

## CLAIM DETERMINATION

<b>Claim Number:</b>	A17013-0001
<b>Claimant:</b>	Safe Harbor Pollution Insurance and Interested Underwriters
<b>Type of Claimant:</b>	RP
<b>Type of Claim:</b>	Sole Cause Act of God/Limit of Liability
<b>Claim Manager:</b>	[REDACTED]
<b>Amount Requested:</b>	\$1,929,684.17
<b>Action Taken:</b>	Denied

### **EXECUTIVE SUMMARY:**

On April 6, 2017, the deck barge VENGEANCE sank and discharged oil into the San Francisco Bay, a navigable waterway of the United States. U.S. Coast Guard Sector San Francisco (Sector San Francisco) notified the National Response Center (NRC) of the incident.<sup>1</sup> Unable to immediately contact the responsible party, Sector San Francisco personnel accessed the Oil Spill Liability Trust Fund (OSLTF) and hired NRC Environmental Services (NRCES) to conduct pollution response operations. Vortex Marine Construction, Inc. (Vortex) the owner and operator of the VENGEANCE, arrived on-scene shortly thereafter and assumed responsibility for the incident. Vortex hired Global Diving and Salvage, Inc. for dive operations and Patriot Environmental Services to conduct pollution response activities.<sup>2</sup> Sector San Francisco deemed the salvage operations and pollution removal activities complete on July 19, 2017.<sup>3</sup> After incurring all of the pollution removal costs associated with the response, Vortex assigned all rights to Safe Harbor Pollution Insurance (SHPI) and interested underwriters.<sup>4</sup> SHPI submitted an act of God third party defense claim, and in the alternative, an entitlement to limited liability claim to the National Pollution Funds Center (NPFC) for \$1,929,684.17.<sup>5</sup> The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and concluded that Claimants have not demonstrated an entitlement to an act of God defense or an entitlement to limited liability for their uncompensated removal costs and damages under the Oil Pollution Act (OPA) that exceed their limit of liability.<sup>6</sup>

### **I. BACKGROUND, WEATHER, INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:**

#### ***Background***

On March 14, 2017, Sector San Francisco issued a waiver to Vortex to temporarily anchor over the Bay Area Rapid Transit Tube (BART) to conduct routine corrosion preventative

<sup>1</sup> National Response Center Report #1175062, reported on April 7, 2017.

<sup>2</sup> Coast Guard Pollution Report Message (CG POLREP) 1 DTG R121957Z Apr 17.

<sup>3</sup> CG POLREP 6 DTG R192010Z Jul 17.

<sup>4</sup> Letter to the NPFC provided by Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor Pollution Insurance executing assignment of Vortex claim for exoneration/limitation of liability under the OPA to Safe Harbor Pollution Insurance and interested underwriters Starr Indemnity and Liability Company, Argonaut Insurance Company and Berkshire Hathaway Specialty Insurance in the amount of \$1,802,762.85 dated February 22, 2019. As such, the terms "claimant" or "claimants" herein refers to Vortex or SHPI, et al., as applicable.

<sup>5</sup> Nicoletti Hornig & Sweeney - on behalf of SHPI - claim submission dated October 15, 2018, page 2.

<sup>6</sup> 33 U.S.C. § 2703(a) and 33 U.S.C. § 2704(a).

maintenance on the tube. The waiver authorized Vortex to anchor and operate over the BART from March 13, 2017, until April 30, 2017.<sup>7</sup>

The deck barge VENGEANCE, owned and operated by Vortex, arrived at its anchoring location over the BART on March 29, 2017. The VENGEANCE was equipped with a crane that was permanently affixed with a roller ring and was tended by the tug LAGUNA throughout the workday. The VENGEANCE was anchored from each corner of the barge with four (4) 10,000-pound high-performance delta flipper type anchors to prevent drift.<sup>8</sup>

### ***Weather***

On April 6, 2017, the National Weather Service issued a Small Craft Advisory (SCA) to mariners in the San Francisco Bay for areas south of the Bay Bridge in six (6) hour intervals. The SCA warned mariners to expect winds that evening ranging from 20 to 30 knots with occasional gusts up to 45 knots; and subsequent gale force winds gusting from 35 to 40 knots.<sup>9,10</sup>

### ***Incident***

At 0341 on April 7, 2017, Sector San Francisco notified the NRC of a sunken barge in the San Francisco Bay just east of Yerba Buena Island, CA, with a potential to discharge approximately 4,000 gallons of diesel fuel and 300 gallons of hydraulic oil.<sup>11</sup> The sunken barge was later identified as the VENGEANCE, which contained approximately 3,000 gallons of diesel fuel and 300 gallons of hydraulic oil. The barge sank while anchored over the BART and began to discharge diesel fuel from an open fuel vent into the San Francisco Bay, a navigable waterway of the United States.<sup>12</sup> The barge was unmanned at the time of the sinking.<sup>13</sup>

### ***Responsible Party***

The VENGEANCE was owned and operated by Vortex. Vortex is the designated responsible party (RP) for the oil spill incident.<sup>14</sup>

Safe Harbor Pollution Insurance (SHPI) and interested underwriters Starr Indemnity and Liability Company, Argonaut Insurance Company and Berkshire Hathaway Specialty Insurance

---

<sup>7</sup> CG Sector San Francisco anchorage waiver letter issued to Vortex Marine Construction, Inc. dated March 14, 2017.

<sup>8</sup> Enclosure to letter provided by Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor Pollution Insurance dated January 15, 2019, pages 2-3.

<sup>9</sup> PowerPoint of Mr. [REDACTED], Senior Meteorologist, Weather Flow, Inc. provided to the NPFC via email on February 22, 2019.

<sup>10</sup> Thresholds governing the issuance of Small Craft Advisories are specific to geographic areas. For areas on the west coast, including California, Small Craft Advisories are issued for sustained winds of 21 to 33 knots, and/or wave heights exceeding 10 feet (or wave steepness values exceeding local thresholds). Gale Force warnings are issued for sustained surface winds, or frequent gusts, in the range of 34 knots (39 mph) to 47 knots (54 mph). <https://www.nws.noaa.gov/os/marine/faq> (last visited April 22, 2019).

<sup>11</sup> National Response Center Report #1175062, reported on April 7, 2017.

<sup>12</sup> CG POLREP 1 DTG R121957Z Apr 17.

<sup>13</sup> Enclosure to letter provided by Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor Pollution Insurance dated January 15, 2019, page 8.

<sup>14</sup> CG National Vessel Documentation Center Certificate of Documentation issued to Vortex Marine Construction, Inc. dated December 30, 2016 and valid at the time of the incident.

(Claimants) provided oil pollution insurance to Vortex.<sup>15</sup> Having incurred the pollution removal costs associated with the response and having been assigned the rights of Vortex, Claimants are pursuing an act of God third party defense and in the alternative, entitlement to a limited liability claim with the NPFC.

