF. Due to the complexity of the damages sought by Claimants, further adjudication of the damages is required in order to determine if the claimed amounts are reimbursable as OPA damages. Instead of delaying resolution of the issues addressed in this determination, the NPFC issues this determination now and will later issue a second determination analyzing how much of Claimants' damages can be compensated by the OSLTF. [6]

I. FACTS

A. Incident Details

On December 13, 2012, at 1210, the BOSTON 30 loaded 10,000 barrels of oil and was transported by the Tug QUENAMES to Kinder Morgan Industries (KMI) on Staten Island, New York. The BOSTON 30 delivered and offloaded the 10,000 barrels of oil to KMI without incident. At 1805 on December 13, 2012, the BOSTON 30 departed KMI and was towed by the Tug QUENAMES to New York Terminal, Elizabeth, New Jersey, to load 20,164.93 barrels of No. 6 fuel oil, arriving at 2055. There was no report of oil leaking from the BOSTON 30 on its transits to KMI, or from KMI to New York Terminal. [7]

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costs from their sum certain, making their revised sum certain $17,330,833.46. See letter from Mr. [redacted], American Steamship to Mr. [redacted], NPFC, dated 8 Feb 2017.

[5] See, letter dated 8 Feb, 2017 from Mr. [redacted], American Steamship to Mr. [redacted], NPFC, changing their sum certain from $18,931,690.36 to $17,330,833.46. The claimed limit of liability is based on the BOSTON 30's size of 1634 gross registered tons (GRT) and the applicable single-hull tank vessel limit of liability on the date of the incident, set forth at 33 C.F.R. 138.230(a)(3) (2012).

[6] Partial reimbursement of an OSLTF claim is authorized by 33 U.S.C. § 2713 (d).

[7] See, BOSTON 30 vessel log, dated 13 Dec 2012, submitted with OSLTF Claim dated 9 Dec 2015.

The draft of the BOSTON 30 at the time of arrival to New York Terminal was 2'6" forward and 4'9" aft.[8] Loading from the facility began on December 13, 2012, at 2310 and was completed on December 14, 2012, at 1115.[9]

On December 14, 2012, at 1330, the BOSTON 30 departed New York Terminal under tow of the Tug QUENAMES, and was towed head-to-tail (stern first), and port-to-port, through the Arthur Kill, into Kill Van Kull along the South of Shooters Island Reach, to Mayship Repair, Staten Island, New York. The BOSTON 30 arrived at Mayship Repair at 1525, where it was secured to the dock starboard side in.[10] The draft of the BOSTON 30 at the time of departure from New York Terminal was 15'3" forward and 15'1" aft.[11] Weather for the day was mild with a high temperature of 48 degrees and 5mph variable wind from the WSW.[12]

At 2000, the Kirby tank barge DBL 25 arrived alongside the port side of the BOSTON 30 to lighter the oil cargo. Lightering of the BOSTON 30 began at 2035.[13] At 2215, after successfully pumping down the No.1 port and No. 1 starboard cargo tanks, the tanker man onboard the DBL 25 noticed oil in the water between the BOSTON 30 and DBL 25. Transfer of oil was stopped and sorbent boom was placed around both barges.

Mr. [redacted], Captain of the Tug QUENAMES and Qualified Individual identified in the vessel's response plan,[14] reported the spill to the CG National Response Center and then

[8] Based upon the ullage report prepared by the tankerman onboard the BOSTON 30, upon the tank vessel's arrival at New York Terminal, the No. 2 port cargo tank was successfully gauged and determined to be carrying approximately 101.89 barrels of residual oil. There were no reports of oil leaking from the barge or water coming into the No. 2 port cargo tank upon its arrival at New York Terminal. See, NMC Global Corporation after loading ullage report for the BOSTON 30 dated 13 Dec 2012, submitted with OSLTF Claim dated 9 Dec 2015. The residual oil indicates that a leak would have been detected if the tank had been holed prior to its departure from New York Terminal. The gauging also would have detected water leakage.

[9] The Claimants state that BOSTON 30 had attended New York Terminal on 17 occasions in 2012 prior to its visit on 13 Dec 2012. Its last visit was on 6 Oct 2012. The BOSTON 30 used the same berth and the same manifold on all of its prior 17 visits to New York Terminal. See, page 2 of OSLTF claim dated 9 Dec 2015. See also, BOSTON 30 prior log entries, submitted with OSLTF Claim dated 9 Dec 2015.

[10] See, Tug QUENAMES logs, submitted with OSLTF Claim dated 9 Dec 2015. See also, CG Sector NY VTS clip, submitted with OSLTF Claim dated 9 Dec 2015; and Email from Mr. [redacted], American Steamship to Mr. [redacted], NPFC, dated 15 April 2016.

[11] See, NMC Global Corporation after loading ullage report for the BOSTON 30 dated 13 Dec 2012 submitted with OSLTF Claim dated 9 Dec 2015.

[12] See, weather information for December 14, 2012, as documented on https://www.wunderground.com/history/airport/KNYC/2012/12/14/DailyHistory.html?req_city=&req_state=&req_statename=&reqdb.zip=&reqdb.magic=&reqdb.wmo=.

[13] See, Tug QUENAMES logs, submitted with OSLTF Claim dated 9 Dec 2015.

[14] See, BOSTON No. 30 Vessel Response Plan dated 15 May 2009 page 5-1 submitted with OSLTF Claim dated 9 Dec 2015.

contacted Miller's Launch to respond to the oil spill.[15] Tank soundings of the BOSTON 30 and DBL 25 conducted by the tankermen on-board did not immediately reveal the source of the spill. BMT requested permission from the United States Coast Guard (CG) to resume lightering operations so that the Boston 30 could be assessed for damages and cause of leak. The request was approved, and the transfer of oil from the BOSTON 30 to the DBL 25 resumed on December 15, 2012, at 0001. [16] This transfer continued until 0120 when it was stopped for a second time as more oil was discovered in the water between the two barges.[17]

CG Sector New York personnel arrived on-scene at approximately 0130 to provide oversight of the pollution removal activities; investigate the source of the spill; and monitor the removal actions which continued through 1 May 2013.[18] Approximately 30,000 gallons of oil was released from the barge.[19]

BMT hired Randive to conduct a dive survey of the BOSTON 30 on December 21, 2012. The survey revealed an "L" shaped tear between the 1st and 2nd frame member aft of the forward bulkhead of port cargo tank No. 2. The longitudinal portion of the tear measured 16" x 4" at the widest point and longest point. The transverse portion of the tear measured 10" x 2" at the longest and widest point.[20]

BMT also hired American Maritime Services & Consulting Associates (AMSCA) to address why oil did not start to leak from the No. 2 port cargo tank of the BOSTON 30 immediately upon impact with the unidentified object. AMSCA marine surveyor, Mr. [redacted], concluded that given the amount of oil loaded in the No. 2 port cargo tank and the resulting static head pressure within the tank, water would flow into the tank until the static head of oil and water in the tank was in equilibrium with the static head of pressure outside of the breach. As the BOSTON 30 began discharging oil from the No. 1 port and No. 1 starboard cargo tank, the bow of the barge would begin to rise and the stern trim of the barge would increase, resulting in the static head of the oil in No. 2 port cargo tank becoming greater than the static head of sea water outside the tank and oil would start to leak into the surrounding water.[21]

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[15] See, Email dated 18 Aug 2016 from Mr. [redacted], Duane Morris, LLP, to Mr. [redacted], NPFC outlining the activities of Captain [redacted] immediately following the discovery of the oil spill.

[16] See, Witness statement of [redacted], BOSTON 30 Person in Charge (PIC) dated 15 Dec 2012 and witness statement of [redacted], DBL 25 Person In Charge (PIC) dated 20 Dec 2012 submitted with OSLTF Claim dated 9 Dec 2015.

[17] See, Witness Statement of [redacted], BMT Tankerman dated 15 Dec 2012 submitted with OSLTF Claim dated 9 Dec 2015.

[18] See, witness statement of [redacted], BOSTON 30 Person in Charge (PIC) dated 15 Dec 2012. See also; tug logs, submitted with OSLTF Claim dated 9 Dec 2015; and May's Ship Yard / Junk Yard Cove Maintenance and Monitoring Phase Documentation signed by the RP, FOSCR and SOSCR on 1 May 2013 submitted with the OSLTF Claim dated 9 Dec 2015.

[20] See, Randive, Inc of New Jersey dive survey dated 21 Dec 2012 submitted with OSLTF Claim dated 9 Dec 2015.

[21] See, American Maritime Services & Consulting Associates report, pages 4-9, dated 7 Dec 2015, submitted with OSLTF Claim dated 9 Dec 2015.

