CLAIM DETERMINATION

Claim Number:	A17013-0001
Claimant:	Safe Harbor Pollution Insurance and Interested Underwriters
Type of Claimant:	RP
Type of Claim:	Sole Cause Act of God/Limit of Liability
Claim Manager:	(b) (6), (b)
Amount Requested:	$1,929,684.17
Action Taken:	Denied on Reconsideration

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.[1] 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.[2] Sector San Francisco deemed the salvage operations and pollution removal activities complete on July 19, 2017.[3] 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.[4] 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.[5] The NPFC thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and concluded that the Claimants failed to demonstrate 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.[6] On May 31, 2019, the Claimants timely sought reconsideration of the NPFC's determination specific to their entitlement to a limitation of liability only and requested additional time to submit evidence in support of their request.[7] The NPFC responded by drafting and executing a Tolling Agreement with the Claimants that provided additional time as requested.[8] On October 30, 2019, the Claimants timely submitted evidence in support of their request for reconsideration.[9]

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[1] National Response Center Report #1175062, reported on April 7, 2017.
[2] Coast Guard Pollution Report Message (CG POLREP) 1 DTG R121957Z Apr 17.
[3] CG POLREP 6 DTG R192010Z Jul 17.
[4] 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.
[5] Original claim submission dated October 15, 2018, page 2.
[6] NPFC initial determination dated April 29, 2019.
[7] Claimants letter to the NPFC dated May 31, 2019.
[8] Tolling agreement between Safe Harbor Pollution Insurance (Requestor) and the NPFC dated June 27, 2019.
[9] Claimants letter dated October 30, 2019, with evidence in support of their request for reconsideration.

Requests for reconsideration are considered *de novo*. The NPFC has thoroughly reviewed the original claim, the request for reconsideration, all information provided by the Claimants, information it obtained independently, and the applicable law and regulations. Upon reconsideration, the NPFC concludes that the facts established by the administrative record support denying this claim under the Oil Pollution Act (OPA). For the reasons outlined in the original determination and the reasons below, this claim must be denied.

I. CLAIM HISTORY

On October 15, 2018, the Claimants 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.[10] The NPFC thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and concluded that the Claimants failed to demonstrate 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.[11] The NPFC's initial determination is hereby incorporated by reference.

II. REQUEST FOR RECONSIDERATION

The regulations implementing OPA require requests for reconsideration of an initial determination to be in writing and include the factual or legal grounds for the relief requested, along with any additional support for the claim.[12] The claimant has the burden of providing all evidence, information, and documentation deemed necessary by NPFC's Director to support the claim.[13] When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including any new information provided by the Claimant in support of its request for reconsideration. The written decision by the NPFC is final.[14]

On May 31, 2019, Claimants timely requested reconsideration of the NPFC's initial determination specific to their entitlement to a limitation of liability only and requested additional time to submit evidence in support of their request.[15] In response, the NPFC drafted and executed a Tolling Agreement with the Claimants that provided additional time as requested.[16] On October 30, 2019, the Claimants timely submitted evidence in support of their request for reconsideration.[17] In their request for reconsideration, the Claimants assert that under the OPA, the "general rule" is that a responsible party is entitled to limit its liability to compensable removal and damages that exceed its statutory limit of liability and that once the Claimants have demonstrated that they incurred removal costs on behalf of the responsible party

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[10] Original claim submission, page 2.
[11] NPFC initial determination dated April 29, 2019.
[12] 33 C.F.R. 136.115(d).
[13] 33 C.F.R. 136.105(a).
[14] *Id*.
[15] Claimants letter dated May 31, 2019.
[16] Tolling agreement between Safe Harbor Pollution Insurance and the NPFC dated June 27, 2019.
[17] Claimants letter dated October 30, 2019. The exhibits provided in support of the Claimant's request for reconsideration included Exhibit A - Dooley SeaWeather Analysis dated October 25, 2019; Exhibit B- Fisher Maritime Consulting Group Report dated October 29, 2019; and Exhibit C - Martin Ottoway Marine Consultants Report dated October 25, 2019 (hereinafter "Exhibit A", "Exhibit B" and "Exhibit C", accordingly).

in excess of the statutory limit, OPA places the burden on the NPFC to establish that an exception to limitation of liability applies.[18] Additionally, the Claimants assert that the NPFC's definition of gross negligence under the OPA is in error as the NPFC's definition fails to capture the notion of deliberateness and conscious disregard of apparent risks suggested by 'misconduct' that is 'reckless, willful, or wanton.[19] Further, the Claimants assert that Vortex's response to the forecasted weather was reasonable under the circumstances[20] and that disagreements over pending weather between Vortex management and the Captain of the Tug LAGUNA and VENGEANCE crew were not negligent.[21] The Claimants also assert that the condition of the VENGEANCE was not the cause of the sinking[22] and assert that corrosion identified onboard the VENGEANCE was not significant.[23] Lastly, the Claimants assert that anchor roll with water washing onto the deck of the barge caused the VENGEANCE to sink[24] and that flooding into starboard void 10-38 and adjoining spaces was not sufficient to sink the VENGEANCE.[25]

III. __LEGAL ANALYSIS:__

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.[26] 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 CFR Part 136. 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. 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.

The regulations implementing OPA require requests for reconsideration of an initial determination to be in writing and include the factual or legal grounds for the relief requested, along with any additional support for the claim in accordance with the governing claims regulations at 33 CFR 136.115(d). In their request for reconsideration, Claimants did not contest

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[18] Claimants letters dated May 31, 2019, page 2, and October 30, 2019, page 2.
[19] Claimants letters dated May 31, 2019, pages 5-6, and October 30, 2019, pages 2-4.
[20] Claimants letters dated May 31, 2019, pages 3-4, and October 30, 2019, pages 4-5.
[21] Claimants letter dated October 30, 2019, page 5.
[22] Claimants letters dated May 31, 2019, pages 4-5, and October 30, 2019, pages 5-6.
[23] Claimants letter dated October 30, 2019, page 6.
[24] *Id*.
[25] Claimants letter dated May 31, 2019, page 4.
[26] The court in *Bean Dredging, LLC v. United States*, 773 F. Supp. 2d 63, 75 (D.D.C. 2011), characterized the informal adjudication 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 . . . ."