### ***Recovery Operations***

On April 7, 2017, Sector San Francisco accessed the OSLTF to hire NRCES while attempting to contact the owner of the VENGEANCE.<sup>16</sup> NRCES responded and deployed 3,000 feet of containment boom around the sunken barge. Shortly thereafter, Vortex personnel arrived on-scene and assumed responsibility for the incident. Vortex hired Global Diving and Salvage, Inc. (Global) for dive operations and Patriot Environmental Services (Patriot) to relieve NRCES of its pollution removal responsibilities.<sup>17</sup> Global personnel dove on the sunken barge, successfully plugged the fuel vent that had been actively discharging diesel fuel into San Francisco Bay,<sup>18</sup> and determined that the vessel was laying on its starboard beam.<sup>19</sup> Coast Guard Vessel Traffic Service (VTS) San Francisco confirmed that the VENGEANCE had not sunk in the navigational channel. A safety zone with a 350-meter radius was established around the sunken barge to prevent vessel traffic from impeding the pollution removal activities and salvage operations. A Unified Command was established that included Sector San Francisco, California Department of Fish & Wildlife, San Francisco Department of Environmental Management, BART, and Vortex to oversee the pollution removal activities and salvage operations.<sup>20</sup>

Over the next several days, sonar surveys revealed that the VENGEANCE had settled approximately five feet into the mud and had heeled approximately 130 degrees on her starboard side in a partially inverted position and was resting on the crane house. For the purposes of salvage, Global determined that the barge would have to be par buckled (rolled) onto its hull and drafted a plan to par buckle the barge which was submitted to the Unified Command on April 17, 2017.<sup>21</sup> On April 25, 2017, the par buckling plan was approved and the VENGEANCE was successfully par buckled.<sup>22</sup> The par buckling left the VENGEANCE with a 28-degree heel to starboard and resulted in the crane and boom becoming detached from the barge.<sup>23</sup>

On June 12, 2017, Global submitted a salvage plan for the recovery of the barge and crane to the Unified Command. The plan identified structural weaknesses within the VENGEANCE, specifically that the barge had been constructed without any longitudinal frames and would therefore not have sufficient structural integrity to be refloated using air as the mechanism to

---

<sup>15</sup> Safe Harbor Pollution Insurance policy V-14530-16 issued to Vortex Marine Construction, Inc. dated October 1, 2016. The per occurrence limit as set forth in the policy for an oil spill incident was \$5,000,000.00.

<sup>16</sup> Authorization to Proceed issued to NRC Environmental Services, Inc. from Sector San Francisco dated April 7, 2017. U.S. Coast Guard Shore Infrastructure Logistics Center Order for Supplies or Services issued to NRC Environmental Services, Inc. dated April 7, 2017.

<sup>17</sup> CG POLREP 1 DTG R121957Z Apr 17.

<sup>18</sup> Email from ██████████, Global Diving to Sector San Francisco Incident Management Division dated April 7, 2017, provided by Claimant on January 15, 2019, as Exhibit B, Part 1, page 6.

<sup>19</sup> Email from ██████████ representing Hull/P&I interests to Edward Travers & Associates dated April 10, 2017, provided by Claimant on January 15, 2019, as Exhibit B, Part 1, page 19.

<sup>20</sup> CG POLREP 1 DTG R121957Z Apr 17.

<sup>21</sup> Global Diving Salvage Plan – Par buckling Phase dated April 17, 2017, pages 3 and 5.

<sup>22</sup> CG POLREP 3 DTG R121922Z May 17.

<sup>23</sup> Global Diving Salvage Plan – Barge & Crane Recovery dated June 12, 2017, page 3.

restore buoyancy. As such, Global recommended removing the diesel fuel from the barge by installing a pollution dome over the fill pipe and once lightered, severing the barge into two pieces.<sup>24</sup> The salvage plan was approved and approximately 2,700 gallons of diesel fuel were successfully lightered from the diesel fuel tank on-board the VENGEANCE. Upon completion of the lightering, Global personnel successfully sectioned the barge in preparation of final salvage.<sup>25</sup>

On July 11, 2017, the crane from the VENGEANCE was successfully salvaged and placed into a secondary containment upon a flat deck barge. However, during the lift, diesel fuel and hydraulic oil discharged from the crane house. Patriot personnel responded and were able to collect approximately 250 gallons of diesel fuel into over pack drums and recovered another 300-350 gallons of diesel fuel and oil with the use of the sorbent material. Once the discharge was controlled and the crane was successfully lowered and secured to the deck barge, the aft section of the VENGEANCE was raised to the surface and Global personnel dewatered the spaces on the barge. Once the spaces on the aft section of the barge were dewatered, the aft section was placed upon the deck barge and secured.<sup>26</sup>

On July 12, 2017, attempts to salvage the forward section of the barge were unsuccessful as there was movement in the starboard rigging during the lift.

On July 14, 2017, Global revised their salvage plan and proposed the installation of two 42' steel I beams under the deck of the barge running fore and aft with additional lifting chains attached to provide better support to the deck. The plan also proposed Global personnel board the barge with its decks awash and dewater the spaces of the barge with the use of 3" trash pumps. Once dewatered, the barge would then be placed upon the deck barge and secured for transit.<sup>27</sup>

On July 15, 2017, the unified command approved the revised salvage plan. Global personnel worked throughout the day to cut large holes into bulkheads and through the deck of the barge to accommodate the 42' steel I beams being installed fore to aft. Over the next several days, strengthening modifications to the barge continued and the forward section of the VENGEANCE was successfully lifted, dewatered with the use of 3" trash pumps<sup>28</sup> and secured to the deck barge on July 18, 2017.<sup>29</sup>

On July 19, 2017, Sector San Francisco considered all equipment demobilized and operations associated with the salvage of the VENGEANCE complete.<sup>30</sup>

## **II. DISCUSSION:**

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

---

<sup>24</sup> Global Diving Salvage Plan – Barge & Crane Recovery dated June 12, 2017, pages 4-6.

<sup>25</sup> CG POLREP 6 and Final DTG R192010Z Jul 17.

<sup>26</sup> CG POLREP 6 and Final DTG R192010Z Jul 17.

<sup>27</sup> Global Diving Salvage Plan – Barge & Crane Recovery Rev 3 dated July 14, 2017, pages 3.

<sup>28</sup> Summary of conversation between Mr. [REDACTED], Salvage Master Global Diving and Mr. [REDACTED], NPFC dated February 8, 2019.

<sup>29</sup> CG POLREP 6 and Final DTG R192010Z Jul 17.

<sup>30</sup> CG POLREP 6 and Final DTG R192010Z Jul 17.

States.<sup>31</sup> Further, a responsible party's liability is strict, joint, and several.<sup>32</sup> In the case of a vessel, the responsible party includes any person owning, operating or demise chartering the vessel.<sup>33</sup> 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."<sup>34</sup> OPA was intended to cure these deficiencies in the law.

Notwithstanding, under limited circumstances the OSLTF may reimburse a responsible party for its uncompensated removal costs and damages. Under the plain meaning of 33 U.S.C. § 2708(a), a responsible party must demonstrate that a defense applies before the OSLTF can reimburse removal costs or 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.<sup>35</sup> Therefore, as with 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 introduce evidence in support of any of the elements necessary to establish entitlement to compensation from the OSLTF, or fails to establish each of the elements, the NPFC must deny the claim.<sup>36</sup>

The Claimants have demonstrated that they incurred the pollution removal costs associated with this response and were properly assigned the rights of the RP and have submitted a claim to the NPFC asserting an act of God third party defense to liability under section 2703 of this title and in the alternative, an entitlement to limitation of liability under section 2704 of this title. As such, the Claimant's third party defense and limitation to liability are evaluated below.

### **III. DETERMINATION PROCESS:**

---

<sup>31</sup> 33 U.S.C. § 2702(a).

<sup>32</sup> H.R. Rep. No. 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

<sup>33</sup> 33 U.S.C. § 2701(32)(A).

<sup>34</sup> *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), *reprinted in* 1990 U.S.C.C.A.N. 722).

<sup>35</sup> *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).