Automated Information System (AIS)[22] data, transmitted from the Tug QUENAMES and received by CG Sector NY, provided the vessels' position, course and speed during their entire transit from New York Terminal to Mayship Repair, and indicates that the Tug QUENAMES and BOSTON 30 remained inside the navigational channel for the entire transit.[23] CG personnel interviewed the crew and collected witness statements, noting that the crew did not report striking anything during their transit from New York Terminal to Mayship Repair.[24]

B. Vessel Details

The BOSTON 30 was a 1,634 gross registered ton (GRT) single-hull tank barge built in 1961.[25] The barge was 250.9' in length, 41.9' in breadth and 18.3' in depth. The barge had 10 cargo tanks (1-5 port & starboard) with a forward and aft rake and had a total cargo capacity of 29,624 barrels or 1,244,208 gallons of oil.[26] The capacity of the No. 2 port cargo tank was 3,550 barrels or 149,100 gallons.[27]

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[22] The Automatic Identification System (AIS) is a shipboard broadcast system that acts like a transponder, operating in the VHF maritime band that is capable of handling well over 4,500 reports per minute and updates as often as every two seconds. It uses Self-Organizing Time Division Multiple Access (SOTDMA) technology to meet this high broadcast rate and ensure reliable ship-to-ship operation. Its display includes a symbol for every significant ship within radio range, each as desired with a velocity vector (indicating speed and heading). Each ship "symbol" can reflect the actual size of the ship, with position to GPS or differential GPS accuracy. By "clicking" on a ship symbol, you can learn the ship name, course and speed, classification, call sign, registration number, Maritime Mobile Service Identity (MMSI), maneuvering information, closest point of approach (CPA), time to closest point of approach (TCPA) and other navigation information. *See*, http://www.navcen.uscg.gov/?pageName=AISmain.

[23] See, CG Sector NY VTS clip, submitted with OSLTF Claim dated 9 Dec 2015. After reviewing the VTS clip, it appears that the Tug QUENAMES averaged between 4-5.5 knots but never exceeded 5.9 knots during its transit from NY Terminal to Mayship Repair.

[24] See, witness statement dated 20 Dec 2012 from Mr. [redacted]; Mate on board the Tug QUENAMES during its transit from New York Terminal to Mayship Repair, submitted with OSLTF Claim dated 9 Dec 2015. See also, email dated 18 Aug 2016 from Mr. [redacted], Duane Morris, LLP, to Mr. [redacted], NPFC stating that [redacted] was standing lookout alone while simultaneously piloting the Tug QUENAMES from NY Terminal to Mayship Repair. Drug and alcohol testing was also performed on the tanker man onboard both the BOSTON 30 and DBL 25 with negative results. See, record of drug and alcohol testing, submitted with OSLTF Claim dated 9 Dec 2015. Neither [redacted], Captain on-board the Tug QUENAMES or [redacted], Mate on-board the Tug QUENAMES were drug or alcohol tested following the incident. See also, email dated 18 Aug 2016 from Mr. [redacted], Duane Morris, LLP, to Mr. [redacted], NPFC.

[25] As of January 1, 2015, it is illegal to operate tank vessels not equipped with a double hull on any waters subject to the jurisdiction of the United States carrying oil in bulk as cargo or cargo residue. See, Coast Guard message DTG 221736ZDEC14. On January 5, 2015, BMT wrote a letter to CG Sector Boston informing them that the BOSTON 30 official number 287302 had been taken out of service and the vessel was going to be used as a floating office/storage facility at their lay berth at KMI Staten Island. In addition, BMT was considering donating the barge as part of an artificial reef project to the Marine Fishing Access Unit, NYSDEC Bureau of Marine Resources. *See*, BMT letter dated 5 Jan 2015.

[26] See, page 11-10 of Vessel Response Plan, Boston Marine Transport, BOSTON 30 dated 15 May 2009, submitted with OSLTF Claim dated 9 Dec 2015.

[27] See, page 11-10 of Vessel Response Plan, Boston Marine Transport, BOSTON 30 dated 15 May 2009 submitted with OSLTF Claim dated 9 Dec 2015.

On December 14, 2012, while making its transit from New York Terminal to Mayship Repair, the barge was carrying 20,164.93 barrels or 846,927 gallons of No. 6 oil distributed through its 10 cargo tanks.[28] The amount of cargo carried in No. 2 port cargo tank on December 14, 2012, was 2,611.98 barrels or 109,703.16 gallons of No. 6 oil.[29]

The BOSTON 30 was built to ABS Rules for Building & Classing Vessels under 90 meters. Results of a mid-body exam of the BOSTON 30 conducted by JMS Naval Architects on August 20, 2008, revealed that the bottom plating of the No. 2 port cargo tank exceeded the minimum standards established by ABS for bottom plate thickness.[30] In addition, the 2008 and 2010 CG Dry Dock/Internal Structural Exam/Hull Exams with associated work lists were reviewed for comparison. While there were deficiencies noted during both of these examinations, none of the deficiencies noted or work list items generated by CG marine inspectors pertained to the cargo tank bottom plating in the vicinity of the No. 2 port cargo tank.[31]

C. The Arthur Kill, Kill Van Kull and South of Shooters Island Reach Waterway

The BOSTON 30 was towed by the Tug QUENAMES through the Northern Arthur Kill into Kill Van Kull to Mayship Repair, passing the Tug SHAWN MILLER while navigating the South of Shooters Island Reach of Kill Van Kull.[32] The channel depth of the Arthur Kill and Kill Van Kull is approximately 50' but drops to 30'. There are numerous marked wrecks and other navigational obstructions located in the navigational channel passing through South of Shooters Island Reach to Mayship Repair.

[28] See, NMC Global Corporation after loading ullage report for the BOSTON 30 dated 13 Dec 2012 submitted with OSLTF Claim dated 9 Dec 2015.

[29] See, NMC Global Corporation after loading ullage report for the BOSTON 30 dated 13 Dec 2012 submitted with OSLTF Claim dated 9 Dec 2015.

[30] Upon construction, ABS required bottom plating to be .373". Due to the age of the vessel, ABS allowed 25% wastage upon re-examination, or .280". During a mid-body exam conducted by JMS Naval Architects on August 20, 2008, the No. 2 port cargo tank bottom plating measured .468", .462", .428", .419", .453", .461", .397" and .440" See, JMS Naval Architects Section Modulus Strength Report dated 2 Sep 08 submitted with OSLTF Claim dated 9 Dec 2015.

[31] See, closed 2008 CG DDX/ISE Exam with associated work list dated 20 Aug 08. *See also,* closed CG DDX/ISE Exam with associated work list dated 12 May 10.

[32] See, CG Sector NY VTS clip, submitted with OSLTF Claim dated 9 Dec 2015. The CG VTS New York Users Manual for Newark Bay identifies the "entire length of Shooter's Reach" as a recommended no meeting or overtaking zone. *See,* CG VTS New York User's Manual, pages 28-29, revised July 2010 and CG VTS New York User's Manual, page 34, revised Mar 2016. CG VTS New York, however, told NPFC that only the North of Shooters Island Reach was considered a no meeting or overtaking zone, and that the recommendations of no meeting or overtaking did not apply to the South of Shooters Island Reach. *See,* email dated 16 Mar 16 documenting a conversation between Mr. [redacted], CG NPFC, and LTJG [redacted], CG VTS New York.

On December 14, 2012, a high tide of 6.6 feet occurred in the vicinity of Mayship Repair at 0828. A low tide of -1.3 feet occurred at 1520.[33] A high tide of 5.5 feet was recorded in the vicinity of New York Terminal at 2004 on 13 Dec 2012. A low tide of -1.0 occurred at 0236 on 14 Dec 2012.[34] A max flood current of 2.4 knots occurred at 1028 while a maximum ebb current of -1.6 knots occurred at 1619.[35]

D. Surveys of New York Terminal and Mayship Repair

On December 21, 2012, upon completion of the underwater hull survey of the BOSTON 30, BMT directed Randive to conduct a dive survey of the river bottom surrounding the berth at Mayship Repair at which the BOSTON 30 was moored as well as the area adjacent to that dock. Randive personnel conducted a river bottom survey measuring 60' in diameter around the dock and noted a smooth, level mud bottom with no obstructions.[36]

On January 3, 2013, Ocean and Coastal Consultants conducted a dive survey for New York Terminal of the river bottom of the area surrounding the berth New York Terminal where the BOSTON 30 was loaded.[37] The dive survey identified four objects in the immediate vicinity of the pier. However, all four objects were covered in light silt and showed no signs of impact.[38]

E. Hull Survey of the Boston 30 in Dry Dock

Following the casualty, the BOSTON 30 was taken to Union Dry-dock in Hoboken, NJ, for an additional hull survey and permanent repairs. Atlantic Marine Associates (AMA) was hired

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[33] A high tide of 5.5 feet was recorded in the vicinity of New York Terminal at 2004 on 13 Dec 2012. A low tide of -1.0 occurred at 0236 on 14 Dec 2012. *See,* tide information for Bayonne Bridge, Staten Island dated 13 Dec 2012 – 17 Dec 2012.