NPFC's denial of the act of God defense in the original determination. Accordingly, this determination is focused on the application of the limitation of liability provision in OPA.

B. *Responsible Parties Bear the Burden of Proving Entitlement to OSLTF Reimbursement*

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.[27] Further, a responsible party's liability is strict, joint, and several.[28] In the case of a vessel, the responsible party includes any person owning, operating or demise chartering the vessel.[29] 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."[30] 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 ***<u>only if the responsible party demonstrates</u>*** 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 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.[31] Therefore, just like any other claimant, a responsible party must carry its burden of proving an entitlement under the OPA before receiving reimbursement from the OSLTF.[32]

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[27] 33 U.S.C. § 2702(a).
[28] *See*, H.R. Conf. Rep. No. 101-653, 102, *reprinted in* 1990 U.S.C.C.A.N. 779 (August 1, 1990).
[29] 33 U.S.C. § 2701(32)(A).
[30] *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.).
[31] *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).
[32] 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:

In order to be entitled to OSLTF compensation udder 33 U.S.C. § 2708, a responsible party must first prove an entitlement to limited liability under 33 U.S.C. § 2704. Under 33 U.S.C. § 2704 (c), the OPA does not permit limited liability when the incident was proximately caused by the gross negligence, willful misconduct, or violation of a federal regulation by the responsible party or its agent or employee. Consequently, a responsible party must show that these three exceptions to limited liability 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."[33] This is not an impossible burden to carry. [34] 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 the exceptions to limited liability in 33 U.S.C. § 2704 (c) probably do not apply. For example, the NPFC does not require detailed proof of compliance with federal regulations that have no apparent connection to

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> 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 ***<u>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</u>***. 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, *reprinted in* 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 it is the responsible party, not the NPFC, which has the burden to prove it [or in the case of an insurance company-claimant, its ensured] is entitled to a limitation of liability when making a claim against the OSLTF under 33 U.S.C. § 2708).

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

[34] 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 **<u>burden of evidence is sustained by proof which renders probable the existence of the negative fact</u>**, nothing in the nature of a demonstration being required.
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> 31A <u>*C.J.S. Evidence*</u> § 200 (2015)(internal footnotes omitted)(emphasis added).

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.[35]

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 VENGEANCE, Vortex had unique access to the facts surrounding this incident because it was in control of the operations resulting in the discharge and had dominion and control over the discharging vessel. This unique access to the vessel makes Claimants particularly well-positioned to actually know or discover the facts surrounding the incident. Placing the burden of proof on a responsible party and its insurers seeking compensation under 33 U.S.C. § 2708 incentivizes full disclosure of all relevant facts by Claimants who should be in the best position to know or learn what happened during an OPA incident.

In this case, Claimants argue that all responsible parties are generally entitled to compensation under 33 U.S.C. § 2708 (a) upon proving that their total removal costs exceed the liability limits in 33 U.S.C. § 2704. For all the reasons described above, the NPFC respectfully disagrees with Claimants' characterization of how OPA allocates the burden of proving an OSLTF claim by a responsible party. In order to receive OSLTF reimbursement, a responsible party must carry its burden of proving an entitlement to limited liability.

Notwithstanding any disagreement between NPFC and Claimants, OPA's allocation of the burden of proof for responsible party claims does not control the outcome of this determination. OPA's allocation of the burden of proof for OSLTF claims will only be controlling when the evidence is in equipoise or fails to establish an element of the claim by a preponderance of the evidence.[36] In support of their argument, Claimants rely on *Great American Ins. Co. v. U.S.*, 55 Supp. 3d 1053 (N.D. Ill. 2014). However, that decision is distinguishable from this claim because the proximate cause of the incident in *Great American* was unknown. NPFC denied the *Great American* claim under the theory the claimants failed to carry their burden of proving the incident's proximate cause, not because the known facts established gross negligence or willful

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[35] *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).
[36] *Medina v. California*, 505 U.S. 437, 449 (1992)("… the allocation of the burden of proof to the defendant will affect competency determinations only in a narrow class of cases where the evidence is in equipoise; that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent."). *See also*, *Simmons v. Blodgett*, 110 F.3d 39, 42 (9th Cir. 1997)("Well-settled principles guide the fact-finding process, including the rule that when the scales are evenly balanced and the relevant evidence leaves a trier of fact in 'equipoise,' the party with the burden of proof loses."); *Maher Terminals, Inc. v. Director, Office of Workers*, 992 F.2d 1277, 1284 (3rd Cir. 1993)('The ALJ found that the evidence was in equipoise, which by definition, means that the claimant did not carry her burden of proof by a preponderance of the evidence."); *Ford Motor Co. v. Coleman*, 402 F.Supp. 475 (D.D.C. 1975)("By 'evidence in equipoise' we mean that on some item that is material for the Government to establish, as the party with the burden of proof, the court cannot fairly say whether the item or its contrary is the more probable.").

misconduct on behalf of the responsible party. In contrast to *Great American*, as explained in more detail below, the NPFC determines that the preponderance of credible evidence in this claim establishes that Vortex's gross negligence proximately caused this incident. Because the administrative record for this claim affirmatively shows gross negligence by a responsible party or its employee, this claim must be denied regardless of how OPA allocates the burden of proving a responsible party's entitlement to OSLTF compensation.

C. *Limitation of Liability*

Claimants on reconsideration continue to assert that they are entitled to limited liability under 33 U.S.C. §§ 2708 and 2704(a). If successful, Claimants would be reimbursed from the OSLTF their compensable removal costs that exceed the OPA limit of liability.[37] As the insurers for the responsible party, Claimants are subrogated to the responsible party's rights and can only recover if Vortex is entitled to limited liability. Having reviewed the applicable law and the information provided by Claimants in support of their initial claim, their request for reconsideration as well as information independently obtained, NPFC determines that the incident was proximately caused by the gross negligence[38] of the responsible party or an employee of the responsible party. As a result, the requirements of 33 U.S.C. §§ 2708 (a), 2704(c)(1), and 2712(b) have not been met and the claim for limited liability must be denied.