<sup>36</sup> OPA's legislative history makes it clear 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 a guarantor for that responsible party... to assert a claim for removal costs and damages *only if the responsible party... can show that the responsible party...has a defense to liability, or is entitled to a limitation of liability.*

H.R. Conf. Rep. 101-653 at 110 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 788 (emphasis added). *See also*, *Apex*, 208 F.Supp.2d 642 (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); *Water Quality Insurance Syndicate v. United States*, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009) (holding that a responsible party has the burden of showing an entitlement to OSLTF compensation under 33 U.S.C. § 2708).

The NPFC utilizes an informal process when adjudicating claims against the OSLTF.<sup>37</sup> As a result, 5 U.S.C. § 555 (e) requires the NPFC to provide a brief statement explaining its determinations. This determination is issued to satisfy that requirement for the Claimant's claim against the OSLTF.

When adjudicating claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence, including evidence provided by claimants and evidence obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim. The NPFC is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>38</sup> If there is conflicting evidence in the record, the NPFC makes a determination as to what evidence is more credible or deserves greater weight, and finds facts and makes its determination based on the preponderance of the credible evidence.

The administrative record in this case unequivocally resolves several important issues. Specifically, the San Francisco Bay was a navigable waterway of the United States and the oil spill at issue here was an incident under the OPA. In addition, Vortex was the owner and operator of the deck barge VENGEANCE, and therefore the responsible party for this incident and the claim submitted by Safe Harbor Pollution Insurance, with interested underwriters was submitted to the NPFC on November 1, 2018, and is therefore timely.<sup>39</sup> The remaining issues are discussed below.

#### ***A. Act of God defense to liability***

OPA provides a responsible party limited defenses to liability. The statute, in pertinent part, provides:<sup>40</sup>

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.<sup>41</sup>

In order to successfully defend against liability, the Claimants must demonstrate that the VENGEANCE discharge was caused ***solely*** by an “act of God”. The claimant has failed to do so. This oil spill was not “caused solely by” an “act of God” as that term is defined in OPA. 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

---

<sup>37</sup> 33 CFR Part 136.

<sup>38</sup> See, e.g., *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center*, 71 Fed. Reg. 60553 (October 13, 2006) and *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center* 72 Fed. Reg. 17574 (concluding that NPFC may consider marine casualty reports but is not bound by them). The NPFC notes that it did not rely on the Marine Casualty Investigation Report for this determination. (While the NPFC respectfully disagrees with the dicta in *Natures Way, LLC v. U.S.*, 904 F.3d. 416, 421 n.7 (5<sup>th</sup> Cir. 2018), it has opted to follow it in this determination).

<sup>39</sup> SHPI claim submission dated October 15, 2018, page 1.

<sup>40</sup> 33 U.S.C. § 2703(a) (emphasis added).

<sup>41</sup> “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. 33 U.S.C. 2701(1).

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 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. *Id.* at 656-57.

Claimants assert an entitlement to an act of God defense under the theory that the VENGEANCE sank because of an intense storm, which caused severe downpours of rain and highly damaging wind gusts in excess of 60 mph, which resulted in 114,000 residents in the Bay Area to lose power. The Claimants acknowledge that a storm was forecast for the area, but claim there were no mariner warnings issued which would have advised Vortex that it needed to take additional precautions to secure its vessel in the San Francisco Bay. Moreover, they claim that the forecasted intensity of the storms were not adequate to advise Vortex of any danger to the VENGEANCE. The Claimants refer to numerous vessels that were damaged in the San Francisco Bay, including damage to these vessels caused by high winds, which caused damage to some local docks. The Claimants conclude by stating that this type of storm was highly unusual in the San Francisco Bay Area for April and it was the type of unforeseeable, unanticipated weather event as contemplated in the OPA act of God defense.<sup>42</sup>

---

<sup>42</sup> SHPI claim submission dated October 15, 2018, page 3-4.

On April 6, 2017, the National Weather Service (NWS) issued a small craft advisory (SCA) to the mariners in the San Francisco Bay for areas south of the Bay Bridge. The SCA was issued for projected high winds and was broadcast throughout the day in 6-hour intervals. The first SCA was issued at 2:32 a.m. and warned mariners of winds later that evening originating from the south and ranging from 20 to 30 knots (23 to 35 mph)<sup>43</sup> with occasional gusts up to 45 knots (52 mph). The second SCA was issued at 8:59 a.m. and warned mariners of winds later that evening originating from the south and ranging from 20 to 30 knots (23-35 mph) with occasional gusts up to 45 knots (52 mph). The third SCA was issued at 2:26 p.m. and warned mariners of winds later that evening originating from the south and ranging from 15 to 25 knots. The last SCA was issued at 5:52 p.m. and warned mariners of winds later that evening originating from the south ranging from 15 to 25 knots with gale force winds gusting from 35 to 40 knots (40 to 46 mph).<sup>44</sup>

Additionally, there are five weather-monitoring devices located within a 4-mile radius of where the VENGEANCE sank. The closest device is maintained by NOAA and located in Oakland's Outer Harbor approximately 0.85 miles from the site of the sinking. On April 6, 2017, the highest average wind speed from that site was recorded at 8:15 p.m. and 9:00 p.m. measuring 35 mph with a maximum wind gust measurement of 49 mph recorded at 8:50 p.m. The next closest device is maintained by NOAA and located in the Port of Oakland approximately 1.2 miles from the site of the sinking. On April 6, 2017, the highest average wind speed from that site was recorded at 8:50 p.m. and 9:00 p.m. measuring 42 mph with a maximum wind gust measurement of 56 mph recorded at 9:05 p.m. The next closest device is maintained by Weather Flow and is located at the Bay Bridge toll plaza approximately 1.9 miles from the site of the sinking. On April 6, 2017, the highest average wind speed from that site was recorded at 8:50 p.m. measuring 25 mph with a maximum wind gust measurement of 40 mph recorded at 8:30 p.m. The next closest device is maintained by Weather Flow and is located on Treasure Island approximately 2.4 miles from the sight of the sinking. On April 6, 2017, the highest average wind speed from that site was recorded at 8:25 p.m. measuring 47 mph with a maximum wind gust measurement of 50 mph recorded at 8:30 p.m. The last device is maintained by Weather Flow and is located in Alameda approximately 4 miles from the sight of the sinking. On April 6, 2017, the highest average wind speed from that site was recorded at 8:15 p.m. and 9:00 p.m. measuring 35 mph with a maximum wind gust measurement of 49 mph recorded at 8:50 p.m.<sup>45</sup>

Based upon the weather data and broadcasts of the NWS, it is clear that the circumstances surrounding this claim were not "unanticipated" in character as required by OPA's act of God defense. The NWS issued SCAs to mariners in the San Francisco Bay for areas south of the Bay Bridge throughout the day on April 6, 2017, warning mariners of winds from the south ranging from 23 to 35 mph with gusts up to 52 mph. With the exception of a 56 mph gust of wind measured at the Port of Oakland weather monitoring device at 9:05 p.m. which was a 3 second burst of wind and only 4 mph over the NWS warnings, all of the winds associated with the weather event of April 6, 2017, in and around a 4 miles radius surrounding the site of the VENGEANCE sinking were accurately predicted and broadcast by the NWS throughout the day.

---

<sup>43</sup> A knot of speed is converted to miles per hour (mph) by multiplying the measurement by 1.15078.

<sup>44</sup> PowerPoint of Mr. [REDACTED], Senior Meteorologist, Weather Flow, Inc. provided to the NPFC via email on February 22, 2019, slide 10.

<sup>45</sup> PowerPoint of Mr. [REDACTED], Senior Meteorologist, Weather Flow, Inc. provided to the NPFC via email on February 22, 2019, slide 4.