[34] See, tide information for Bayonne Bridge, Staten Island dated 13 Dec 2012 – 17 Dec 2012.

[35] See, current information for Bayonne Bridge, Kill Van Kull dated 12 Dec 2012 – 15 Dec 2012.

[36] See, Randive Inc. of New Jersey dive survey dated 21 Dec 2012, submitted with OSLTF Claim dated 9 Dec 2015.

[37] Mr. [redacted], representing the American Club stated a lawsuit was filed on behalf of BMT against New York Terminal for the limited purpose of securing an order enabling BMT to conduct an underwater inspection of the New York Terminal pier area. New York Terminal then disclosed that they had been directed by the CG Captain of the Port (COTP) New York Order No. 133-12 to cease operations until New York Terminal had conducted underwater inspections of the pier. That underwater inspection was conducted on January 3, 2013. Once the results of the Ocean and Coastal Consultants survey were obtained and New York Terminal complied with the tasking of the order, COTP Order No. 133-12 was lifted. New York Terminal then produced those inspection reports to BMT in the suit, at which time the court determined BMT had fulfilled its need for an inspection and the matter was closed. See, email from Mr. [redacted], Freehill, Hogan & Mahar, LLP to Mr. [redacted], NPFC dated 31 Mar 2016. See also, COTP Order No. 133-12 dated 22 Dec 2012 provided by Mr. [redacted], Duanne Morris, LLP, in an email dated 18 Aug 2016.

[38] The first object identified was a 14" diameter timber pile located 8' off the bulkhead. The second object identified was a ¼" thick x 6" wide x 6' tall piece of steel plate located 20' off the bulkhead. The third object identified was a ¼" thick x 3" wide x 3' tall piece of steel plate located 20' off the bulkhead. The fourth object identified was a 65" diameter x 33" tall tractor truck tire located 75' off the bulkhead. *See,* dive survey conducted by Ocean and Coastal Consultants dated 3 Jan 2013, submitted with OSLTF Claim dated 9 Dec 2015.

by BMT to survey the damage to the barge. AMA personnel noted that the breach in the hull was formed from contact under the waterline with an apparently sharp object. Score marks were noticed on the bottom of the barge, running fore and aft, port and starboard which appeared to begin or end at the breach. The score marks on the hull exhibited a change in direction relative to the barge bottom, indicating that the barge changed direction while underway and in contact with an unidentified object. AMA also noted damage further aft on the barge to the No. 4 port cargo tank where the BOSTON 30 had apparently struck an object.[39]

AMA concluded that the score marks on the bottom of the barge leading to/from the damaged area and the nature of the damage itself clearly indicated that the barge was underway when the damage was sustained. In their opinion, the damage to the hull of the BOSTON 30 was sustained at some point during the transit from New York Terminal to Mayship Repair and could not have been sustained while loading oil at New York Terminal or when discharging oil at Mayship Repair.[40]

AMA also addressed why neither the Captain nor any of the crew of the Tug QUENAMES reported feeling or hitting anything during their transit from NY Terminal to Mayship Repair. AMA noted that the crew members were on the tug and that the BOSTON 30 was unmanned. The crew, therefore, would not be expected to be aware of any contact between the bottom of the BOSTON 30 and an obstruction while underway.[41]

F. Hurricane Sandy and NOAA NRT5 Survey

Hurricane Sandy made landfall on October 29, 2012, near Atlantic City, New Jersey. The storm produced high winds and due to a coinciding spring tide, a storm surge recorded at 14' above mean low water. The waterways and port facilities in and around New York City were closed for several days following the storm due to the risk to navigation of uncharted debris.[42]

The USACE and NOAA shared responsibility for conducting hydrographic surveys in the port of New York/New Jersey following Hurricane Sandy, and completed all hydrographic surveys within 5 days after the hurricane. This allowed CG Sector New York to re-open all deep draft navigable waterways in and around the ports of New York and New Jersey.[43] Specific to the waterway transited by the Tug QUENAMES and BOSTON 30, NOAA's Navigation Response Team 5 (NRT5) was assigned to complete surveys on the northern portion of the Arthur Kill, down to Carteret New Jersey, and the western portion of the Kill Van Kull,

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[39] See, AMA report No. 15-644 dated 7 Dec 2015 pages 7-12, submitted with OSLTF Claim dated 9 Dec 2015.

[40] See, AMA report No. 15-644 dated 7 Dec 2015 Summary/Opinion page 13 submitted with OSLTF Claim dated 9 Dec 2015.

[41] See, OSLTF claim dated 9 Dec 2015, page 8. *See also,* AMA report No. 15-644 dated 7 Dec 2015, pages 16-17, submitted with OSLTF Claim dated 9 Dec 2015.

[42] See, USCG Sector New York After Action Report Improvement Plan, Executive Summary page 3 submitted with OSLTF Claim dated 9 Dec 2015.

[43] See, NOAA Rapid Survey Response for Hurricane Sandy page 2 dated 22 Feb 2013 submitted with OSLTF Claim dated 9 Dec 2015.

including South of Shooters Island Reach. The NRT5 survey of these identified areas was successfully completed between October 31 – November 6, 2012. The navigational channel from New York Terminal to Mayship Repair was thereafter reopened to vessel traffic on 11 Nov 2012, 33 days before the BOSTON 30 incident, and vessel traffic returned to normal levels soon thereafter.[44]

Other than the BOSTON 30 VTS provided by the Claimants, no VTS data has been preserved for cargo voyages transiting the same route as the BOSTON 30 during the period beginning on 11 Nov 2012 when the channel was reopened to vessel traffic following the NRT5 survey, through the date of the BOSTON 30 incident. But, according to CG VTS New York, approximately 40 tugs pushing tows utilize the South of Shooters Island Reach on a daily basis, and no other oil pollution incidents were reported in the area between New York Terminal and Mayship Repair during the period 11 Nov 2012 and 14 Dec 2012.[45] This statistic indicates that approximately 1320 vessels safely transited between north Arthur Kill and South of Shooter's Island Reach after Hurricane Sandy during the 33 days that preceded the Boston 30 incident.

G. CG Sector New York Marine Safety Information Bulletin 02-12

On December 5, 2012, CG Sector New York issued Marine Safety Information Bulletin (MSIB) 02-12 regarding "Upcoming Spring Tide and Marine Debris" stating the following:

> From December 12 – December 15, the Port of New York/New Jersey will experience larger than normal tidal ranges due to a spring tide. According to forecasts from the National Weather Service, tides during this period at Battery Park are expected to be approximately 1' higher than the normal 5' tide. As there is still a significant amount of marine debris from Hurricane Sandy potentially within this tidal range, there is a potential for an increase in hazards within our waterways. Accordingly, mariners, waterfront facilities and the public are advised to remain vigilant to the threat from objects that are adjacent to or submerged in the vicinity of the waterway which may become hazards to navigation. Sector NY is actively working with our local and federal partners to identify and remove those hazards that are posing a navigational or environmental threat.[46]

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[44] See, CGAN-2012-081, dated 11 Nov 2012; email from [redacted], USCG Sector NY Waterways Management Division to [redacted], dated 28 Jun 2016; email from LCDR [redacted], NOAA Navigational Manager, Northeast Region to LCDR [redacted], USCG Sector NY Chief Waters Management Division dated 20 Dec 2012.]. See also, NRT5 Chartlet 1 of 1 plot showing the results of the 31 Oct to 06 Nov 2012, multi-beam digital terrain model and high density soundings for South of Shooters Island Reach, overlaid on NOAA Chart 12333; NOAA Rapid Survey Response for Hurricane Sandy, page 21, dated 22 Feb 2013, submitted with OSLTF Claim dated 9 Dec 2015.

[45] See, email from LTJG [redacted], CG VTS New York to Mr. [redacted], NPFC dated 14 Jun 2016. There are numerous other daily tug transits but CG VTS New York does not track light tug transits.

[46] See, CG Sector NY MSIB 02-12 dated 5 Dec 2012 submitted with OSLTF Claim dated 9 Dec 2015. The term "spring tide" refers to the variations in tidal ranges that occur twice monthly, during the full and new moons, when tidal ranges are larger than average. Spring tides occur because the Earth, sun and moon are in alignment and the gravitational pull of the sun is added to the gravitational pull of the moon. The term is derived from the concept of the tide "springing forth", and is unrelated to the seasons. *See*, http://oceanservice.noaa.gov/facts/springtide.html. Full and new moons occurred on the following dates immediately prior to the incident: 29 Oct 2012, 13 Nov 2012, 28 Nov 2012 and 13 Dec 2012. See, http://eclipse.gsfc.nasa.gov/SKYCAL/SKYCAL.html?cal=2015#skycal.