As previously noted, OPA's liability limits will not apply when the OPA incident was proximately caused by a responsible party's "willful misconduct" or "gross negligence".[39] Similarly, the OSLTF cannot reimburse any claim if the incident, removal costs, or damages were caused by the "gross negligence" or "willful misconduct" of the claimant. The NPFC defines those terms as follows:

> ***<u>Gross Negligence:</u>*** 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.

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[37] 33 U.S.C. §2708 (b)

[38] A series of negligent acts can constitute gross negligence. *See e.g.*, *In re Oil Spill by Oil Rig Deepwater Horizon,* 21 F.Supp.3d 657, 742 (E.D. La. 2014)("[S]everal connected or successive acts of simple negligence may support a finding of gross negligence, due to their compounding effect."); *see also, In re Oil Spill by Oil Rig Deepwater Horizon,* 2014 WL 12773902 (November 13, 2014)(Order denying plaintiff's motion to amend and alter the court's finding "that BP committed a series of negligent acts that, together, amounted to gross negligence."). *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. 4th 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).

[39] 33 U.S.C. § 2704 (c)(1)(A).

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. [40]

The structure of OPA's liability and compensation regime supports giving distinct meanings to the terms "gross negligence" and "willful misconduct". 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".[41]

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).[42]

Gross negligence is less culpable behavior than recklessness or willful misconduct. In *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668 (D.C. Cir. 1996) the court instructed "[t]here is a continuum that runs from simple negligence to intentional misconduct. Recklessness, or reckless disregard, lies between gross negligence and intentional harm." Similarly, after determining that "gross negligence" and "willful misconduct" should be interpreted the same under the OPA as under the FWPCA, the court in *In re Oil Spill*, 21 F.Supp.3d 657, 734 (E.D. La. 2014) concluded that the "prevailing notion is that gross negligence differs from ordinary negligence in terms of degree, and both are different in kind

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[40] *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).

[41] *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.").

[42] *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.").

from reckless, wanton, and willful misconduct." One well-respected legal encyclopedia describes the distinction between gross negligence and willful misconduct with the following:

> 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**. Gross negligence involves a failure to act under circumstances that indicates a passive and indifferent attitude toward the welfare of others. Negative in nature, it implies an absence of care. Willful misconduct, on the other hand, requires an intentional act or an intentional failure to act, either with knowledge that serious injury is a probable result, or with a positive and active disregard for the consequences. Similarly, willful and wanton negligence is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his or her knowledge of the existing circumstances and conditions, that his or her conduct probably will cause injury to another. Accordingly, **willful or wanton negligence has been said to involve a greater degree of negligence than gross negligence, particularly in the sense that in the former an actual or constructive consciousness of the danger involved is an essential ingredient of the act or omission.**[43]

Because OPA does not define the terms "gross negligence" or "willful misconduct", they should be given their plain and ordinary meaning. "Gross negligence" should be 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.[44] 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. [45] 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

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[43] 57A Am.Jur. Negligence §231 (2nd ed. Supp. 2020)(footnotes omitted)(emphasis added).

[44] *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").

[45] *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…"); *Judicial Council of California Civil Jury Instructions (CACI)*, 425 "Gross Negligence" Explained (December 2015)("Gross negligence is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others. A person can be grossly negligent by acting or failing to act.").

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.[46]

When deciding whether "willful misconduct" has been established under the OPA, courts have relied upon FWPCA cases analyzing the same issue.[47] 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.[48] 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***.[49] *Id*. (emphasis added).

The test for determining "willful misconduct" under the OPA is an objective test as opposed to a subjective test. A determination of "willful misconduct" 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."[50]

In their Request for Reconsideration, Claimants argue that NPFC incorrectly interprets the term "gross negligence" by not requiring proof of recklessness or willful indifference to the safety of others. In support of this contention, Claimants rely on the decision in *Water Quality Ins. Syndicate v. U.S.*, 225 F.Supp.3d 41 (D.D.C. 2016). After carefully considering that case,

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[46] *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.").

[47] *See generally, Water Quality Ins. Syndicate v. United States*, 522 F.Supp.2d 220, 229-30 (D.D.C. 2007).

[48] *See*, H.R. Conf. Rep. 101-653, *reprinted in* 1990 U.S.C.C.A.N. 779.

[49] *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1162-63 (2nd Cir. 1978)(emphasis added).

[50] *Safeco v. Burr*, 551 U.S. 47, 57 (2007) . *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 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 NPFC respectfully disagrees with the decision. When defining "gross negligence" under the OPA, *Water Quality Ins. Syndicate* relied on a statutory definition in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) at 42 U.S.C. § 9607 (d)(2). That statute provides state and local governments immunity from CERCLA liability when responding to releases of hazardous substances from facilities owned by others unless the damages resulted from the defendants gross negligence or willful misconduct. The law was intended to eliminate a disincentive for governments to respond to emergencies.[51] In contrast, OPA was intended to expand the scope of a responsible party's liability and to increase liability limits.[52] Given the disparity between the purposes for these laws, gross negligence under 42 U.S.C. § 9607 (d)(2) should not control whether a responsible party can receive reimbursement from the OSLTF under the OPA.

Consistent with the above, the standard of care owed by a state or local government responding to hazardous substances released from another person's facility should be very different from the standard of care owed by a responsible party seeking limited liability. This conclusion is reinforced by the placement of the phrase "[f]or the purpose of the preceding sentence" immediately before language defining "gross negligence" in 42 U.S.C. § 9607 (d)(2). The wording and placement of this phrase suggests that the definition was meant to only address states and local governments relying on the statute to avoid CERCLA liability. Furthermore, 42 U.S.C. § 9607 (d)(3) makes it clear that nothing in 42 U.S.C. § 9607 (d)(2) should be construed as altering a responsible party's CERCLA liability. If the definition of gross negligence in 42 U.S.C. § 9607 (d)(2) does not alter a responsible party's CERCLA liability, then the definition should likewise not affect a responsible party's liability under OPA by controlling whether liability will be limited.