As such, the Claimants assertion that there were no mariner warnings issued that would have advised Vortex to take additional precautions is without merit.

In an effort to better understand Vortex's safety management procedures regarding weather, the NPFC requested documentation of Vortex's safety management system.<sup>46</sup> In response, the Claimants provided a copy of the Vortex Marine Construction Health, Safety and Environment Program (HSE).<sup>47</sup> The HSE contains procedures that requires copies of all weather reports and forecasts to be passed to the Barge Superintendent and Barge Captain immediately upon receipt and to post those weather reports and forecasts in the control tower, bridge or equivalent on the barge. Additionally, the HSE states that upon receipt of deteriorating weather conditions, the Barge Superintendent and Barge Captain will follow their procedures for down weather criteria. Those procedures states that in accordance with international marine custom and for the purpose of indemnity, the decision to take measures for the safety of the barge or vessel must normally be issued by the Barge Superintendent and after arriving at the decision, the Barge Superintendent will consult with the Barge Captain, taking into account all of the factors presented by the Barge Captain in relation to the operations of the barge.<sup>48</sup>

When questioned about Vortex's compliance with their HSE in regards to weather and down weather criteria and procedure for this incident, the Claimant responded that the section of HSE regarding weather procedures "was written at a time when technology and human interaction with technology was not as advanced as it was in April 2017".<sup>49</sup> Vortex stated that [given the advances since the HSE was written] it became the practice of Vortex and its employees to monitor weather reports through cell phone based applications....<sup>50</sup> NPFC expresses doubt about the accuracy of this response. The procedures that formed the basis of the NPFC questions to Vortex came directly out of Vortex's HSE Manual in which each page contains a revision date of August 6, 2018, which is over a year *after* the sinking of VENGEANCE.<sup>51</sup> On Page 2 of the HSE, Vortex's owner, [REDACTED] signed a statement as to the importance of following the guidance in the manual. In it he states, "[t]he management of Vortex embraces its health and safety responsibilities, and *agrees to be held accountable* for incorporating the program contained herein into their operations."<sup>52</sup> While as Vortex admits, it may have become the practice of Vortex and its employees to monitor the storm through cell-phone based applications, doing so violated the very terms of the company's Manual to which the owner himself agrees to be held accountable for incorporating.

When questioned about who served as Barge Superintendent and Barge Captain on April 6, 2017, the Claimants stated that the VENGEANCE did not have a Barge Superintendent as its operations over the BART did not involve dredging and that Mr. [REDACTED], the crane

---

<sup>46</sup> Email from Mr. [REDACTED] to Claimant dated November 15, 2018.

<sup>47</sup> Provided as an attachment to an email from Nicoletti Hornig and Sweeney to Mr. [REDACTED] dated February 7, 2019.

<sup>48</sup> Vortex Marine Construction Health, Safety and Environment Program Manual Section 3.0 and 3.1 revised August 6, 2018, page 8.

<sup>49</sup> Enclosure to letter from Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor Pollution Insurance dated February 26, 2019, response to question 1.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Vortex Marine Construction Health, Safety and Environment Program Manual revised August 6, 2018, page 2.

operator aboard the VENGEANCE served as Barge Captain.<sup>53</sup> When questioned about who monitored the weather on April 6, 2017, the Claimants stated that the Barge Captain [REDACTED], Dive Supervisor Mr. [REDACTED] and Vortex owner, Mr. [REDACTED] regularly monitored the weather forecasts.<sup>54</sup> When questioned about alternate berths available to the VENGEANCE in the event of heavy weather, the Claimants provided a copy of a rental agreement between Bay Ship & Yacht and Vortex, which documented the rental of 150 feet of pier space at the Treasure Island facility.<sup>55</sup> Lastly, when questioned about who made the decision to leave the VENGEANCE anchored over the BART on April 6, 2017, the Claimants stated that it was the decision of Mr. [REDACTED], owner of the Vortex/VENGEANCE to leave the VENGEANCE anchored in place over the BART,<sup>56</sup> after consultations with skilled mariners and Vortex employees.<sup>57</sup>

The NPFC contacted Mr. [REDACTED], Captain of the tug LAGUNA for his recollection of the weather related events of April 6, 2017. Captain [REDACTED] is a Coast Guard-licensed tugboat captain who was hired by Vortex Marine to operate the Vortex tug LAGUNA for a 6-week period while the VENGEANCE was anchored over the BART in San Francisco Bay. Captain [REDACTED] stated that his responsibilities as Captain of the LAGUNA included transporting the crew to the VENGEANCE in the morning, tending the VENGEANCE by tying up near the bow of the barge throughout the workday and then transporting the crew back to shore at the end of the workday. Regarding the weather of April 6, 2017, Captain [REDACTED] recalled being very concerned over the incoming weather. Specifically, he thought that Vortex was going to remove the crew from the VENGEANCE at 12:00 p.m. because of impending weather, but later found out that someone “from management” made the decision to leave the crew onboard until at least 3:30 p.m. Captain [REDACTED] also stated that he voiced his concerns about the incoming weather and his recommendations to several different people to move the VENGEANCE from its anchored position over the BART to its rented berth at Treasure Island. Specifically, he recalled expressing his concerns over the weather and recommendations to move the barge to the Dive Supervisor and Barge Captain/Supervisor [REDACTED]. However, he stated that his concerns over the weather and recommendations to move the barge were ignored and a decision was made to leave the VENGEANCE anchored and unattended over the BART.<sup>58</sup>

The NPFC also contacted Warden (b) (4) [REDACTED], CA Fish & Wildlife. Warden (b) (4) [REDACTED] responded to the sinking and subsequent oil spill and discussed the events of the casualty with Captain [REDACTED]. According to Warden (b) (4) [REDACTED], Captain [REDACTED] told him that he had real concerns over the pending weather on April 6, 2017, and that he had relayed those concerns and

---

<sup>53</sup> Enclosure to letter from Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor Pollution Insurance dated February 26, 2019, response to questions 1 and 2.

<sup>54</sup> Enclosure to letter from Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor Pollution Insurance dated February 26, 2019, response to question 1.

<sup>55</sup> Enclosure to letter provided by Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor pollution Insurance dated February 26, 2019, response to question 4 – Copy of 2017 Wharfage at Treasure Island between Bay Ship & Yacht and Vortex Marine Construction dated March 16, 2017 for pier availability from March 29, 2017 through April 28, 2017.

<sup>56</sup> Enclosure to letter provided by Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor Pollution Insurance dated February 26, 2019, response to question 3.

<sup>57</sup> Enclosure to letter provided by Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor Pollution Insurance dated January 15, 2019, response to question 21.