The Claimants have not submitted any evidence to NPFC, and there is no evidence in the administrative record, indicating that the Captain and crew of the Tug QUENAMES took special precautions in response to MSIB 02-12 while towing BOSTON 30 from New York Terminal to Mayship Repair on December 14, 2012.

H. The Response

On December 15, 2012, Miller's Launch, Inc was activated by the vessel's qualified individual and responded with oil spill response personnel; eight oil spill response vessels; 13,600 feet of containment boom; vacuum trucks; brush skimmers; and sorbent material to begin containment and cleanup of the discharged oil.[47] Meredith Management Group was activated to supply personnel for incident management services.[48] Gallagher Marine Systems, LLC, was also activated to assume the duties of qualified individual as well as staff the incident command post and support Meredith Management in all incident management services.[49] Clean Harbors Environmental; Clean Harbors Cooperative; Ken's Marine Services; and Marine Spill Response Corporation were also hired to provide additional oil spill response personnel; oil spill response vessels; vacuum trucks; sorbent material and containment boom to assist Miller's Launch in the containment and cleanup of discharged oil.[50] Center for Toxicology & Environmental Health, LLC, was hired to conduct air monitoring and Miller Environmental Group was hired to set up and oversee the decontamination stations set up oiled personnel, equipment and vessels.[51]

From December 15 until January 4, 2013, oil spill removal operations continued at Mayship Repair and along the Kill Van Kull. Specifically, oil spill removal operations were conducted in the vicinity of IMTT Bayonne; Goethals Bridge to the Bayonne Bridge in the vicinity of NY Container Terminal; the Bayonne Bridge to the Verrazano Bridge in the vicinity of Fort Wadsworth; and the Verrazano Bridge to Great Kills in the vicinity of Miller's Park and Great Kills Park.[52] There was confusion as to the amount of oil discharged from the BOSTON 30 as tank soundings and water by distillation testing conducted by SGS North America revealed that the difference in gallons of oil carried by BOSTON 30 compared to the amount of oil received by the DBL 25 after applying a water by distribution ratio equaled 22,949 gallons of oil unaccounted for from the BOSTON 30.[53] In comparison, Clean Waters of New York received

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[47] See, Miller Launch's invoices and purchase orders submitted with OSLTF Claim dated 9 Dec 2015.

[48] See, Meredith Management's invoices and purchase orders submitted with OSLTF Claim dated 9 Dec 2015.

[49] See, Gallagher Marine System's invoices and purchase orders submitted with OSLTF Claim dated 9 Dec 2015.

[50] See, Clean Harbors Environmental, Clean Harbors Cooperative, Ken's Marine Service and Marine Spill Response Corporation invoices and purchase orders submitted with OSLTF Claim dated 9 Dec 2015.

[51]. See, Center for Toxicology & Environmental Health and Miller Environmental Group's invoices and purchase orders submitted with OSLTF Claim dated 9 Dec 2015.

[52] See, CG Incident Action Plan for period 28 Dec – 4 Jan 13 submitted with OSLTF Claim dated 9 Dec 2015.

[53] See, email from [redacted], SGS North America to Boston Marine Transport dated 18 Dec 2012 submitted with OSLTF Claim dated 9 Dec 2015.

and properly disposed of approximately 30,087 gallons of oil from the incident.[54] Following the cleanup of the oil spill, the BOSTON 30 was taken to Union Dry-dock and Repair in Hoboken, NJ, for further assessment and permanent repair.[55]

While the majority of oil spill removal operations concluded on January 4, 2013, an evaluation of Mayship Repair and Junkyard Cove revealed additional oil staining on the piers, bulkheads and shorelines. As such, CG Sector New York, NY Department of Environmental Conservation and Boston Marine Transport agreed to implement a monitoring and maintenance plan where hard boom with absorbent boom was strategically placed throughout both facilities in an effort to collect and absorb the oil over an extended period of time. The hard boom and sorbent boom were monitored by Miller's Launch personnel several times a week through May 1, 2013, at which time CG Sector New York, New York Department of Environmental Conversation and Boston Marine Transport personnel met and agreed that all of the oil had been removed from the piers, bulkheads and shoreline and cleanup was complete. [56]

II. DETERMINATION

A. Adjudication of Claims Against the OSLTF

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.[57] As a result, 5 U.S.C. § 555 (e) requires the NPFC to provide a brief statement explaining the basis for a denial. This determination is issued to satisfy that requirement.

The claims adjudication process is also subject to the regulations at 33 C.F.R. Part 136. Because this determination is a settlement offer under 33 C.F.R. § 135.115 (b), it will automatically expire 60 days after the date it has been mailed to Claimants. The NPFC reserves the right to revoke this settlement offer at any time.[58]

During the adjudication of claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence and weighs its probative value when determining the facts of the claim. The NPFC's review of the evidence is *de novo*, and the NPFC

[54] See, Clean Waters of New York Invoice 01419 submitted with OSLTF Claim dated 9 Dec 2015.

[55] See, Atlantic Maritime Associates, Inc, report dated 7 Dec 2015 submitted with OSLTF Claim dated 9 Dec 2015.

[56] See, Monitoring & Maintenance Plan / Mayship Repair and Junkyard Cove dated 17 Jan 2013, 15 Feb 2013 and 1 May 2013, all submitted with OSLTF Claim dated 9 Dec 2015.

[57] The court in Bean Dredging, LLC v. United States, 773 F. Supp. 2d 63, 75 (D.D.C. 2011), characterized the informal adjucation process for OSLTF claims with the following: "[W]hile the OPA allows responsible parties to present a claim for reimbursement to the NPFC, they do not confer upon such parties a right to a formal hearing, a right to present rebuttal evidence or argument, or really any procedural rights at all, *see* 33 U.S.C. §§ 2704, 2708, 2713, an entirely unremarkable fact given that Congress' overarching intent in enacting the OPA was to 'streamline' the claims adjudication process . . . ."

[58] See, Smith Property Holdings v. United States, 311 F.Supp.2d 69, 83 (D.D.C. 2004).

is not bound by the findings of fact and conclusions reached by other entities.[59] If there is conflicting evidence in the record, the NPFC will make a determination as to what evidence is more credible or deserves greater weight, and finds facts based on the preponderance of the credible evidence.

B. Claims Against the OSLTF by Responsible Parties

Under the OPA, a responsible party is liable for all removal costs and damages resulting from either an oil discharge or a substantial threat of oil discharge into a navigable water of the United States.[60] Further, a responsible party's liability is strict, joint, and several.[61] In the case of a vessel, the responsible party includes any person owning, operating or demise chartering the vessel.[62] When enacting OPA, "Congress explicitly recognized that the existing federal and states laws provided inadequate cleanup and damage remedies, required large taxpayer subsidies for costly cleanup activities and presented substantial burdens to victim's recoveries such as… burdens of proof unfairly favoring those responsible for the spills."[63] OPA was intended to cure these deficiencies in the law.

Notwithstanding the above, under limited circumstances the OSLTF may reimburse a responsible party for its uncompensated removal costs and damages. In order to receive OSLTF reimbursement a responsible party must show an entitlement to either a defense or limited liability under the OPA. Specifically, 33 U.S.C. § 2708(a) (emphasis added) provides that:

> The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 2713 of this title ***only if the responsible party demonstrates*** that--
>
> (1) the responsible party is entitled to a defense to liability under section 2703 of this title; or
>
> (2) the responsible party is entitled to a limitation of liability under section 2704 of this title.

Under the plain meaning of 33 U.S.C. § 2708(a), a responsible party must demonstrate that either a defense or limited liability applies before the OSLTF can reimburse removal costs or

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[59] See, Bean Dredging, LLC v. United States, 699 F. Supp. 2d 118, 128-29 (D.D.C. 2010) (noting that the NPFC may consider a marine casualty investigation report but is not bound by it). See also, Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center, 71 Fed. Reg. 60553 (October 13, 2006)(concluding that NPFC is not bound by findings made in marine casualty investigations); and Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center, 72 Fed. Reg. 17574 (April 9, 2007)(discussing comments received). As a result, the NPFC is not bound by any of the findings or conclusions reached in CG Investigation, or CG Hearing dated 7 Mar 14, as, submitted with OSLTF claim dated December 9, 2015.

[60] 33 U.S.C. § 2702(a).

[61] See, H.R. Conf. Rep. No. 101-653, 102, 1990 U.S.C.C.A.N. 779 (August 1, 1990)

[62] 33 U.S.C. § 2701(32)(A).