Based upon the above, NPFC concludes that establishing "gross negligence" under the OPA does not require proof of recklessness. Instead, proof of recklessness will establish "willful misconduct". NPFC's interpretation recognizes that "gross negligence" and "willful misconduct" are separate terms with distinct meanings. NPFC's interpretation is consistent with judicial interpretations of "willful misconduct" under both the OPA and the FWPCA. "Willful misconduct" does not always require specific intent to harm and can be shown with proof of recklessness. NPFC's interpretation is also consistent with the weight of authority holding that "gross negligence" is a type of behavior that is less culpable than both recklessness and willful misconduct.

IV. ANALYSIS OF CLAIMANTS REQUEST FOR RECONSIDERATION

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. 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.

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[51] H.R. REP. 99-253, 73, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2855.

[52] *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.).

In addition to its analysis in the original determination, NPFC specifically analyzes and addresses the following assertions by the claimants upon reconsideration.

a. Claimants assert that disagreements over pending weather between Vortex management and the Captain of the Tug LAGUNA and VENGEANCE crew were not negligent and that Vortex's response to the forecasted weather was reasonable under the circumstances

The Claimants assert that while the original determination highlights a difference of opinion between Captain (b) (6), (b) and Vortex personnel regarding leaving the VENGEANCE at anchor given the impending weather forecast, a mere difference of opinion between members of a vessel's crew regarding impending weather does not, by itself, establish negligence. Further, Captain (b) (6), (b) admitted that his source for the weather forecast was a local TV news station, which is not the appropriate or prudent source to obtain weather information for the San Francisco Bay.[53]

Claimants further assert that the National Weather Service (NWS) forecast for the night of April 6, 2017, did not adequately advise Vortex of the impending weather, and, in fact, severely under-forecasted actual conditions in San Francisco Bay. Specifically, the official NWS forecast in effect for San Francisco Bay at the time the crew left the barge at 3:30 p.m. on April 6, 2017, was a small craft advisory which forecasted sustained winds of 15 to 25 knots and that it wasn't until 5:49 p.m., that the NWS revised its forecast to advise that gale force conditions were imminent or occurring and that sustained winds could reach 15 to 25 knots with wind gusts reaching 35 to 40 knots. And by 6:58 p.m., sustained winds had reached 30 knots and those winds steadily climbed to reach a peak sustained wind speed of nearly 44 knots at 9:30 p.m.[54]

Lastly, the Claimants state that NWS forecast issued at 2:26 p.m. on April 6, 2017, was the latest information available to Vortex at the time it made the decision to leave the barge at anchor; and the forecast in effect was not sufficient to advise Vortex of impending gale force conditions in San Francisco Bay. They further state that the 2:26 p.m. forecast was a relatively benign forecast which downgraded expected conditions. The claimants assert that although the NWS upgraded the forecast to a gale warning at 5:49 p.m., that forecast indicated that gale conditions were imminent or already occurring. Assuming Vortex was able to mobilize the necessary equipment to address this gale warning at 5:49 p.m., it would have taken at least 2 hours to reach the VENGEANCE and begin the de-anchoring process. At that point, weather conditions had already severely deteriorated, wind speeds had already exceeded the 5:49 p.m. forecast and it would have been far too dangerous to both life and property to perform a de-anchoring operation.[55] Given the weather forecast and actions of other contractors on site, Vortex's decision to leave the VENGEANCE in place was a reasonable decision at the time in consideration of the forecasted weather. Gale conditions are highly rare in San Francisco Bay, and Vortex's reliance on the available NWS weather forecast was reasonable and prudent.[56]

NPFC's Response

[53] Claimants letter dated October 30, 2019, page 5.
[54] Claimants letter dated October 30, 2019, page 4; Exhibit A pages 10-15.
[55] Claimants letter dated October 30, 2019, page 5; Exhibit B pages 7-10.
[56] Claimants letter dated October 30, 2019, page 5.

The NPFC disagrees. The Claimants identified Mr. (b) (6), (b), the VENGEANCE crane operator as the Barge Captain,[57] a claim that Mr. (b) (6), denies. Regardless, Mr. (b) (6), (b) acknowledged providing a recommendation to Mr. (b) (6), (b), owner of the VENGEANCE that afternoon which Mr (b) (6), relied on. The NPFC contacted Mr. (b) (6), to explain how he evaluated incoming weather conditions to form a recommendation. Mr. (b) (6), stated that he always relied heavily on the opinion of the tugboat captain attending the barge as the captain of the tug had access to weather updates and would inform him as needed.[58]

The NPFC then contacted the captain of the attending tug, Captain (b) (6), (b), Captain of the tug LAGUNA. For reference, Captain (b) (6), is a Coast Guard-licensed tugboat captain who was hired by Vortex Marine to operate the Vortex tug LAGUNA while the VENGEANCE was anchored in San Francisco Bay. When questioned about the weather of April 6, 2017, Captain (b) (6), 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 (b) (6), also recalled voicing his concerns about the incoming weather and his recommendations to move the VENGEANCE from its anchored position to its rented berth at Treasure Island to several people onboard the VENGEANCE to include the Dive Supervisor and Mr. (b) (6),. 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.[59]

The conversation between the NPFC and Captain (b) (6), specific to the weather of April 6, 2017, was shared with Mr. (b) (6),. However, contrary to his earlier statement about always relying heavily on the attending tugboat captain, Mr. (b) (6), stated that he didn't recall any conversations with Captain (b) (6), regarding the weather on April 6th, or of the Captain's desire to move the VENGEANCE; but insisted that he would have moved the VENGEANCE if Captain (b) (6), had truly been concerned.[60]