<sup>58</sup> Summary of conversation between Captain [REDACTED] and Mr. [REDACTED], NPFC dated February 8, 2019.

his recommendation to bring the VENGEANCE to shore to the supervisors on the VENGEANCE but that his concerns of severe weather and recommendation to bring the VENGEANCE to shore had been dismissed.<sup>59</sup>

The NPFC also communicated with Mr. [REDACTED], a Vortex diver onboard the VENGEANCE to discuss his recollection of weather related events of April 6, 2017. Mr. [REDACTED] stated that there had been numerous discussions between himself and other members of the crew on the VENGEANCE on April 6, 2017, about the impending weather and their recommendations to bring the VENGEANCE to shore but that their concerns over the weather and recommendations to bring the barge into shore were dismissed.<sup>60</sup>

The NPFC contacted Mr. [REDACTED], Vortex Dive Supervisor onboard the VENGEANCE to discuss his recollection of weather related events of April 6, 2017. Mr. [REDACTED] stated that both he and Barge Captain/Supervisor [REDACTED] closely monitored the weather throughout that day on April 6, 2017, with the use of cell phones and a radio maintained by Mr. [REDACTED]. He stated that both he and Mr. [REDACTED] considered Captain [REDACTED] weather concerns but decided to leave the VENGEANCE anchored over the BART based upon the available weather reports obtained through their phone and from the radio of Mr. [REDACTED].<sup>61</sup>

The NPFC also contacted Mr. [REDACTED], Vortex Barge Captain/Supervisor and Crane Operator to discuss his recollection of the weather related events of April 6, 2017. Mr. [REDACTED] stated that he was not the Barge Supervisor on April 6, 2017, but instead only served as the vessel's crane operator. When asked about the weather of April 6, 2017, he stated that he always relied heavily on the opinion of the tugboat captain (in this case, it would have been Captain [REDACTED]) as the tugboat captain had access to weather updates and would inform him as needed. During the conversation, the NPFC told Mr. [REDACTED] that it had previously spoken with Captain [REDACTED], captain of the tug LAGUNA and that Captain [REDACTED] claimed that he had expressed his concerns over the pending weather with personnel from the VENGEANCE. The NPFC relayed to Mr. [REDACTED] that Captain [REDACTED] recalled having conversations with both Mr. [REDACTED] and the Dive Supervisor over his weather concerns and desire to move the VENGEANCE from anchorage into the previously reserved Treasure Island berth but that his concerns and recommendations to move the VENGEANCE had been dismissed. Mr. [REDACTED] stated that he did not recall any conversations with Captain [REDACTED] but insisted that he would have moved the VENGEANCE if Captain [REDACTED] had truly been concerned. He stated that he had discussed the pending weather with Mr. [REDACTED], and the decision to leave the VENGEANCE at anchor was made by Mr. [REDACTED].<sup>62</sup>

It is clear that the circumstances surrounding this OPA incident claim were not “inevitable” in character as required by OPA’s act of God as the sinking of the VENGEANCE could have been easily avoided. Vortex had secured a rental berth at the Bay Ship & Yacht wharfage at

---

<sup>59</sup> Summary of conversation between Warden (b) (4), CA F&W and Mr. [REDACTED], NPFC dated February 19, 2019.

<sup>60</sup> Summary of conversation between Mr. [REDACTED], Vortex diver and Mr. [REDACTED], NPFC dated March 4, 2019.

<sup>61</sup> Summary of conversation between Mr. [REDACTED], Vortex Dive Supervisor and Mr. [REDACTED], NPFC dated February 8, 2019.

<sup>62</sup> Summary of conversation between Mr. [REDACTED], Vortex Barge Captain/Crane Operator and Mr. [REDACTED], NPFC dated February 8, 2019.

Treasure Island but failed to move the VENGEANCE from anchorage based upon the questionable recommendations of Mr. [REDACTED] who was identified by Vortex as the VENGEANCE Barge Captain, but stated to the NPFC that his only role on the barge was that of crane operator. Mr. [REDACTED]'s recollection of weather events on April 6, 2017, is as confusing as his role on the VENGEANCE as he claimed that he relied upon the Captain of the tug for his weather reports but he couldn't recall the weather concerns and recommendations to move the VENGEANCE from anchor from either Captain [REDACTED] or any other members of the crew. Mr. [REDACTED] also states that he would have surely moved the VENGEANCE from anchor if the Captain of the tug had expressed concerns over the weather but he failed to do so. Dive Supervisor [REDACTED] clearly recalled the weather concerns of Captain [REDACTED] but both Mr. [REDACTED] and Mr. [REDACTED] dismissed the Captain's concerns and recommendations as Captain [REDACTED] was described as different and had weird ideas. Captain [REDACTED] was a Coast Guard-licensed captain, skilled mariner and Vortex employee who had real concerns over the weather and safety of the VENGEANCE but his recommendations were dismissed by the two persons for whom Mr. [REDACTED] relied upon for recommendations on the weather and the safety of the VENGEANCE. Additionally, if Mr. [REDACTED] had followed the Vortex weather safety requirements as documented in the Vortex Marine Construction Health, Safety and Environment Program and had obtained and posted copies of the NWS SCAs in the control tower, bridge or equivalent on the VENGEANCE as required, he may have better heeded the warnings of Captain [REDACTED] and Vortex crew instead of recommending to leave the VENGEANCE at anchor.

Lastly, the NPFC reviewed NWS weather data and the issuance of SCAs during the months of March and April for calendar years 2015, 2016, and 2017. That review revealed the NWS had issued a total of 39 SCAs on 14 separate dates that warned mariners in the San Francisco Bay area of high winds originating from a southerly direction.<sup>63</sup> Based upon the review of weather data and issuance of SCAs by the NWS for similar time periods leading up to and during the year of the VENGEANCE sinking, it became apparent that the circumstances surrounding this OPA incident claim were not "unusual" in character as required by OPA's act of God definition.

The RP has not established by a preponderance of the evidence that the discharge of oil and the resulting damages were caused solely by an act of God. In fact, the RP by its actions (or inactions) appear to have significantly contributed to this incident. The claimants' request for a complete defense based on an act of God must be denied.

### ***B. Limitation of Liability***

Claimants alternatively assert that they are entitled to limited liability<sup>64</sup> under 33 U.S.C. § 2704 (a). If successful, the responsible party would be permitted to recover from the OSLTF its compensable removal costs that exceeded its OPA limit of liability. As the responsible party, the claimants are only allowed to seek removal costs only if it can demonstrate that it is entitled to limited liability under 33 U.S.C. §§ 2704 (a) and 2712 (b).<sup>65</sup> In support of its claim to limited liability, claimants assert the same positions as they presented in their act of God claim, then summarily state that "there are no indications" that the incident was proximately caused by

---

<sup>63</sup> Spreadsheet of weather data provided by Mr. [REDACTED], WeatherFlow dated March 1, 2019.

<sup>64</sup> Limited liability would allow the responsible party to recover from the OSLTF its compensable removal costs that exceeded its OPA limit of liability.

<sup>65</sup> See, 33 U.S.C. § 2708.

Vortex as outlined in 33 U.S.C. 2704(c)(1). The NPFC disagrees. Having reviewed the applicable law and the information provided by the claimants in support of their claim submission as well as information obtained independently by the NPFC, the incident appears to have been proximately caused by the gross negligence of the responsible party or an employee of the responsible party, the requirements of 33 U.S.C. §§ 2704(c)(1) and 2712(b) have not been met and the claim for limited liability must be denied.

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."<sup>66</sup> This is not an impossible burden to carry.<sup>67</sup> A responsible party will meet its burden by showing that its 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.<sup>68</sup>

---

<sup>66</sup> *United States v. Grogg*, 9 F.2d 424, 426 (W.D. Va. 1925).

<sup>67</sup> The treatise, *Corpus Juris Secundum*, 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)(internal footnotes omitted)(emphasis added).

<sup>68</sup> *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).

The terms “gross negligence” and “willful misconduct” have distinct meanings under the OPA.<sup>69</sup> The NPFC defines those terms as follows:<sup>70</sup>

**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” when there is an extreme departure from the care required under the circumstances or a failure to exercise even slight care.<sup>71</sup>

---

<sup>69</sup> 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 (5<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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.”).

<sup>70</sup> *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).

<sup>71</sup> 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

**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.<sup>72</sup>

---

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 (10<sup>th</sup> 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 (5<sup>th</sup> 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.”).

<sup>72</sup> When deciding whether “willful 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, reprinted in 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 (2<sup>nd</sup> 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 probable 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 U.S. 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 (1<sup>st</sup> Cir. 2011), *quoting Safeco*, 551 U.S. 47, 57 (2007)(“In a series of decisions beginning in 1985, the Supreme Court has 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.”).

The discussion above regarding Vortex's actions (or inactions) with respect to the weather is incorporated herein. Additionally, in an effort to better understand the events surrounding the sinking and condition of the barge prior to sinking, the NPFC reviewed and questioned several personnel, including the claimants (Vortex) about the integrity of the VENGEANCE's compartments, voids and bulkheads on April 6, 2017. The claimants responded that all of compartments, voids and bulkheads were in good condition with full integrity on April 6, 2017. The claimants were also questioned if the voids and compartments, to include starboard void 10-38 were closed when the crew of the VENGEANCE departed on April 6, 2017, and to describe the condition of all hatches covering those compartments and voids. The claimants responded that all voids and compartments were covered whenever Vortex vessels were left unattended, including the VENGEANCE on April 6, 2017, and that all voids and compartments were staunch and in good condition on April 6, 2017. Lastly, the claimants were questioned about the cause of the VENGEANCE's sinking. The claimants stated that large gusts of wind and associated surface currents applied to the large windage of the crane house and boom as well as resisting anchor force may have been sufficient to heel the barge over to such a degree that the working deck became awash and seawater was able to enter covered hatches causing the vessel to sink.<sup>73</sup>

Specifically, it is likely that VENGEANCE's starboard void 10-38 was holed resulting in the permanent installation of a submersible pump with a heavy gauge extension cord that extended from the void and out onto the main deck of the barge which prevented the proper closure of the watertight deck hatch covering starboard void 10-38 on April 6, 2017. As such, starboard void 10-38 was open and vulnerable to the wind driven waves associated with the weather event of April 6, 2017, which resulted in the down flooding of starboard void 10-38. Corrosion (wastage) to watertight bulkheads within starboard void 10-38 and other watertight spaces allowed continued flooding into compartments of the barge, which ultimately led to the sinking of the VENGEANCE as described below.

Regarding the probability that starboard void 10-38 was holed on April 6, 2017, the NPFC contacted Warden (b) (4), CA Fish & Wildlife who had attended the VENGEANCE at Lind Marine in Alameda, CA, as part of his response to the sinking and discharge of oil from the VENGEANCE. The NPFC questioned Warden (b) (4) about his response and the condition of the barge post-casualty. Warden (b) (4) stated that while inspecting the salvaged barge, he observed and photographed a small blue submersible pump shackled to the bulkhead near the ladder inside of starboard void 10-38.<sup>74</sup> He also stated that he observed and photographed a large, heavy gauge extension cord connected to the submersible pump, which extended outside of the void and onto the main deck of the VENGEANCE.<sup>75</sup> Lastly, Warden (b) (4) stated he observed several voids that were missing watertight deck hatches. Warden (b) (4) provided a picture of starboard void 10-38 absent its watertight deck hatch cover and referenced a picture

---

<sup>73</sup> Enclosure to letter provided by Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor Pollution Insurance dated January 15, 2019, pages 6 and 10.

<sup>74</sup> Photograph Images 1431 and 1432 provided by Warden (b) (4) of a small blue submersible pump with an orange discharge hose shackled to the bulkhead near the ladder in starboard void 10-38 dated July 19, 2017.

<sup>75</sup> Photograph Image 1433 and 1438 provided by Warden (b) (4) of a heavy gauge extension cord leading from starboard void 10-38 onto the main deck of the VENGEANCE dated July 19, 2017.



from his F&W Report of the VENGEANCE immediately after capsizing but before sinking that showed a watertight deck hatch missing from a void on the port aft section of the barge.<sup>76,77,78</sup>

The NPFC also contacted Mr. [REDACTED], Vortex deck engineer, regarding the condition of the voids on the VENGEANCE prior to sinking. Mr. [REDACTED] stated that he had worked on the VENGEANCE for four to five days leading up to, and including, April 6, 2017. He stated that he was aware of a void on the starboard side of the barge that was equipped with a submersible pump, as he had seen the extension cord from the pump leading up from the open void and leading to a portable generator on the deck of the VENGEANCE. He stated that there was an anchor scow tied to the starboard side of the VENGEANCE and he would have to travel to and from the anchor scow for equipment and he passed this open void on numerous occasions. He also stated that on at least one occasion, he was asked to fuel the portable generator that powered the submersible pump to keep the generator running.<sup>79</sup>

The NPFC also discussed the condition of the voids with Captain [REDACTED], Captain of the Tug LAGUNA. Captain [REDACTED] is a licensed tugboat captain who was hired by Vortex Marine to operate their tug LAGUNA for a 6-week period while the VENGEANCE worked on the BART in San Francisco harbor. Captain [REDACTED] stated that the LAGUNA would tend the VENGEANCE by tying up near the bow of the barge throughout the workday and that he would frequently leave the LAGUNA and walk the VENGEANCE's deck throughout the workday. It was during those walkarounds that he became aware of an open hatch on the starboard side of the barge. He stated that he had looked into the open void on several occasions and noted that there was submersible pump being used in the void.<sup>80</sup>

The NPFC also contacted Mr. [REDACTED], a Vortex diver regarding the condition of the voids on the VENGEANCE prior to sinking. Mr. [REDACTED] stated that he had worked on the VENGEANCE from March 29 - April 6, 2017. He stated that he was aware of a void on the starboard side of the barge forward of the crane and winch that was equipped with a submersible pump as he had plugged the extension cord from the submersible pump into the portable generator on the deck of the VENGEANCE on numerous occasions between March 29 - April 6, 2017.<sup>81</sup>

The NPFC also contacted Mr. [REDACTED], Global Diving, who served as the Salvage Master and oversaw the salvage of the VENGEANCE. Mr. [REDACTED] was questioned whether the blue submersible pump found shackled to the bulkhead of starboard void 10-38 could have been

---

<sup>76</sup> Summary of conversation between Warden (b) (4), CA F&W and Mr. [REDACTED], NPFC dated February 19, 2019.

<sup>77</sup> Photograph Image 1435 provided by Warden (b) (4) of starboard void 10-38 with its hatch missing dated July 19, 2017.

<sup>78</sup> Photograph of the VENGEANCE partially submerged with a watertight hatch missing from a void on the port aft portion of the barge dated April 17, 2017, included as part of CA F&W Report Citation #AD2074947 page 28 as provided by Claimant as part of the Consent Decree between Vortex Marine and the State of California filed June 29, 2018.

<sup>79</sup> Summary of conversation between Mr. [REDACTED], Vortex deck engineer and Mr. [REDACTED], NPFC dated February 8, 2019.

<sup>80</sup> Summary of conversation between Captain [REDACTED] and Mr. [REDACTED], NPFC dated February 8, 2019.

<sup>81</sup> Summary of conversation between Mr. [REDACTED], Vortex diver and Mr. [REDACTED], NPFC dated March 4, 2019.

a Global pump that was used during the salvage and dewatering of the void. Mr. ██████ denied that possibility. He stated that Global personnel had only used 3” trash pumps to dewater the spaces within the VENGEANCE and that all Global equipment to include all pumps and extension cords were properly recovered and accounted for at the conclusion of the salvage.<sup>82</sup>

Vortex was questioned about the condition of all voids including starboard void 10-38 onboard the VENGEANCE prior to the sinking on April 6, 2017. Vortex was also questioned about the post casualty discovery of a submersible pump shackled to a bulkhead in starboard void 10-38 and the heavy gauge extension cord leading from the pump and onto the deck of the VENGEANCE. Vortex responded by stating that there was no leak in any compartments or voids, including starboard void 10-38 and that while Vortex was aware of communications surrounding a submersible pump found shackled in starboard void 10-38, they were unaware of why the pump was found in that space.<sup>83</sup> However, in an email between Mr. ██████, the owner of Vortex and Mr. ██████, Sector San Francisco, Mr. ██████ stated that during the investigation into the sinking of the VENGEANCE, he was made aware of an electric pump that had been placed into a void of the VENGEANCE due to a “trickle” and that it was his understanding from his crew that this was a temporary remedy until an interior patch was installed. Mr. ██████ went on to state in the email that he assumed the pump was placed in the void when the leak had been identified and that his crew had intended to repair the hull at their soonest opportunity.<sup>84</sup>

It is likely that the submersible pump permanently installed in starboard void 10-38 was installed as a remedy for continual water leaking into the void. The failure of the VENGEANCE crew to inform their management of a leak into starboard void 10-38 violates the Vortex Marine Construction Health, Safety and Environment Program Manual, which requires all Vortex employees to report any material damage affecting the seaworthiness or efficiency of the vessel.<sup>85</sup> As such, the actions of Vortex management, operator and/or person in charge of the VENGEANCE were negligent for failing to report the ingress of water into starboard void 10-38 which could have contributed to the sinking of the barge.

Regarding the probability that the watertight deck hatch covering starboard void 10-38 was not properly secured or was missing on April 6, 2017, the NPFC relies on their interview with Warden (b) (4) in which he stated that he had observed several voids missing their watertight deck hatches and provided a picture of starboard void 10-38 missing its watertight deck hatch cover.<sup>86</sup> He also stated that he had observed and photographed a large, heavy gauge extension

---

<sup>82</sup> Summary of conversation between Mr. ██████, Global Diving and Mr. ██████, NPFC dated February 8, 2019.

<sup>83</sup> Enclosure to letter provided by Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor Pollution Insurance dated January 15, 2019, page 5.

<sup>84</sup> Email between Mr. ██████, Vortex Marine and CWO3 ██████, CG Sector San Francisco dated January 30, 2018.

<sup>85</sup> Vortex Marine Construction Health, Safety and Environment Program Section 2.1 (a)(1) revised August 6, 2018, page 7. In addition, based on its severity, the failure to report the starboard void leak might have also been considered a violation of the Federal Regulations which requires the operator or person in charge of any vessel to notify the nearest CG Sector or Officer in Charge, Marine Inspections of an occurrence materially and adversely affecting the vessel’s seaworthiness or fitness for service or route, including but not limited to flooding and a hazardous condition. 46 CFR 4.05-1 (a)(4) and 46 CFR 4.05-1(b).

<sup>86</sup> Photograph Image 1435 provided by Warden (b) (4) of starboard void 10-38 with its hatch missing dated July 19, 2017.

cord connected to the submersible pump, which extended outside of the void and onto the main deck of the VENGEANCE.<sup>87</sup> Lastly, he referenced a picture from his report of the VENGEANCE immediately after capsizing but before sinking, that showed a watertight deck hatch missing from a void on the port aft section of the barge.<sup>88,89</sup>

The NPFC contacted Mr. [REDACTED], Global Diving to inquire if any of the watertight deck hatches were removed during the salvage of the VENGEANCE. Mr. [REDACTED] stated that to his knowledge, none of the watertight deck hatches from the VENGEANCE were removed during salvage as it was not necessary for the salvage nor would it be safe for a diver to enter a 20" hatch opening while wearing an air tank. He stated that Global personnel did cut holes into the bow rake and on the top of other compartments to add an I-beam used to support the salvage operations but that did not involve the removal of any watertight deck hatches. He further stated that many of the spaces on the starboard side of the VENGEANCE had been filled with mud after the casualty. After par buckling the barge, but before its salvage, Global Diving employed an "Air Lifting" technique to remove the majority of the mud from these spaces. Air lifting was described as dropping a 12" steel pipe with air fittings into a space and pumping air into the pipe, which created a powerful vacuum that removed the mud from the contaminated space. Mr. [REDACTED] stated that they had cut "large windows" into the deck of the barge to perform air lifting but that none of the 20" watertight deck hatches would have been removed, as they would have been too tight for the 12' steel pipe and air fittings. When asked why some of the spaces on the starboard side of the barge had filled with mud, Mr. [REDACTED] stated that as the VENGEANCE was lying with its starboard side in the mud, there would have been an accumulation of mud in any void if the watertight deck hatches were missing.<sup>90,91,92</sup> When Mr. [REDACTED] was asked if he remembered any of the watertight deck hatches as being missing from the VENGEANCE as the barge was lifted out of the water, he stated that he had observed several watertight deck hatches missing from the voids as the barge was being salvaged. Lastly, when asked if Global personnel would have removed any of the watertight deck hatches post salvage, he stated that Global employees would have removed all watertight deck hatches upon raising the VENGEANCE for dewatering purposes but was certain that all of the watertight deck hatches would have been replaced immediately upon completion of dewatering as they wouldn't have wanted any hatches free on the deck of the salvage barge during transport.<sup>93</sup>

---

<sup>87</sup> Photograph Image 1433 and 1438 provided by Warden (b) (4) of a heavy gauge extension cord leading from starboard void 10-38 onto the main deck of the VENGEANCE dated July 19, 2017.

<sup>88</sup> Summary of conversation between Warden (b) (4), CA F&W and Mr. [REDACTED], NPFC dated February 19, 2019.

<sup>89</sup> Photograph of the VENGEANCE partially submerged with a watertight hatch missing from a void on the port aft portion of the barge dated April 17, 2017, included as part of CA F&W Report Citation #AD2074947 page 28 as provided by Claimant as part of the Consent Decree between Vortex Marine and the State of California filed June 29, 2018.

<sup>90</sup> Photograph Image 1431 provided by Warden (b) (4) showing the heavy accumulation of mud surrounding the blue submersible pump located in the VENGEANCE starboard void 10-38 dated July 19, 2017.

<sup>91</sup> Photograph Image 1433 provided by Warden (b) (4) showing the heavy accumulation of mud along the longitudinal supports located in the VENGEANCE starboard void 10-38 dated July 19, 2017.

<sup>92</sup> Photograph Image 1434 provided by Warden (b) (4) showing the heavy accumulation of mud surrounding the orange discharge hose leading from the blue submersible pump located in the VENGEANCE starboard void 10-38 dated July 19, 2017.

<sup>93</sup> Summary of conversations between Mr. [REDACTED], Global Diving and Mr. [REDACTED], NPFC dated February 8, 2019.

The NPFC also contacted Mr. [REDACTED], Vortex diver regarding the starboard void forward of the crane and winch onboard the VENGEANCE prior to its sinking. Specifically, the NPFC asked Mr. [REDACTED] if that void had been covered with a watertight deck hatch on April 6, 2017, before the crew left the VENGEANCE for the day. Mr. [REDACTED] stated that the void had probably been left open as the hatch for that void was normally missing.<sup>94</sup>

It is likely that the watertight deck hatch on starboard void 10-38 was not properly secured or missing on April 6, 2017. The facts reveal that the hatch cover was not properly installed or attached in order to accommodate the extension cord that ran from the deck down into the void to supply power to the blue submersible pump permanently installed in the void. This conclusion is supported by the post casualty photographs of starboard void 10-38 missing its watertight deck hatch and the interviews of salvors who attest to not removing any watertight deck hatches during salvage but only to removing watertight deck hatches for dewatering but then replacing the hatches upon completion to avoid hazards on the salvage barge. It is further supported by the statement of a VENGEANCE crewmember who attests to seeing the starboard void forward of the crane and winch normally open or missing its hatch cover and the heavy presence of mud inside starboard void 10-38 post casualty suggesting the absence of a watertight deck hatch cover while the VENGEANCE was sunk in 5'2" of mud on her starboard side. Lastly, the photos of the VENGEANCE taken at low tide<sup>95</sup> and during par buckling operations<sup>96</sup> document several watertight deck hatches missing from other voids on the aft side of the VENGEANCE, suggesting that watertight deck hatches other than the watertight deck hatch covering starboard void 10-38 were missing or not properly secured on April 6, 2017. The failure of the VENGEANCE crew to properly secure watertight deck hatches prior to leaving the barge violates the Vortex Marine Construction Health, Safety and Environment Program Manual that requires all Vortex employees to ensure that all watertight compartments and tanks are secure in the event of heavy weather.<sup>97</sup> As such, the actions of Vortex management, operator and/or person in charge of the VENGEANCE were negligent in failing to secure the watertight deck hatch over starboard void 10-38 and other voids on April 6, 2017, and could have contributed to the sinking of the barge.

Regarding the probability that there was corrosion (wastage) to watertight bulkheads within starboard void 10-38 and other water tight spaces, the NPFC relied upon post casualty photographs of the VENGEANCE. Specifically, the NPFC relied upon a photograph that documented wastage on a watertight bulkhead that separated starboard void 10-38 and the forepeak<sup>98</sup> and a photograph documenting wastage on a watertight bulkhead located within the

---

<sup>94</sup> Summary of conversation between Mr. [REDACTED], Vortex diver and Mr. [REDACTED], NPFC dated March 4, 2019.

<sup>95</sup> Photograph of the VENGEANCE partially submerged with a watertight hatch missing from a void on the port aft portion of the barge dated April 17, 2017, included as part of CA F&W Report Citation #AD2074947 page 28 as provided by Claimant as part of the Consent Decree between Vortex Marine and the State of California filed June 29, 2018.

<sup>96</sup> Photograph dated May 7, 2017, of the VENGEANCE during par buckling operations that show three watertight deck hatches missing from voids on the port side of barge provided by CWO3 [REDACTED], CG Sector San Francisco, on March 4, 2019.

<sup>97</sup> Vortex Marine Construction Health, Safety and Environment Program Section 17.1 (a)(1) revised August 6, 2018, page 23.

<sup>98</sup> Photograph dated July 20, 2017, of corrosion (wastage) to the watertight bulkhead separating starboard void 10-38 and the forepeak of the VENGEANCE provided by CWO3 [REDACTED], CG Sector San Francisco, on March 4, 2019.

forepeak that separated watertight voids within the forepeak.<sup>99</sup> According to the claimants, the last dry dock survey of the VENGEANCE was conducted in 2005 but that Vortex was not in possession of that survey.<sup>100</sup> Additionally, Vortex stated that before any voyage and again upon arrival to their destination, Vortex personnel would inspect all compartments and voids for leaks and to check watertight integrity. The records of those inspections were not provided to the NPFC.<sup>101</sup> It is evident from the photographs obtained post-casualty that the wastage to the watertight bulkhead between starboard void 10-38 and the forepeak and the wastage to the watertight bulkheads within the forepeak was significant and should have been observed, documented and repaired by Vortex personnel in order to maintain watertight integrity of the barge. It is likely that down flooding into open starboard void 10-38 also flooded the forepeak through wastage between a watertight bulkhead separating starboard void 10-38 and the forepeak and further wastage between watertight bulkheads within the forepeak.

A prudent mariner understands the importance of maintaining watertight integrity on a vessel and the fact that the claimants assert to having inspected the voids on the VENGEANCE for watertight integrity before departure and upon arrival to San Francisco Bay questions the thoroughness of their inspection procedures and likely resulted in undetected degradation to watertight integrity of the vessel that significantly contributed to the sinking of the barge.

A series of negligent actions can constitute gross negligence.<sup>102</sup> Because of the actions (or inactions) of Vortex and/or its employees to take the necessary precautions against the forecasted weather of April 6, 2017; and based on the significant information regarding starboard void 10-38, the missing or inoperable watertight hatch, and the watertight integrity of the vessel coupled with the actions (or inactions) by Vortex and/or its employees as detailed above, the incident appears to be proximately caused by the gross negligence of the responsible party or an employee of the responsible party. As such, the requirements of 33 U.S.C. §§ 2704(c)(1) and 2712(b) have not been met. The claimants are not entitled to limited liability, and their claim therefor, must be denied.

---

<sup>99</sup> Photograph dated July 20, 2017, of corrosion (wastage) on a watertight bulkhead located within the forepeak that separated another watertight void within the forepeak of the VENGEANCE provided by CWO3 [REDACTED], CG Sector San Francisco, on March 4, 2019.

<sup>100</sup> Enclosure to letter provided by Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor Pollution Insurance dated January 15, 2019, page 1.

<sup>101</sup> Enclosure to letter provided by Nicoletti Hornig & Sweeney, attorneys representing Safe Harbor Pollution Insurance dated January 15, 2019, pages 4-5.

<sup>102</sup> See e.g., *In re Oil Spill by Oil Rig Deepwater Horizon*, 21 F.Supp.3d 657, 742 (E.D. La. 2014)(citing 57A Am.Jur.2d *Negligence* § 229 (“[S]everal connected or successive acts of simple negligence may support a finding of gross negligence, due to their compounding effect.”); see also, *McPhearson v. Sullivan*, 463 S.W.2d 174 (Tex.1971). (Several connected acts of simple negligence may support a ... finding of gross negligence); accord, *Burk Royalty v. Wells*, 616 S.W. 2d 911, 922 (Tex. 1981)(“The existence of gross negligence need not rest upon a single act or omission but may result from a combination of negligent acts or omissions, and many circumstances and elements may be considered in determining whether an act constitutes gross negligence.”); *Maddelena v. Southern Bell Tel.* 382 So. 2d 1246 (Fla. 4<sup>th</sup> DCA 1980)(“The compounding effect of the successive acts may, in fact, amount to gross negligence.”. For completeness, the NPFC also reviewed this claim under the analysis provided in a recent Administrative Procedure Act case. Even under the interpretation of gross negligence suggested by the court in that case, this claim still fails. *Water Quality Insurance Syndicate v. United States*, 225 F. Supp. 3d 41, 75 (D.D.C. 2016).

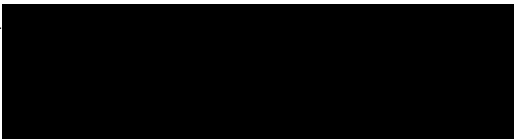
**IV. CONCLUSION:**

The claimants have not demonstrated that they are entitled to a complete defense under an act of God theory, nor have they demonstrated they are entitled to a limitation of liability

Because the weather event of April 6, 2017, was not unanticipated, inevitable or unusual, and because this incident was not solely caused by an act of God, that claim fails. Additionally, the NPFC has determined that the claimants are not entitled to limited liability as the evidence in this case indicates that the incident was proximately caused by the gross negligence of the responsible party and/or its employees.

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, the claim is denied.

Claim Supervisor:



Date of Supervisor's review: *April 29, 2019*

Supervisor Action: *Denied*