[63] Apex Oil Co., Inc. v. United States, 208 F. Supp. 2d 642, 651-52 (E.D. La. 2002)(citing S. Rep. No. 101-94 (1989); 1990 U.S.C.C.A.N. 722.).

damages. Consistent with this statutory requirement, the OSLTF's claims regulations also require all claimants to carry the burden of proving an entitlement to reimbursement. [64] Therefore, just like any other claimant, a responsible party must prove an entitlement under the OPA before receiving reimbursement from the OSLTF. If a responsible party fails to establish an entitlement to compensation from the OSLTF, or fails to establish the elements by a preponderance of the credible evidence, the NPFC must deny the claim.[65]

The administrative record in this case unequivocally resolves several important issues. For example, the New York Harbor was a navigable waterway and the oil spill at issue here was an incident under the OPA. In addition, BMT, as the owner and operator of the BOSTON 30 and Tug QUENAMES, was the responsible party for this incident.[66] The claim was submitted to the NPFC on December 9, 2015, and is therefore timely. The remaining issues are discussed below.

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[64] See, 33 CFR 136.105(a)("The claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim."); and 33 CFR 136.105(e)(6) (requiring that each claim include evidence to support the claim).

[65] OPA's legislative history supports NPFC's conclusion that a responsible party has the burden of showing an entitlement to OSLTF compensation under 33 U.S.C. § 2708. As explained in the House Conference Report on OPA:

> Section 1008 of the House bill allows a responsible party or the owner of oil on a tank vessel, or a guarantor for that responsible party or owner of oil, to assert a claim for removal costs and damages ***only if the responsible party or owner can show that the responsible party or owner has a defense to liability, or is entitled to a limitation of liability***. In the latter case, a claim may be submitted only to the extent amounts paid by the responsible party or owner, or by a guarantor on the responsible party's or owner's behalf, exceeds the applicable limit on liability.

H.R. Conf. Rep. 101-653, 110, 1990 U.S.C.C.A.N. 779 (August 1, 1990) (emphasis added). See also, Apex Oil Co., Inc. v. United States, 208 F.Supp.2d 642 (E.D. La., 2002)(claimant failed to carry its burden of proof with respect to the "act of God" defense); International Marine Carriers v. OSLTF, 903 F.Supp. 1097 (S.D. Tex. 1994)(claimant must show elements of a "third party" defense by a preponderance of the evidence); Bean Dredging, LLC v. United States, 773 F.Supp.2d 63, 86 (D.D.C. 2011)(the responsible party "had the burden of proof of establishing its entitlement to reimbursement on the administrative level" …); and Water Quality Ins. Syndicate v. United States, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009)(holding that 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).

Placing the burden of proof on a responsible party claimant seeking compensation under 33 U.S.C. § 2708 is consistent with the general rule that a party seeking relief bears the burden of proving an entitlement to that relief. Requiring a responsible party claimant to prove its entitlement to OSLTF compensation is also consistent with the general rule that a party with particular knowledge of the facts ought to bear the burden of proving those facts. As the owner and operator of the BOSTON 30, BMT had unique access to the facts surrounding this incident because they were in control of the operations resulting in the discharge and had dominion and control over the discharging vessel. This unique access to the discharging vessel makes Claimants peculiarly well positioned to actually know or discover the facts surrounding the incident. By placing the burden of proof on a responsible party and its insurers seeking compensation under 33 U.S.C. § 2708, the NPFC incentivizes full disclosure of all relevant facts by claimants who are well positioned to know or learn what happened during an OPA incident.

[66] See also, NPFC correspondence dated November 25, 2015.

C. Defenses to OPA Liability

In an effort to receive reimbursement of all costs and damages, Claimants assert that the "puncture to the No. 2P tank on the BOSTON 30 on December 14, 2012 was caused by an event extrinsic to the BOSTON 30 and not the result of any actions or neglect on the part of Tug QUENAMES, Barge BOSTON 30 or BMT." Claimants further contend that "[s]uch extrinsic cause constitutes either an Act of God or an act of a third party or parties unrelated to BMT as contemplated by 33 U.S.C. 2703 (a)(l) and (3)."[67]

OPA gives a responsible party three defenses to liability. The statute provides:

> A responsible party is not liable for removal costs or damages under OPA section 2702 of this title ***if the responsible party establishes, by a preponderance of the evidence***, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused *solely* by--
>
> (1) an act of God;
>
> (2) an act of war;
>
> (3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail), ***if the responsible party establishes, by a preponderance of the evidence***, that the responsible party--
>
> (A) ***exercised due care*** with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and
>
> (B***) took precautions against foreseeable acts*** or omissions of any such third party and the ***foreseeable consequences*** of those acts or omissions; or
>
> (4) any combination of paragraphs (1), (2), and (3).

33 U.S.C. § 2703(a) (emphasis added).

In order to successfully defend against liability, the Claimants must show that the BOSTON 30 discharge was caused ***solely*** by an "act of God" (as defined in OPA), or that the incident was caused ***solely*** by an act or omission of an unrelated third party and that the responsible party satisfied 33 U.S.C. § 2703(a)(3)(A) and (B).

[67] See, OSLTF claim dated December 9, 2015, p. 10.

In addition, under 33 U.S.C. § 2712(b), "[t]he Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of that claimant." The terms "gross negligence" and "willfull misconduct" have distinct meanings under the OPA.[68] The NPFC defines those terms as follows:[69]

> ***Gross Negligence:*** Negligence is a failure to exercise the degree of care which a person of ordinary caution and prudence would exercise under the circumstances. A greater degree of care is required when the circumstances present a greater apparent risk. Negligence is "gross"

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[68] Because OPA does not define the terms "gross negligence" or "willful misconduct", these terms should be given their plain and ordinary meaning. "Gross negligence" is ordinarily distinguished from "willful misconduct" in that "gross negligence" is a lesser standard that does not require recklessness and "willful misconduct" generally refers to intentional misconduct that can sometimes be established with proof of recklessness. See, Restatement (Third) of Torts: Phys. & Emotional Harm § 2 Recklessness, cmt. a (2010). See also, W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 34, at 212 (5th ed. 1984)("'gross negligence' falls short of a reckless disregard"); 57a Am. Jur. 2d Negligence § 231 (2016)("A distinction is frequently made between gross negligence and willful, wanton, or reckless conduct. While the jurisdictions adopting this distinction consider gross negligence substantially and appreciably higher in magnitude than ordinary negligence, it is still not equivalent to wanton or willful conduct, and it does not encompass reckless behavior.")(footnotes omitted).

The structure of OPA's liability and compensation regime supports giving different meanings to the terms "gross negligence" and "willful misconduct". As discussed above, under 33 U.S.C. § 2712(b) a claimant may not receive OSLTF reimbursement for removal costs or damages caused by the claimant's "gross negligence or willful misconduct". Also, 33 U.S.C. § 2704 (c)(1) precludes limited liability for oil spills caused by the "gross negligence or willful misconduct of" the responsible party. If Congress had intended for "gross negligence" to have the same meaning as "willful misconduct" under the OPA, there would have been no reason to deny OSLTF reimbursement and limited liability for both types of conduct. Moreover, the use of the disjunctive term "or" in both 33 U.S.C. § § 2704 (c)(1) and 2712(b) further suggests that "gross negligence" is a separate and distinct type of wrongdoing from "willful misconduct". See, 1A N. Singer, Statutes and Statutory Construction § 21:14, p. 189-190 (7th ed.2007)("The disjunctive 'or' usually, but not always, separates words or phrases in the alternate relationship, indicating that either of the separated words or phrases may be employed without the other. The use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately.").

The statutory language used by Congress to impose liability on an OPA guarantor also supports giving "gross negligence" a different meaning from "willful misconduct" Under 33 U.S.C. § 2716 (f)(1)(C), a guarantor can only avoid liability when "the incident was caused by the willful misconduct of the responsible party." In contrast, a claimant will be denied OSLTF reimbursement and unlimited OPA liability will be imposed on a responsible party for either "gross negligence" or "willful misconduct". The fact that OPA only provides guarantors with a defense for "willful misconduct", but not "gross negligence" shows that Congress intended for the two phrases to have separate meanings. If it were otherwise, an OPA guarantor would be exonerated from liability for either "gross negligence" or "willful misconduct" just like 33 U.S.C. § § 2704 (c)(1) and 2712(b). See, In re Oil Spill by Oil Rig Deepwater Horizon, 21 F.Supp.3d 657, 734 (E.D. La. 2014)("Because only 'willful misconduct' creates this [guarantor's] defense, OPA treats 'willful misconduct' as distinct from, and more egregious than, 'gross negligence.'"). See also, 2A N. Singer, Statutes and Statutory Construction § 46:6, p. 249-252 (7th ed.2007)("The same words used twice in the same act are presumed to have the same meaning. Likewise, courts do not construe different terms within a statute to embody the same meaning. ... In like manner, where the legislature has employed a term in one place and excluded it in another, it should not be implied where excluded.").