As the statements provided by Captain (b) (6), and Mr. (b) (6), were contradictory, the NPFC contacted the VENGEANCE Dive Supervisor, Mr. (b) (6), (b) for his recollection of conversations or concerns expressed by Captain (b) (6), specific to the weather of April 6, 2017. Mr. (b) (6), stated that he clearly recalled the weather concerns of Captain (b) (6), but stated that both he and Mr. (b) (6), dismissed Captain (b) (6), 's concerns and recommendations Instead, he and Mr. (b) (6), made their decision to leave the VENGEANCE anchored over the BART based upon the available weather reports obtained through their cell phones and Mr. (b) (6), s' radio.[61]

Lastly, the NPFC contacted Mr. (b) (6), (b), a Vortex diver onboard the VENGEANCE to discuss his recollection of the weather related events of April 6, 2017. Mr. (b) (6) stated that there had been numerous discussions between himself and other members of the VENGEANCE crew concerning the impending weather and as a result, they had made a recommendation to bring the

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[57] Claimants letter dated February 26, 2019, responses to questions 1 and 2.

[58] Telephone conversation between Mr. (b) (6), (b), Vortex Barge Captain/Crane Operator and NPFC.

[59] Telephone conversation between Captain (b) (6), (b) and NPFC.

[60] Telephone conversation between Mr. (b) (6), (b) and NPFC.

[61] Telephone conversation between Mr. (b) (6), (b), Vortex Dive Supervisor and NPFC.

VENGEANCE to shore. However, their concerns over the weather and recommendations to bring the barge into shore were dismissed.[62]

The Claimants were asked 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. (b) (6) to leave the VENGEANCE anchored in place,[63] after consultations with "skilled mariners and Vortex employees."[64] A review of the Vortex Marine Construction Health, Safety and Environment Program Manual (HSE) reveals that upon receipt of deteriorating weather conditions, the Barge Superintendent and Barge Captain will follow their procedures for down weather criteria. Those procedures state 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.[65]

The Claimants state that the VENGEANCE did not have a Barge Superintendent on April 6, 2017, as its operations over the BART did not involve dredging.[66] If Mr. (b) (6), (b) was the Barge Captain onboard the VENGEANCE on April 6, 2017, he either failed to recall or purposely ignored the weather warnings and recommendation of Captain (b) (6), (b) and other members of the VENGEANCE all of whom met Mr. (b) (6), (b)s criteria of "skilled mariners and Vortex employees." It is difficult to discern what factors or recommendations were considered by Mr. (b) (6), (b) and later presented to Mr. (b) (6). In the end, it is apparent that Mr. (b) (6), (b)s decision to leave the VENGEANCE anchored in place went against the very advice of some of skilled mariners, including a licensed Captain, and Vortex employees upon whom he said he relied.

Moreover, the Vortex HSE contains procedures that require 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. The HSE also states that upon receipt of deteriorating weather conditions, the Barge Superintendent and Barge Captain will follow their procedures for down weather criteria. Those procedures state 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.[67]

When reviewing the actions of Vortex personnel specific to weather and down weather criteria and procedure for this incident, it is apparent that many of the procedures identified

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[62] Telephone conversation between Mr. (b) (6), (b), Vortex diver and NPFC.
[63] Claimants letter dated February 26, 2019, response to question 3.
[64] Claimants letter dated January 15, 2019, response to question 21.
[65] Vortex Marine Construction Health, Safety and Environment Program Manual (revised August 6, 2018), Section 3.0 and 3.1, page 8.
[66] Claimants letter dated February 26, 2019, response to questions 1 and 2.
[67] Vortex Marine Construction Health, Safety and Environment Program Manual (revised August 6, 2018), Section 3.0 and 3.1, page 8.

within the Vortex HSE were either ignored or disregarded. Specifically, if Mr. (b) (6), (b) was the Barge Captain onboard the VENGEANCE on April 6, 2017, he failed to perform the duties of a Barge Captain for weather and down weather criteria as described within the Vortex HSE as he relied upon alternate applications to monitor weather reports as crew members were allowed to monitor weather conditions by methods of their choice. In addition, Mr. (b) (6), (b) failed to post the 2:32 a.m. or 8:59 a.m. SCAs which 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) in the barge's control tower, bridge or equivalent on the barge which may have better informed Mr. (b) (6), (b) when making decisions about the VENGEANCE specific to the weather.

Conversely, if Mr. (b) (6), (b) was actually *not* the Barge Captain onboard the VENGEANCE on April 6, 2017, then two issues are immediately apparent. The first is that the VENGEANCE did not have an assigned Barge Captain that day as required by the HSE. The second is that Mr. (b) (6), (b) exceeded his authority in his discussions with Mr. (b) (6) regarding the movement of the VENGEANCE in accordance with the HSE.

As to the weather conditions on April 6, 2017, the NWS issued small craft advisories (SCAs) to the mariners in the San Francisco Bay for areas south of the Bay Bridge in 6-hour intervals throughout the day for projected high winds. The first SCA issued at 2:32 a.m. warned mariners of winds later that evening originating from the south and ranging from 20 to 30 knots (23 to 35 mph)[68] 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).[69] Such conditions are not rare to the San Francisco Bay as the NWS had previously 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 during the months of March and April for calendar years 2015, 2016, and 2017.[70]

Additionally, as stated above, the Vortex HSE contains detailed procedures about incoming weather. When the Claimants were questioned about Vortex's compliance with their HSE in regards to weather and down weather criteria and procedure for this incident, they stated 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".[71] 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...."[72] 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 in which each page contains a revision date of August 6, 2018, which is over a year *after* the sinking of VENGEANCE.[73] On Page 2 of the HSE, Vortex's owner, Mr. (b) (6), (b) 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

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[68] A knot of speed is converted to miles per hour (mph) by multiplying the measurement by 1.15078.
[69] Information confirmed by Mr (b) (6), (b), Senior Meteorologist, Weather Flow, Inc. Weather Flow works with CG Sector San Francisco to provide weather information for the region.
[70] Spreadsheet of weather data provided by WeatherFlow.
[71] Claimants letter dated February 26, 2019, response to question 1.
[72] *Id*.
[73] *Id*.