[69] *See*, In re Kuroshima Shipping S.A., 2003 AMC 1681, 1693. See also, Water Quality Insurance Syndicate v. United States, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009)(relying on NPFC's definition of "gross negligence"); and Water Quality Insurance Syndicate v. United States, 522 F.Supp.2d 220, 228-29 (D.D.C. 2007)(holding that "willful" misconduct under the OPA could also be established by a series of negligent acts that amount to recklessness).

when there is an extreme departure from the care required under the circumstances or a failure to exercise even slight care.[70]

Willful Misconduct: An act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences.[71]

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[70] Under the OPA, a finding of "gross negligence" requires proof of a departure from the standard of care beyond what would constitute ordinary negligence because simple negligence is established by showing a failure to exercise the degree of care that someone of ordinary prudence would exercise in the same circumstance. See generally, United States v. Ortiz, 427 F.3d 1278, 1283 (10th Cir. 2005). "Taken at face value, [gross negligence] simply means negligence that is especially bad." Restatement (Third) of Torts (Physical and Emotional Harm) § 2 Recklessness, cmt. a (2010). "[M]ost courts consider that 'gross negligence' … differs from ordinary negligence only in degree, and not in kind." W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 34, at 212 (5th ed. 1984). See also, Milwaukee & St. P.R. Co. v. Arms, 91 U.S. 489, 495 (1875)("'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence;' but, after all, it means the absence of the care that was necessary under the circumstances…").

Gross negligence should be determined based upon the same objective reasonable-person standard as ordinary negligence, and therefore requires no showing of any mental state or scienter. The facts of each case must control the degree of care required to prevent an oil spill. As a result, a greater degree of care will be required when the facts of a case establish an increased risk. See e.g., Water Quality Ins. Syndicate v. United States, 632 F.Supp.2d 108, 112 (D. Mass. 2009). See also, W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 34, at 208-09 ("As the danger becomes greater, the actor is required to exercise caution commensurate with it.").

[71] When deciding whether "willfull misconduct" has been established under the OPA, courts have relied upon FWPCA cases analyzing the same issue. See generally, Water Quality Ins. Syndicate v. United States, 522 F.Supp.2d 220, 229-30 (D.D.C. 2007). Relying on FWPCA authorities when interpreting the OPA is consistent with Congress' legislative intent that OPA's definitions should have the same meaning as those same terms have been given under the FWPCA. See, H.R. Conf. Rep. 101-653, 1990 U.S.C.C.A.N. 779. Under both OPA and the FWPCA, proof of recklessness will establish "willful misconduct". For example, in Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151, 1162-63 (2nd Cir. 1978), the court considered whether the vessel owner's willful misconduct precluded limited liability for an oil spill under the FWPCA. In its analysis, the court defined "willful misconduct" as follows:

> [A]n act intentionally done, with knowledge that the performance will probably result in injury, or ***done in such a way as to allow an inference of reckless disregard of the probably consequences***. [citation omitted]. If the harm results from an omission, the omission must be intentional, and the actor must either know the omission will result in damage or the ***circumstances surrounding the failure to act must allow an implication of a reckless disregard of the probable consequences***. [citation omitted]. The knowledge required for a finding of willful misconduct is that there must be either actual knowledge that the act, or the failure to act, is necessary in order to avoid danger, or if there is no actual knowledge, the ***probability of harm must be so great that failure to take the require action constitutes recklessness***.

Id (emphasis added).

The test for determining "willful misconduct" under the OPA is an objective test, not a subjective test. Thus, a determination of "willful misconduct" under the OPA does not always require proof of specific intent to harm. Rather, "willful misconduct" can be established with facts showing recklessness. These concepts are illustrated in Safeco v. Burr, 551 47, 57 (2007) where the Court analyzed how a statute should be construed when its standard for liability turns on a finding of willfulness. In that case, the Court concluded that "where willfulness is a statutory condition to civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well, [citations omitted]. This construction reflects common law usage, which treated actions in 'reckless disregard' of the law as 'willful' violations." Id. See also, Fryer v. A.S.A.P., 658 F.3d 85, 91 (1st Cir. 2011), quoting Safeco, 551 U.S. 47, 57 (2007)("In a series of decisions beginning in 1985, the Supreme Court has

A responsible party's entitlement to a complete defense is further limited by 33 U.S.C. § 2703(c). That statute provides:

> Subsection (a) of this section 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 or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

The RP reported the incident to the NRC after the discharge was discovered.[72] Also, the record shows that the RP cooperated with the CG Sector NY Federal on-scene coordinator representatives (FOSCR). There is no evidence suggesting that the RP failed to comply with an order. As a result, the exceptions to the sole cause defenses to liability in OPA 33 U.S.C. § 2703(c) are not at issue. We, therefore, analyze whether Claimants have carried their burden of proving an entitlement to either an act of God defense or a third party defense.

1. Act of God Defense:

Claimants seek to avoid liability for this oil spill by alleging an act of God defense. The phrase "act of God" is defined by 33 U.S.C. § 2701 (1) as follows (emphasis added):

> "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight;

The seminal case, Apex Oil Company, Inc. v. United States, 208 F.Supp.2d 642 (E.D. La. 2002), analyzed what a claimant must show in order to be entitled to an act of God defense under the OPA. In that case, the court construed the defense in the context of similar defenses in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607, and the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1321. The court reasoned that an act of God defense under OPA, CERCLA, or the FWPCA is much harder to prove than a common law act of God defense. The court concluded that spring floods and their associated strong currents did not amount to an OPA act of God defense. Under the facts of that case, the conditions were anticipated and could have been avoided if the crew had exercised

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repeatedly held that, 'where willfulness is a statutory condition of civil liability, … [the term] cover[s] not only knowing violations of a standard, but reckless ones as well.").

[72] The RP's qualified individual, Miller Marine, reported the incident to the NRC

due care. Also, the floods and currents were not the sole cause of the oil spill. The court explained:

> The case at bar indisputably involves Apex's undertaking the task of towing seven barges, three of which were laden with slurry oil, up the Mississippi River toward their final destination in Chicago, knowing the flood stage condition of the river, knowing that strong fast currents were precipitating damage to navigational aids, knowing that effects were migrating down river, after being duly advised that caution should be exercised in light of the considerably perilous conditions, to ship three barges laden with slurry oil together with four empties northbound, but it did so with a tug which did not have an engine powerful enough to press onward into the increasing swift and powerful current on the river rife with tortuous bends.
>
> ….
>
> The conditions of the river which occasioned the discharge of slurry oil at issue in this case were both anticipated and predicted. The most apparent cause was the underpowered Apex tug, which was stalled by even the less powerful current encountered transiting an auxiliary span of Highway 80, Vicksburg Bridge on the LMR. The second most apparent cause is that, in the face of the intensifying current in close proximity to the bridge and just below a sharp bend in the river, the tug captain chose to negotiate the bridge with his tug and tow, albeit through an auxiliary span where he believed the current to be of a lesser force or magnitude.

Here, Claimants assert an entitlement to an act of God defense under the theory that the Boston 30 struck "debris/obstruction" resulting from Hurricane Sandy while transiting the New York Harbor. In support of this contention, Claimants point to CG Sector New York's Marine Safety Information Bulletin, No. 02-12, issued on December 5, 2012. This bulletin provided the following warning:

> From December 12th through December 15th, the Port of New York/New Jersey will experience larger than normal tidal ranges due to a spring tide. According to forecasts from the National Weather Service, tides during this period at Battery Park, New York are expected to be approximately one foot above the normal high tide of five feet. As there is still a significant amount of marine debris from Hurricane Sandy potentially within this tidal range, there is the potential for an increase in hazards within our waterways. Accordingly, mariners, waterfront facilities and the public are advised to remain vigilant to the threat from objects that are adjacent to or submerged in the vicinity of the waterway which may become hazards to navigation. [73]

Claimants cite the holding in Lord & Taylor LLC v. Zim Integrated Shipping Services, Ltd., 108 F.Supp.3d 197 (S.D. N.Y. 2015) as support for their proposition that Hurricane Sandy was

[73] See, CG Sector NY MSIB 02-12, dated 5 Dec 2012 submitted with OSLTF Claim dated 9 Dec 2015.

an act of God under the OPA. In that case, the court concluded that Hurricane Sandy was so severe that it constituted an "act of God" within the meaning of the CARRIAGE OF GOODS BY SEA ACT, that the impact of Sandy was unprecedented and exceeded worst case expectations, and that the authorities failed to predict the severity of the storm surge. Relying on those conclusions, Claimants assert that, to the extent that the damage to the No. 2 port cargo tank of the BOSTON 30 was attributable to the vessel's impact with debris deposited in the New York Harbor by Hurricane Sandy, this incident was similarly caused by an "act of God" within the meaning of OPA and entitles the RP to full exoneration from liability.[74]

This oil spill was not "caused ***solely*** by" an "act of God" as that term is defined in OPA. Hurricane Sandy made landfall in New Jersey on October 29, 2012 and, with the coincidence of a spring tide, left a debris field in its wake. The BOSTON 30 incident, however, did not occur during Hurricane Sandy, or even in its immediate aftermath during the resulting flooding from the spring tide. It occurred 46 days later, and 33 days after the New York Harbor waterways were opened to traffic. The conditions faced by the Boston 30 were not "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character".[75] As a result, the holding in Zim does not apply.

Also, the circumstances surrounding this OPA incident claim were not "unanticipated" or "exceptional, inevitable, and irresistible" in character as required by OPA's act of God defense. As the Claimants acknowledge, the CG Sector New York Marine Safety Information Bulletin 02-12 warned mariners of upcoming spring tide conditions and significant marine debris remaining from Hurricane Sandy. The bulletin explicitly advised mariners to remain vigilant between the dates December 12 – December 15, 2012. Spring tides are natural phenomenon that occur twice during a month. The adverse conditions, including the resulting flood currents and well known risks to navigation from debris movements within the water column, were therefore predictable, and should have been anticipated by the Captain and crew of the Tug QUENAMES.

The effects of spring tides, moreover, can be prevented and avoided by the exercise of due care or foresight, and could have been prevented or avoided in this instance. Pushing a single-hull tank barge, loaded with No. 6 oil, through the Arthur Kill, Kill Van Kull and South of Shooters Island Reach at low tide, during a spring tide, in an area with a well-publicized risk of uncharted hazards to navigation was, at best, risky and demanded extraordinary vigilance. There, however, is nothing in the administrative record to indicate that the vessel's crew took *any* special precaution in response to the CG MSIB or the increased risks created by the debris. Such precautions might have included using a double-hull tank vessel, making the transit during high tide instead of low tide, or taking additional measures to avoid oncoming vessels during the transit to Mayship Repair. The RP took none of these reasonable precautions. Instead the RP assumed the additional risk of operating a single-hull vessel in dangerous waters.

In this claim, the RP's actions were a proximate cause of this oil spill. Similar to the oil spill in Apex, the responsible party's decision to undertake the voyage with full knowledge of the potential hazards was a proximate cause of the incident at issue in this claim. Because the

[74] See, pages 11-13 of OSLTF Claim, dated 9 Dec 2015.

[75] 33 U.S.C. § 2701 (1).

responsible party's actions were a proximate cause, this incident was not solely caused by an act of God and Claimants' request for compensation based on an act of God defense must be denied.

2. Third Party Defense

The Claimants next claim that they are entitled to a third party defense under OPA 33 U.S.C. § 2703(a)(3). In order to prove this allegation, Claimants must establish, "by a preponderance of the credible evidence," that the oil spill was "caused ***solely*** by ... an act or omission of a third party, other than ... a third party whose act or omission occurs in connection with any contractual relationship with the responsible party," and that the responsible party,

> (A) ***exercised due care*** with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and
>
> (B) *took* **precautions against foreseeable acts** or omissions of the third party to whom it is attempting to shift liability ***and*** the ***foreseeable consequences*** of those acts or omissions; or.

33 U.S.C. § 2073(a)(3).

In U.S. v. Kilroy, 71 ERC 1219, 2009 WL 3633891 (W.D. Wa. 2009), the court considered whether an responsible party had met its burden of proving an entitlement to a third party defense. In that case, a sleeping bag and syringe were found onboard a vessel the evening before it inexplicably sank. The responsible party also asserted that several thefts had occurred from the vessel, including several doors and a bronze porthole. Based upon these facts, the responsible party argued that it should be exonerated from liability based upon a third party defense. The court unequivocally rejected the defense reasoning that "[t]hese randomized, hypothetical accounts of third-party presence are insufficient to raise a genuine issue of material fact that the only reason the Vessel sank was an act of a third party."

Similarly, in United States v. W.R. Grace & Co.-Conn., 280 F.Supp.2d 1135, 1147 (D. Mt. 2002), the court held that the defendant's unsupported and hypothetical contentions were insufficient to prove that the CERCLA incident was solely caused by a third party who had no relationship to the defendant. These cases show that, in order to meet its burden, a responsible party must offer credible evidence showing that the incident was solely caused by a third party who falls within the statutory criteria for the defense. A responsible party may not rely on unsupported contentions to satisfy its burden of proof.

Here, the Claimants assertion of a sole cause third party defense rests entirely on unsupported and hypothetical contentions. The Claimants do not even attempt to show how the barge struck the alleged debris or even identify what was allegedly hit. Also, there is no evidence showing that the unidentified debris was placed in the waterway by a third party covered by the defense. Claimants simply argue that the defense should apply because the vessel hit something in the waterway. Although the defense can sometimes be established without proving the third party's precise identity, Claimants must prove by a preponderance of the evidence that the incident was solely caused by a third party who satisfies the criteria set forth in the statute. In particular, before the defense can apply, the evidence must show that the incident was solely caused by

someone "other than an employee or agent of the responsible party" and the third party's act or omission cannot occur "in connection with any contractual relationship". The evidence in this case fails to establish the third party defense and it must be denied.

Claimants also ignore that the RP played a key role in bringing about the BOSTON 30 incident. The RP decided to operate its single-hull tank barge through the Arthur Kill and Kill Van Kull along the South of Shooters Island Reach to Mayship Repair at low tide under a warning from CG Sector New York [76] advising mariners of debris from Hurricane Sandy within the tidal range and advising them of a potential for an increase in hazards within the waterways. In this case, it was foreseeable that a vessel transiting the port of NY/NJ between the dates of December 12 - December 15, 2012,[77] might strike a hazard below the waterline. It is also foreseeable that striking such a hazard might puncture the hull of a SINGLE hull tank barge and cause a release of oil.

The RP's decision to transit the river knowing full well there was a significant risk that hazards may be encountered after the storm was a proximate cause of this oil spill. Also, Claimants did not take reasonable precautions against foreseeable acts or omissions of a third party and the foreseeable consequences of those acts or omissions as required by 33 USC § 2703 (a)(3)(B). Such precautions might have included using a double-hull tank vessel, making the transit during high tide instead of low tide, or taking additional measures to avoid oncoming vessels during the transit to Mayship Repair. As a result, the Claimants cannot successfully argue that the oil spill was solely caused by some unknown object that inexplicably created an unavoidable hazard to navigation. As described in the above analysis of the act of God defense, the RP's actions were a proximate cause of this incident. Just like the act of God defense, the third party defense must be denied when the responsible party's actions were a proximate cause of the incident.

D. Limitation of Liability Claim

Claimants alternatively assert that they are entitled to limited liability under 33 U.S.C. § 2704 (a). Claimants contend that the OSLTF should reimburse them for the difference between the liability limits and their actual removal costs and damages. In order to be entitled to OSLTF reimbursement for these amounts, Claimants must show that this incident was not proximately caused by gross negligence, willful misconduct, or a regulatory violation as set forth in 33 U.S.C. § 2704 (c).

When submitting a claim against the OSLTF, a responsible party must show that the exceptions to limited liability in 33 U.S.C. § 2704 (c) do not apply even though this burden of proof may require proof of a negative contention, i.e., the incident was not proximately caused by the responsible party's willful misconduct, gross negligence, or regulatory violation. "It is a familiar common-law rule that, where a right to relief is grounded on a negative assertion of a right, the burden of proving the negative rests on the party asserting the right."[78] This is not an impossible burden to carry. [79] A

[76] See, MSIB 02-2012.

[77] See, MSIB 02-2012.

[78] United States v. Grogg, 9 F.2d 424, 426 (W.D. Va. 1925).

responsible party will meet its burden by showing that it's more likely than not that the incident was not proximately caused by willful misconduct, gross negligence, or a regulatory violation.

The quantum of proof required from a responsible party seeking OSLTF reimbursement will vary depending upon the facts of the case. Nevertheless, a responsible party should not be required to conclusively disprove every possible contention supporting unlimited liability. Rather, a responsible party will generally satisfy its burden by showing that OPA's exceptions to limited liability probably do not apply. For example, the NPFC does not require detailed proof of compliance with federal regulations that have no apparent connection to the oil spill. Therefore, in some cases a responsible party's regulatory compliance could be shown by generalized evidence establishing a probability that no regulatory violation occurred. However, if the facts of an OPA incident raise the issue of whether the incident was proximately caused by a regulatory violation, then a responsible party must carry its burden of proving compliance with the specific regulation at issue. If a responsible party fails to carry its burden of proof, then the claim should be denied.[80]

In this case, Claimants satisfied their burden of proving an entitlement to limited liability. BMT timely accepted responsibility for the incident and provided appropriate cooperation and assistance with respect to the removal action.[81] The evidence in this case makes it probable that this incident was not proximately caused by Claimants willful misconduct, gross negligence, or regulatory violation.