health and safety responsibilities, and *agrees to be held accountable* for incorporating the program contained herein into their operations."[74] 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.

b. Claimants assert that the condition of the VENGEANCE was not the cause of the sinking

The Claimants assert that the VENGEANCE was used as a work barge for a project reconstructing the tunnel for the BART system and as such, it is not unusual for these work barges to suffer some type of damage during transit or during operations and for there to be some minor leakage due to small cracks in steel plating. As such, the use of a submersible pump to address a small leak is not unusual nor does it affect the fitness or efficiency of the vessel.[75] Additionally, general maritime law does not require that Vortex maintain a work barge that is perfect in all respects but rather a work barge that is reasonably fit for her intended service. The use of a small submersible pump to remedy an inflow of a minor amount of water does render a vessel unseaworthy. Nor is the use of a pump to treat a "trickle" into a void a negligent act. Most vessels take on water in some capacity and there is no indication that the VENGEANCE had difficulty making the journey from Vortex's facility to the BART Tunnel nor is there any indication that the VENGEANCE was not reasonably fit to withstand the normal, forecasted weather conditions on April 6, 2017.[76]

NPFC's Response

Contrary to what is being asserted by the Claimants in their request for reconsideration, the NPFC's identification of a trickle of water within starboard void 10-38 was not done in an attempt to classify the VENGEANCE as unseaworthy. Rather, the NPFC identified the trickle of water into starboard void 10-38 to substantiate the existence of a submersible pump equipped with an extension cord that lead out of the void and onto the deck of the barge which prevented the closure of starboard hatch 10-38 on April 6, 2017.[77] And it now appears that the Claimants, who had previously denied the existence of a leak within starboard void 10-38 and the existence of a pump to remedy the leak, are portraying the leak and need for a pump to address the leak as common practice for a work barge similar to the VENGEANCE. This admission by the Claimants substantiates the NPFC's findings that a pump was in place and the pump's extension cord prevented the closure of starboard hatch 10-38. In further support of these findings, the NPFC refers to the post casualty photographs of a blue submersible pump shackled to a ladder within starboard void 10-38 with a heavy gauge extension cord extending out of the void and onto the deck of the barge;[78] pictures of starboard void 10-38 with a heavy gauge extension cord

[74] Vortex Marine Construction Health, Safety and Environment Program Manual (revised August 6, 2018), page 2.
[75] Claimants letter dated October 30, 2019, page 5; Exhibit B, page 11.
[76] Claimants letter dated October 30, 2019, pages 6-7.
[77] As documented within the NPFC's initial determination dated April 29, 2019, Vortex employees were aware of a trickle of water into starboard void 10-38 but failed to report the leak to Vortex management. 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.
[78] Photograph Images 1431 and 1432 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.

leading from the void and onto the deck and missing its weathertight deck hatch;[79] and interviews of response personnel, VENGEANCE crewmembers and salvors who were involved in the operation and salvage of the vessel and attest to the absence of weathertight hatches.[80] Lastly, photographs of the VENGEANCE taken at low tide and during par buckling operations documenting several weathertight deck hatches missing from other voids on the aft side of the VENGEANCE,[81] indicating that weathertight deck hatches other than the weathertight deck hatch covering starboard void 10-38 were also missing or not properly secured on April 6, 2017.

c. *Claimants assert that the corrosion identified onboard the VENGEANCE was not significant*

The Claimants also assert that the NPFC's finding that there was significant corrosion in starboard void 10- 38 and adjoining areas is not supported by the evidence. As detailed in an expert report provided by the Claimants, the photographs utilized by the NPFC, as well as photographs provided by Vortex only show localized corrosion to the bulkheads.[82] Photographs and ultrasonic measurements taken post-casualty show a lack of any significant corrosion and sufficient steel in the barge's hull and bulkhead stiffeners.[83] In summary, the Claimants assert that there is no evidence to suggest that significant corrosion existed which allowed water to migrate through the barge and ultimately sink.[84]

NPFC's Response

The Claimants again misconstrue the findings of the NPFC in its original determination. Specifically, the NPFC finds that the localized corrosion in watertight bulkheads as identified in post casualty photographic evidence[85] and acknowledged by the Claimants within their request for reconsideration was contributory to the sinking of the VENGEANCE. In making this finding, the NPFC relied upon a photograph that documented wastage to a watertight bulkhead that separated starboard void 10-38 from the forepeak. This photograph documents a hole at the base of the bulkhead separating the starboard void 10-38 and the forepeak that compromised the integrity of the void and enabled water to flow freely from the void and into the forepeak.[86] The NPFC also relied upon a photograph documenting wastage to a watertight bulkhead located

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[79]Photograph Image 1433 and 1438 of a heavy gauge extension cord leading from starboard void 10-38 onto the main deck of the VENGEANCE dated July 19, 2017. *See also* photograph Image 1435 of starboard void 10-38 with its hatch missing dated July 19, 2017.
[80] Telephone conversations with Warden (b) (6), (b) , California Fish and Wildlife and other individuals. *See*, *supra*, notes 42, 43, 45, and 46.
[81] Photograph of the VENGEANCE partially submerged with a weathertight hatch missing from a void on the port aft portion of the barge dated April 17, 2017. *See also* photograph of the VENGEANCE during par buckling operations that show three weathertight deck hatches missing from voids on the port side of barge dated May 7, 2017.
[82] Exhibit C, page 3.
[83] Exhibit B, page 13.
[84] Claimants letter dated October 30, 2019, page 6.
[85] Photograph of corrosion (wastage) on a watertight bulkhead located within the forepeak that separated another watertight void within the forepeak of the VENGEANCE dated July 20, 2017. *See also,* photograph of corrosion (wastage) to the watertight bulkhead separating starboard void 10-38 and the forepeak of the VENGEANCE dated July 20, 2017.
[86] Photograph of corrosion (wastage) to the watertight bulkhead separating starboard void 10-38 and the forepeak of the VENGEANCE dated July 20, 2017.

within the forepeak that separated watertight voids within the forepeak. This photograph documents a separation of the bulkhead from the deck in a watertight bulkhead separating a void within the forepeak that compromised the integrity of the void and enabled water to flow freely within the forepeak.[87] As a matter of explanation, vessels are designed with watertight compartments to create buoyancy and keep the vessel afloat. Removing the watertight integrity of a compartment allows for multi-compartment flooding during a casualty and compromises the ability of the vessel to remain afloat. To be clear, the NPFC doesn't contest the results of the ultrasonic measurements taken post-casualty documenting sufficient steel in the barge's hull and bulkhead stiffeners but refers instead to the loss of watertight integrity within starboard void 10-38 and the forepeak due to the localized corrosion as documented in photographic evidence and acknowledged by the Claimants upon reconsideration. The Claimants were asked if the watertight compartments within the VENGEANCE were ever checked and if so, could they provide a copy of those inspections. The Claimants responded 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. However, their inspection records were never provided to the NPFC.[88] The localized corrosion to the watertight bulkhead between starboard void 10-38 and the forepeak and the localized corrosion to the watertight bulkheads within the forepeak should have been observed, documented and repaired by Vortex personnel prior to the casualty in an effort to maintain watertight integrity of the VENGEANCE.

d. Claimants assert that flooding into starboard void 10-38 and adjoining spaces was not sufficient to sink the VENGEANCE

The Claimants assert that while the NPFC's determination indicates that it was "likely" that flooding into open void 10-38 spread to other areas which may have caused the sinking, this analysis does not take into account the design of the VENGEANCE and its ability to withstand such an event.[89]

NPFC's Response

The NPFC disagrees and relies upon the post-sinking analyses of the VENGEANCE done by the Marine Safety Center (MSC) - Salvage Engineering Response Team (SERT).

On November 12, 2018, MSC provided an evaluation of the sinking of the VENGEANCE, considering the barge's initial condition, most notably initial drafts, list and trim. Additionally, their analysis incorporated specific down flooding points (openings in the watertight envelope) through which water could enter the hull, and openings in bulkheads providing progressive flooding paths between compartments.[90] The analysis concluded that, for the range of specified initial drafts, trim and list, and with given openings in the hull and between compartments, in conjunction with wind-driven waves, initial flooding into Starboard Void 10-38 through the open deck access would likely have resulted in progressive flooding into the forepeak. Subsequent additional flooding through the unprotected deck opening into the Crew Work Area and

[87] Photograph of corrosion (wastage) on a watertight bulkhead located within the forepeak that separated another watertight void within the forepeak of the VENGEANCE dated July 20, 2017.
[88] Claimants letter dated January 15, 2019, pages 4-5.
[89] Claimants letter dated May 31, 2019, page 4.
[90] USCG Marine Safety Center Analysis dated November 12, 2018, page 1.

progressive flooding to the adjacent voids (Starboard Void 38-62 and Void 62-90) would likely have resulted in the barge rolling onto her starboard side and sinking.[91]

As additional information specific to the salvage of the VENGEANCE was provided by the Claimants or obtained independently, it was noted that MSC's original evaluation identified two main deck openings that served as potential down flooding points, specifically starboard 10-38 and the crew work area now exposed due to the loss of its covering (doghouse) during the storm. However, as the salvage reports documented the removal of the doghouse during salvage operations, the NPFC asked the MSC to re-evaluate its initial analysis assuming, this time, that the doghouse that covered the crew work area on the VENGEANCE was in place during sinking and weathertight; conditions that would have been the most favorable based on the claimants' position.[92] The second MSC analysis concluded that even if the doghouse was in place and was weathertight, the VENGEANCE still would have sunk as the initial evaluation outlined given the weather conditions, and conditions of the barge.[93]

e. *Claimants assert that anchor roll with water washing onto the deck of the barge caused the VENGEANCE to sink*

In its reconsideration request, the claimants posit an explanation of how VENGEANCE sank on April 6, 2017, based on an expert's report. The report explained that the ingress of water into the VENGEANCE resulted from the barge listing and rolling on its anchor due to unanticipated, unusual and severe weather conditions on the night of April 6, 2017.[94] The report asserts that the same storm that sank the VENGEANCE also caused substantial damage to the Bay Area[95] and that given the fact that the VENGEANCE was only partially submerged on the morning on April 7, 2017, (which suggested a very slow below-deck water ingress), it is more likely than not that the barge was caused to roll on its anchor, which allowed water to enter weathertight but not watertight compartments which caused the VENGEANCE to sink.[96]

NPFC's Response

The NPFC disagrees and relies upon the post-sinking analyses of the VENGEANCE done by the MSC-SERT.

NPFC provided the MSC-SERT the Claimants' explanation of how the VENGEANCE sank on April 6, 2017, and was asked to comment on the validity of its explanation. MSC disagreed with the claimant's position, stating:

> that the forces applied from 45 knots of wind from the port side of VENGEANCE would only result in small additional heel angles of 0.5 to 1 degree which corresponds to a freeboard change of two to six inches. This change in freeboard has a negligible effect on the amount of water running up on deck from waves. In

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[91] USCG Marine Safety Center Analysis dated November 12, 2018, page 11.
[92] Claimants assert that all hatches onboard the VENGEANCE were weathertight. See Claimant's letter dated October 30, 2019, page 6; Exhibit B, page 13 and Exhibit C page 5.
[93] Email from USCG Marine Safety Center to the NPFC dated April 26, 2019.
[94] Exhibit B, page 13; Exhibit C, page 5.
[95] Exhibit A, page 21.
[96] Claimants letter dated October 30, 2019, page 6; Exhibit B, page 14; Exhibit C, page 5.

> fact, the direction of the wind and wind-driven waves would be the same causing the vessel to heel away from the wind and actually increasing freeboard on the side encountering wind driven waves. Additionally, weathertight openings prevent water from penetrating into the hull as long as the openings are not exposed to a static head pressure of water. In all conditions analyzed, the minimum freeboard of the VENGEANCE was between 2 to 4.5 feet. While it is possible that wind-driven waves could wash over the deck, it is unlikely that any significant static head pressure from these waves would be encountered by the deck fittings; weathertight fittings should prevent water from entering the hull. As such, it is [our] opinion that VENGEANCE would have remained afloat if all openings were closed and weathertight while the vessel encountered a 45 knot wind."[97]

The NPFC also disagrees with the Claimants' statement that the VENGEANCE was only partially submerged on the morning on April 7, 2017, suggesting a very slow ingress of water below-decks. Global Diving personnel responded at first light, during low tide, and obtained a photograph of the VENGEANCE which showed the port side of the barge exposed approximately 2' above the waterline. Notably, based on the estimated water depths, Global personnel determined that the barge was sitting on her starboard side and resting on the seafloor.[98]

V. FINDINGS

The NPFC has carefully analyzed and weighed the materials provided by the Claimants along with the information it obtained independently. Based on that information and as discussed in detail above, determines the following finding of fact:

1. Vortex relied upon alternate applications to monitor weather reports which was a violation of Vortex's HSE.
2. Vortex failed to post the 2:32 a.m. or 8:59 a.m. SCAs in the barge's control tower, bridge or equivalent on the barge which was a violation of Vortex's HSE.
3. Vortex ignored the weather warnings and recommendations of Captain (b) (6), (b) and some of the members of the VENGEANCE crew, all of whom were "skilled mariners and Vortex employees" and should have been relied upon according to Mr. (b) (6), (b), regarding the decision to move or leave the VENGEANCE at anchor.
4. The crew of the VENGEANCE failed to properly secure weathertight deck hatches prior to leaving the barge unattended.
5. The failure of the crew to properly secure the hatches violated 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.
6. There was a submersible pump located within starboard void 10-38 that was permanently shackled to a ladder within the void and equipped with a heavy duty extension cord that extended outside of the void and onto the deck of the VENGEANCE.

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[97] Email from USCG Marine Safety Center to NPFC dated January 23, 2020.
[98] Global Diving Salvage Plan – Par buckling Phase dated April 17, 2017, page 3.

7. The heavy duty extension cord extending from starboard void 10-38 and onto the deck of the VENGEANCE prevented the proper closure of the void's weathertight hatch on April 6, 2017.
8. Localized corrosion to the watertight bulkhead between starboard void 10-38 and the forepeak and the localized corrosion to the watertight bulkheads within the forepeak allowed water to flow freely from starboard void 10-38 and the forepeak.
9. That given the specifications of the barge and the given openings in the hull and between compartments, in conjunction with wind-driven waves, the initial flooding into Starboard Void 10-38 through the open deck access would likely have resulted in progressive flooding into the forepeak; and that subsequent additional flooding through the weathertight doghouse deck opening into the Crew Work Area and progressive flooding to the adjacent voids (Starboard Void 38-62 and Void 62-90) would likely have resulted in the barge rolling onto her starboard side and sinking.
10. That the results about the cause of the flooding and sinking of the VENGEANCE are not altered even assuming the doghouse was in place and weathertight.
11. The ingress of water into VENGEANCE did not result from the barge listing and rolling on its anchor due to unanticipated, unusual and severe weather conditions on the night of April 6, 2017.

Notwithstanding the fact the NPFC was not provided sufficient information to determine whether or nor Mr. (b) (6), (b) was actually the Barge Captain on the day of the incident, as stated by the claimants and denied by Mr. (b) (6), (b), it finds in the alternative, the following:

1. If Mr. (b) (6), (b) was the Barge Captain onboard the VENGEANCE on April 6, 2017, he either failed to recall or purposely ignored the weather warnings and recommendation of Captain (b) (6), (b) and other members of the VENGEANCE. He also failed to post the 2:32 a.m. or 8:59 a.m. SCAs which 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) in the barge's control tower, bridge or equivalent on the barge which was a violation of Vortex's HSE.

2. If Mr. (b) (6), (b) was not the Barge Captain onboard the VENGEANCE on April 6, 2017, the VENGEANCE did not have an assigned Barge Captain that day as required by the HSE. Additionally, Mr. (b) (6), (b) would have exceeded his authority in his discussions with Mr. (b) (6) regarding the movement of the VENGEANCE.

V. CONCLUSION

Perhaps one could argue, that taken individually, each of the errors above amount to no more than an act of negligence. However, each of them contributed to the sinking of the barge and as a collective, they constitute gross negligence.[99] The failure of Vortex and/or its employees to take the necessary precautions against the forecasted weather (or to staff their barges with qualified personnel); the failure to follow the weather procedures identified within their operating manual; and the failure to listen to Vortex skilled mariners and employees who were concerned about the

[99] Because the facts of this case establish that the incident was proximately caused by Vortex's gross negligence and OPA does not require proof of recklessness to establish gross negligence, the NPFC does not reach the issue of whether Vortex's misconduct also amounts to recklessness.

incoming weather and recommended bringing the VENGEANCE into the dock were all negligent and contributory to the sinking of the VENGEANCE. In addition, the failure of Vortex and/or its employees to properly secure the weathertight hatch covering starboard void 10-38 on April 6, 2017; the practice of Vortex to not secure all weathertight hatches on the VENGEANCE before leaving the barge unattended; and ignoring the corrosion to bulkheads within watertight spaces that compromised the watertight integrity of the barge were also negligent and contributory to the sinking of the VENGEANCE. In consideration of the above, this incident was 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 and the claimants are not entitled to limited liability, and their claim therefore, must be denied.

(b) (6), (b)(b) (6), (b)
(b) (6), (b)(b) (6), (b)

Claim Supervisor: (b) (6), (b)

Date of Supervisor's review: ***June 30, 2020***

Supervisor Action: ***Denied upon reconsideration***