The evidence shows that this incident was proximately caused by the BOSTON 30 striking something during its transit in the Arthur Kill, Kill Van Kull, and South of Shooters Island Reach waterway. As verified by AIS data, the Tug QUENAMES remained within the navigational channel and the BOSTON 30 should have maintained ample draft to transit safely from New York Terminal to Mayship Repair under normal tidal conditions. The Tug QUENAMES assumed additional risk and was likely negligent by failing to take any special precautions in

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[79] The treatise, Corpus Juris Secondum, explains how a party can prove a negative contention with the following:

> The party whose contention requires proof of a negative fact generally has the burden of evidence to prove that fact, except as the rule may be modified by the fact that the evidence as to such issue is peculiarly within the adverse party's knowledge or control. In deciding, however, what quantum of evidence shall be deemed sufficient, the practical limitations on proof imposed by the nature of the subject matter or the relative situation of the parties will be considered.
> The court will more promptly discharge a litigant from the burden of evidence where the proposition is a negative one, and the **burden of evidence is sustained by proof which renders probable the existence of the negative fact**, nothing in the nature of a demonstration being required.

31A C.J.S. Evidence § 200 (2015)(footnotes omitted and emphasis added).

[80] Bean Dredging, LLC v. United States, 773 F.Supp.2d 63, (D. D.C. 2011)(affirming NPFC's determination denying limited liability based upon the responsible party's failure to show compliance with a specific regulation).

[81] See, pages 15-20 of OSLTF claim dated 9 Dec 2015.

response to CG Sector New York's Marine Safety Information Bulletin 02-12 dated December 5, 2012. However, based upon the unique facts of this case, the responsible party's wrongful acts or omissions do not amount to willful misconduct, gross negligence, or a regulatory violation that would support a denial of limited liability under the OPA. NPFC, therefore, determines that the Claimants have established by a preponderance of the credible evidence that the RP's OPA liability should be limited under 33 U.S.C. § 2704. As the responsible parties and subrogated insurers, the Claimants may, therefore, seek reimbursement from the OSLTF to the extent allowed by 33 U.S.C. § 2708 (b) and the OSLTF claims procedures (33 CFR part 136).

E. OSLTF Compensable Response Costs

Under 33 U.S.C. § 2712 (a)(4), the NPFC is authorized to pay claims for uncompensated removal costs in accordance with 33 U.S.C. § 2713. Additionally, 33 U.S.C. § 2712 (a)(4) limits reimbursement to those removal costs determined by the President to be consistent with the National Contingency Plan ("NCP"). For incidents involving actual discharges of oil, the OPA defines removal costs to include "costs of removal that are incurred after a discharge of oil has occurred".[82] The OPA further defines the term "removal" to mean "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."[83]

The Federal On Scene Coordinator ("FOSC") has broad authority under the NCP to determine which removal activities should be conducted and what costs should be incurred during an OPA incident.[84] Consistent with that broad authority, the FOSC determines when the removal action has been completed, not a responsible party or claimant.[85] Once the removal action has been terminated by the FOSC, the OSLTF is no longer available to reimburse removal costs incurred after that date.[86] Costs incurred at the direction of someone other than the FOSC will not be compensable by the OSLTF unless the FOSC subsequently determines that the activities were consistent with the NCP.[87] Unless an exception applies, all claimants must present their claims to the responsible party before requesting reimbursement from the OSLTF.[88] After the claimant has presented its claim to the responsible party, the OSLTF may be available

[82] 33 U.S.C. § 2701 (31).

[83] 33 U.S.C. § 2701 (30).

[84] 40 C.F.R. Part 300.

[85] 33 U.S.C. § 2711. See also, 40 C.F.R. § 300.320.

[86] 40 C.F.R. § 300.320 (b).

[87] 33 U.S.C. § 2712 (a)(4). See also, 33 C.F.R. § 136.203 (c); and *Gatlin Oil Co. v. U.S.*, 169 F.3d 207, 213 (4th Cir. 1999)(holding that costs incurred at the direction of state officials were not reimbursable by the OSLTF because the FOSC did not direct the activities or determine that they were consistent with the NCP).

[88] 33 U.S.C. § 2713 (a).

to reimburse a proper claim if the responsible party denies liability or the claim is not settled in a timely manner.[89]

The Coast Guard has issued regulations controlling what all claimants must show to receive OSLTF reimbursement.[90] Just like any other claimant, Claimants bear the burden of proving that their claimed costs are eligible for reimbursement by the OSLTF.[91] All claimants must produce evidence to support their claim and show how the removal costs resulted from the incident. [92] Claimants must also show what actions were taken to avoid or minimize the claimed costs.[93]

In addition to the general requirements applicable to all claimants, the OSLTF claims regulations specifically address removal cost claims. Before any removal costs can be reimbursed by the OSLTF, the claimant must show that the actions were "necessary to prevent, minimize, or mitigate the effects of the incident" and the costs resulted from those actions.[94] A removal cost claimant must also show "[t]hat the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC."[95] The regulations also limit the amount of compensation allowable with the following:

> 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.[96]

In this case, Claimants seek reimbursement of removal costs incurred in excess of the limit of liability under 33 U.S.C. § 2704. Under the OPA, the limit of liability applicable to the BOSTON 30 was $6,408,000 and Claimants contend that they incurred $15,190,226.83 in removal costs. As a result, Claimants seek a total of $8,782,226.83 as compensation for their removal costs incurred in excess of the limit. The NPFC reviewed the documentation submitted by Claimants to adjudicate whether the claimant had incurred all costs claimed. NPFC's adjudication focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these

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[89] 33 U.S.C. § 2713 (b).

[90] 33 C.F.R. Part 136.

[91] 33 C.F.R. § 136.105 (a).

[92] 33 C.F.R. § 136.105 (e).

[93] 33 C.F.R. § 136.105 (e).

[94] 33 C.F.R. § § 136.203 (a) and (b).

[95] 33 C.F.R. § 136.203 (c).

[96] 33 C.F.R. § 136.205.

actions; (3) whether the actions taken were determined to be consistent with the NCP, and (4) whether the costs were adequately documented and reasonable.

The NPFC determined that most of the claimed response costs should be compensated. However, the NPFC determined that $429,508.69 of the claimed costs could not be reimbursed by the OSLTF. As a result, the NPFC determined that Claimants may be reimbursed a total of $8,352,718.14 for the removal costs portion of their claim. Each denial of compensation is specifically addressed in Enclosure (3). Most of the denials are based upon the following reasons:

1. Rate schedules and descriptions of work missing for MSRC subcontractors;

2. During audit, the RP found math errors in amounts that were in excess of Ken's Marine invoiced costs. NPFC denies any such amount as not properly presented as required by 33 U.S.C. § 2713.;

3. During audit, the RP found math errors in amounts that were in excess of Gallagher's invoiced costs. NPFC denies any such amount as not properly presented as required by 33 U.S.C. § 2713;

4. Unexplained and unsupported Marriot room and tax charges;

5. Lack of itemized receipts, missing personnel activities and excessive travel charges for Meredith Management personnel;

6. Unexplained pollution removal activities/description of work for Polaris personnel;

7. Media relations cost for Internal Marketing Strategies;

8. During the audit, the RP found math errors in amounts that were in excess of Miller's Launch invoiced costs. NPFC denies any such amount as not properly presented as required by 33 U.S.C. § 2713;

9. Channel/berth surveys conducted by Randive personnel;

10. Fines are not compensable removal costs under the OPA. As a result, no portion of the CG fine imposed against BMT could be compensated.

III. CONCLUSION

Based upon the foregoing, Claimants' request for an absolute defense under 33 U.S.C. § 2703 is denied. However, the NPFC determines that Claimants have demonstrated an entitlement to limited liability under 33 U.S.C. § § 2704 and 2708 (a)(2). As a result, the OSLTF may reimburse Claimants in accordance with 33 U.S.C. § 2708 (b) and the OSLTF claims regulations. For the removal costs portion of this claim, the NPFC offers to pay $8,352,718.14.

The NPFC will subsequently issue a second determination resolving which of the claimed damages may be reimbursed by the OSLTF.

[redacted]

Claim Supervisor: [redacted]

Date of Supervisor's Review: ***3/23/2017***

Supervisor Action: ***Approved***

Supervisor's Comments: