CLAIM DETERMINATION

Claim Number:	919031-0001
Claimant:	Great American Insurance Group (GAIC) / Tishman Speyer Properties
Type of Claimant:	RP
Type of Claim:	Limit of Liability
Claim Manager:	[redacted]
Amount Requested:	$572,071.94
Action Taken:	Approved

***EXECUTIVE SUMMARY*:**

On February 14, 2017, the S.S. PETER STUYVESANT ("STUYVESANT") discharged oil into the Boston Harbor, a navigable waterway of the United States. At the time of discharge, the STUYVESANT was lying on the seafloor adjacent to Pier 4, Boston, MA.[1] Tishman Speyer Properties, Inc. ("Tishman"), through its subsidiaries 130 Northern Avenue, LLC and 140 Northern Avenue, LLC, responded and hired Cyn Environmental Services to clean up the oil spill.[2] The CG National Response Center ("NRC") was notified of the incident.[3] U.S. Coast Guard Sector Boston ("CG Sector Boston") also responded to oversee the pollution removal efforts of Tishman.[4] A dive survey of the vessel identified the source of the discharge as residual oil present in the boilers or fuel lines that fed the boilers on-board the STUYVESANT.[5] Due to the condition of the STUYVESANT and the consistency of the oil, a decision was made to remove the STUYVESANT in its entirety to mitigate any further threat of oil pollution into Boston Harbor.[6]

On May 5, 2017, CG Sector Boston personnel confirmed that the STUYVESANT had been successfully removed from the Boston Harbor and no further instances of oil discharge were observed originating from the site.[7] Tishman incurred all of the costs associated with the response and submitted a claim to Great American Insurance Company ("GAIC") for reimbursement. GAIC reimbursed 130 Northern Avenue, LLC, and 140 Northern Avenue, LLC, through Tishman[8] pursuant to the terms of their insurance policy excluding a $50,000 deductible. As a result, this claim was submitted by GAIC as well as 130 Northern Avenue, LLC and 140 Northern Avenue, LLC, through Tishman, (collectively referred to as "Claimants") requesting compensation for removal costs that exceed the applicable limit of liability. Claimants contend that they are entitled to receive $572,071.94.[9] After thoroughly reviewing the documentation

[1] Haley Aldrich Incident Response Action Plan (IRA) dated April 13, 2017, page 3. Haley Aldrich is a Licensed Site Professional hired by Pier 4 Marina Owner, LLC, c/o Tishman Speyer to oversee the response and submit the IRA to the Massachusetts Department of Environmental Protection.
[2] Claim submission dated August 7, 2019. *See also* CG POLREP 1 DTG R231605Z Feb 17.
[3] National Response Center Report #1171066, reported on February 14, 2017 by Haley Aldrich, on behalf of Tishman Speyer.
[4] CG POLREP 1 DTG R231605Z Feb 17.
[5] Haley Aldrich Incident Response Action Plan (IRA) Completion Report dated December 21, 2017, page 2.
[6] CG POLREP 2 DTG R241511Z Feb 17.
[7] CG POLREP 8 DTG R051448Z May 17.
[8] GAIC wire transfer to 130 Northern Avenue, LLC, through Tishman Speyer dated April 26, 2018.
[9] The Claimants originally asserted that the S.S. PETER STUYVESANT was a 1,121 gross ton non-tank vessel and applied a limit of liability rate of $950.00 per gross ton to calculate their limit of liability of $1,064,950.00 (1,121 x 950.00). Removing that limit of liability amount from the costs incurred by the Claimants resulted in a sum certain

and analyzing the controlling laws, the National Pollution Funds Center ("NPFC") concludes that Claimants have carried their burden of proving an entitlement to limited liability under the Oil Pollution Act of 1990 ("OPA"). The NPFC also determines that Claimants' documentation supports compensation of $57,282.35 out of the total $572,071.94 requested by Claimants. The NPFC offers this amount as full and final compensation of this claim.[10]

I. FACTUAL BACKGROUND:

A. Historical Background

The STUYVESANT was a former Hudson River Day Line steamer used as a cocktail lounge and event space beginning in 1968. In order to hold it in place, the vessel was moored in an underwater cradle adjacent to the Pier 4 restaurant in Boston, Massachusetts. After it opened to the public, the STUYVESANT became a popular location for cocktails, as a waiting area for patrons getting dinner at the Pier 4 restaurant, and as a space for private parties and weddings.[11]

On February 6, 1978, heavy winds and storm surge combined to create tides that exceeded the design parameters of the STUYVESANT's underwater cradle. During the storm, the STUYVESANT was lifted from its cradle and ripped from its moorings. Because the vessel's hull was holed during the storm, the STUYVESANT sank at or about a 30-degree angle to starboard. Salvage plans were discussed, but eventually abandoned due to modifications of the vessel during its previous renovation. In 1979, a wrecking crew dismantled and removed the portion of the STUYVESANT's superstructure that extended above the water's surface. The remainder of the vessel was left below the waterline.[12]

In 2014, an affiliate of Tishman purchased the Pier 4 property, which included the area where the STUYVESANT was located,[13] and began a major redevelopment of the property. This redevelopment project necessitated the removal of the STUYVESANT to the mudline to accommodate marine traffic in and around the renovation site.[14] David S. Robinson & Associates, LLC, was hired to conduct a marine archaeological assessment of the STUYVESANT prior to initiating the removal project. During that assessment, the boilers, which were later identified as the source of oil discharge, were not identified in the sidescan

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of $1,442,999.09 ($2,507,949.09 -$1,064,950.00). See claim submission dated August 7, 2019, page 4. The Claimants subsequently revised their sum certain to $1,400,221.94 ($2,465,171.94 - $1,064,950.00) after identifying computation errors contained within their claimed removal costs. *See*, letter from Claimants to the NPFC dated February 12, 2020, page 1. Later, the Claimants acknowledged that the STUYVESANT was a 1721 gross ton non-tank vessel and the limit of liability rate on February 14, 2017, was $1,100.00 which resulted in an applicable limit of liability of $1,893,100.00 (1721 GT x $1,100.00) and resulted in a revised sum certain totaling $572,071.94 ($2,465,171.94 - $1,893,100.00). *See*, email from Claimants to the NPFC dated June 8, 2020.

[10] *See*, 33 CFR 136.115. *See also*, 33 U.S.C. § 2703(a) and 33 U.S.C. § 2704(a).

[11] Marine Archaeological Assessment of the S.S. PETER STUYVESANT conducted by David S. Robinson & Associates, LLC, dated November 3, 2016, page 6 submitted as an exhibit by the Claimants with their claim submission dated August 7, 2019.

[12] *Id*.

[13] IEC Deed & Title search dated February 15, 2020, page 3.

[14] Claim submission dated August 7, 2019, page 2.

sonar or the dive survey.[15] Because the presence of the boilers was unknown, Claimants assumed that the vessel no longer contained any oil for use by a boiler.[16]

B. The Oil Spill

On February 14, 2017, the STUYVESANT discharged oil into the Boston Harbor, a navigable waterway of the United States. The oil discharge occurred during removal of the STUYVESANT as demolition was proceeding from the vessel's aft portion to the mid-ships portion where the former engine/boiler rooms were located.[17] A dive survey revealed that the oil discharged from either the vessel's boilers or one of their fuel lines.[18]

Further research showed that the STUYVESANT was equipped with 4 Babcock & Wilcox water-tube boilers fitted with oil burners. The discharge of oil occurred after the rupture of either one of these boilers or one of the boilers' fuel lines.[19] Due to structural degradation of the STUYVESANT, diving within the hull in an attempt to remove the oil was determined to be unsafe to divers. Additionally, sample analysis of the discharged oil confirmed that the oil was denser than seawater and had the ability to float, suspend in the water column or sink. Oil was also found clinging to the superstructure of the STUYVESANT.[20] As a result, a decision was made to remove the STUYVESANT entirely from the water to mitigate any further threat of pollution into Boston Harbor. A wreck removal plan was prepared by Tishman and approved by CG Sector Boston.[21]

C. Recovery Operations

On February 14, 2017, Tishman activated Cyn Environmental Services (Cyn) to respond to the oil spill. The discharged oil created a visible sheen on the surface of the Boston Harbor and oiled the immediate shoreline with a viscous tar-like oil above and below the waterline. Cyn responded with personnel, vessels, containment and sorbent boom, vacuum trucks, skimmers and hot washers for the oil impacted rip-rap.[22]

Between February 14, 2017, and May 5, 2017, removal of the STUYVESANT continued while Cyn personnel successfully recovered approximately 120 gallons of free floating oil, 260 bags of oiled sorbents, 2,700 gallons of oily water and 12.7 metric tons of oil saturated containment boom.[23] On May 5, 2017, CG Sector Boston personnel confirmed that the STUYVESANT had been successfully removed from the Boston Harbor and that no further instances of oil discharge were observed originating from the site.[24]

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[15] Marine Archaeological Assessment of the S.S. PETER STUYVESANT conducted by David S. Robinson & Associates, LLC, dated November 3, 2016, page 7 submitted as an exhibit by the Claimants with their claim submission dated August 7, 2019.
[16] Claim submission dated August 7, 2019, page 2.
[17] Haley Aldrich Incident Response Action Plan (IRA) Completion Report dated December 21, 2017, page 2.
[18] *Id*.
[19] Haley Aldrich Incident Response Action Plan (IRA) dated April 13, 2017, pages 1 and 3.
[20] *Id*. pages 3-4.
[21] CG POLREP 2 DTG R241511Z Feb 17.
[22] CG POLREP 1 DTG R231605Z Feb 17.
[23] CG POLREP 8 DTG R051448Z May 17.
[24] *Id*.

D. Responsible Party

Tishman, through its subsidiaries, acknowledges owning the STUYVESANT and also being the responsible party for the oil spill incident. In its role as responsible party, Tishman claims to have incurred all of the costs associated with the response in the amount of $2,465,171.94.[25] A search of the applicable property records confirmed that 140 Northern Avenue, LLC, c/o Tishman Speyer was the owner of Pier 4 and the parcels immediately adjacent thereto, including the parcels of property where the STUYVESANT and its cradle were located on February 14, 2017.[26] Claimants were asked to provide clarification as to who owned the property on February 14, 2017; the relationship between 130 Northern Ave, LLC, and 140 Northern Avenue, LLC; and their relationship with Tishman Speyer.[27] Claimants responded that the redevelopment project at issue involved both parcels and that Tishman managed both parcels of property. Moreover, both 130 Northern Avenue, LLC, and 140 Northern Avenue, LLC, were insured under GAIC's oil pollution insurance policy.[28] Under the obligations imposed by the policy, GAIC paid $2,465,171.94 to 130 Northern Avenue, LLC, and 140 Northern Avenue, LLC, through Tishman for removal costs.[29] Claimants submitted this claim seeking compensation of $572,071.94 because that was the amount of removal costs spent in excess of the OPA limit of liability.[30]

E. Claim

On August 7, 2019, Claimants submitted claim to the National Pollution Funds Center ("NPFC") requesting compensation for removal costs that exceed the applicable limit of liability under OPA. Claimants' amended sum certain totaled $572,071.94. During the review and adjudication of the claim, Claimants requested a tolling agreement for additional time to locate and provide additional information to support their claim.[31] That request was approved and extended the tolling period for the NPFC through April 11, 2020. Claimants subsequently requested a second tolling agreement for additional time to locate and provide additional information to support the specific costs in their claim. That request was also approved and extended the NPFC's tolling period through August 29, 2020.[32]

II. ANALYSIS:

A. NPFC's Informal Adjudication Process:

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[25] Claim submission dated August 7, 2019, page 2. The Claimants subsequently revised their sum certain to $1,400,221.94 ($2,465,171.94 - $1,064,950.00) after identifying computation errors contained within their claimed removal costs. *See* letter from Claimants to the NPFC dated February 12, 2020, page 1.

[26] IEC Deed & Title search dated February 15, 2020, page 3. Also, sometime between 1978 and 2017, the STUYVESANT partially drifted onto a parcel of land owned by Fan Pier Development Company. See IEC deed & title search dated February 15, 2020, page 16. However, there's nothing within the claim submission that suggests Fan Pier incurred any removal costs associated with the removal of the STUYVESANT.

[27] *See*, email from the NPFC to the Claimants dated April 24, 2020.

[28] Great American Insurance Policy CSP 4038816 00 effective January 4, 2016, - January 4, 2019, issued to 130 Northern Avenue, LLC, and 140 Northern Avenue, LLC, with $10,000,000.00 pollution incident coverage and a $50,000.00 self-insured retention, page 2. *See also*, Endorsement #1 effective January 4, 2016, for policy CSP 4038816 00 identifying Tishman Speyer Properties, Inc. as additionally insured under the policy.

[29] *See*, email from the Claimants to the NPFC dated April 30, 2020. See also, proof of payment from GAIC to 130 Northern Avenue and 140 Northern Avenue, LLC. *See also*, letter from Tishman Speyer dated December 19, 2019.

[30] *See*, note 9, *supra*.

[31] Tolling agreement between the NPFC and Tishman Speyer/GAIC dated October 10, 2019.

[32] Tolling agreement between the NPFC and Tishman Speyer/GAIC dated December 9, 2019.

The NPFC utilizes an informal process when adjudicating claims against the OSLTF.[33] 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 Claimants' 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. 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 Boston Harbor is a navigable waterway of the United States. In addition, Tishman Speyer Properties, Inc. through their subsidiaries 130 Northern Avenue, LLC, and 140 Northern Avenue, LLC, managed the property, incurred all of the removal costs and is the responsible party for this incident. Lastly, the claim was submitted to the NPFC on August 7, 2019, and is therefore timely.[34]

B. OSLTF Claims by a Responsible Party:

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.[35] Further, a responsible party's liability is strict, joint, and several.[36] In the case of a vessel, a responsible party includes any person owning, operating or demise chartering the vessel.[37] 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."[38] OPA was intended to cure these deficiencies in the law.

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

> The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 2713 of this title ***only if the responsible party demonstrates*** that--

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[33] 33 CFR Part 136.
[34] Claim submission dated August 7, 2019.
[35] 33 U.S.C. § 2702(a).
[36] H.R. Rep. No. 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.
[37] 33 U.S.C. § 2701(32)(A).
[34] *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).

(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. [39] Therefore, just like any other claimant, a responsible party must prove an entitlement under the OPA before receiving reimbursement from the OSLTF. If a responsible party fails to establish an entitlement to compensation from the OSLTF, or fails to establish the elements by a preponderance of the credible evidence, the NPFC must deny the claim.[40] Accordingly, Claimants bear the burden of proving that they are entitled to the amounts claimed.

C. OPA Incident:

Before any OSLTF claim can be paid, a claimant must show that removal costs or damages resulted from an "incident" as defined by OPA. Under 33 U.S.C. § 2712 (a)(4), the OSLTF may

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[39] *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).

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

> Section 1008 of the House bill allows a responsible party or the owner of oil on a tank vessel, or a guarantor for that responsible party or owner of oil, to assert a claim for removal costs and damages ***only if the responsible party or owner can show that the responsible party or owner has a defense to liability, or is entitled to a limitation of liability***. In the latter case, a claim may be submitted only to the extent amounts paid by the responsible party or owner, or by a guarantor on the responsible party's or owner's behalf, exceeds the applicable limit on liability. H.R. Conf. Rep. 101-653, 110, *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).

Placing the burden of proof on a responsible party claimant seeking compensation under 33 U.S.C. § 2708 is consistent with the general rule that a party seeking relief bears the burden of proving an entitlement to that relief. Requiring a responsible party claimant to prove its entitlement to OSLTF compensation is also consistent with the general rule that a party with particular knowledge of the facts ought to bear the burden of proving those facts. As the owner and operator of the STUYVESANT, Tishman 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 discharging 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 are well-positioned to know or learn what happened during an OPA incident.

reimburse a claim for uncompensated removal costs or damages. The OPA defines a "claim" to mean "a request made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident."[41] OPA further defines an "incident" to mean "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil."[42]

When enacting OPA, Congress intended that an incident should be broadly construed to include the entire series of events that caused the discharge of oil. OPA's Conference Report explained: "'Incident' is defined to mean an occurrence or series of related occurrences because, as under other Federal law it is the intent of the Conferees that the **entire series of events resulting in the spill of oil comprises one 'incident'**". H.R. Conf. Rep. 101-653, at 780 (1990), reprinted in, 1990 U.S.C.C.A.N. 779, 1990 WL 132747 (emphasis added). *See also*, *Water Quality Insurance Syndicate v. U.S.*, 522 F.Supp.2d 220, 229 (D.D.C. 2007)(holding that determining liability under the OPA requires analysis of all occurrences resulting in the spill as opposed to simply the spill itself).

OPA's definition of an incident will be satisfied if the item discharging oil was either a vessel or a facility when any one of the incident's occurrences happened. Importantly, the plain language defining an incident does not include any temporal restrictions limiting which occurrences can be included in the series of events that ultimately result in an incident. Instead, a series of occurrences will satisfy the definition so long as they have the same origin and they result in an oil discharge or a substantial threat of an oil discharge.

For this claim, Claimants have successfully carried their burden of proving that an OPA incident occurred. The series of occurrences leading up to this oil discharge commenced when the storm surge and high winds lifted the STUYVESANT from its cradle and broke the vessel free from its moorings. At that point in time, the STUYVESANT satisfied OPA's definition of a vessel at 33 U.S.C. § 2701 (37) because it was capable of being used as a means of transportation on water even though it was actually being used as a cocktail lounge and event space.[43] Before the storm, the vessel floated on the water during high tides while moored in the cradle. Moreover, it is beyond dispute that the STUYVESANT was originally designed to be used as a means of transportation on the water.[44] With this proof, Claimants have shown that before the storm STUYVESANT could have been used as a means of water transportation by being towed once removed from the cradle. This use would have been consistent with the intent underlying the vessel's original design.[45] Because Claimants have shown that STUYVESANT was a vessel when one of the occurrences in the series of events leading up to the oil spill happened, they have satisfied their burden of proving that an OPA incident occurred.

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[41] 33 U.S.C. § 2701 (3).
[42] 33 U.S.C. § 2701 (14).
[43] *See*, *Farrell Ocean Servs. v. United States*, 681 F.2d 91, 93 (1st Cir. 1982)("[A] qualifying 'vessel' is one that is capable of use as a vessel even if not functioning as such at the moment in question."). *See also*, *United States v. Templeton*, 378 F.3d 845 (8th Cir. 2004)(holding that a towboat used as a restaurant, bar, and gas station satisfied the Clean Water Act's definition of a vessel because she was capable of being used as a means of water transportation even though the vessel's engines had been removed.); and *McCarthy v. The Bark Peking*, 716 F.2d 130, 135 fn. 6 (2nd Cir. 1983)(holding that a museum satisfied the statutory definition of a vessel because she was capable of being used as a means of transportation even though the rudder had been welded in a stationary position and she was not subject to a Coast Guard inspection.).
[44] *See generally*, *Lozman v. City of Riviera Beach*, 568 U.S. 115 (2013).
[45] *Id*.

D. Limitation of Liability Under OPA:

Claimants assert that they are entitled to limited liability under 33 U.S.C. § 2704 (a). Claimants contend that the OSLTF should reimburse them for the difference between the liability limits and their actual removal costs and damages. In order to be entitled to OSLTF reimbursement, Claimants must show that this incident was not proximately caused by gross negligence, willful misconduct, or a regulatory violation.[46]

The terms "gross negligence" and "willful misconduct" have distinct meanings under the OPA.[47] The NPFC defines those terms as follows:[48]

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[46] 33 U.S.C. § 2704 (c).

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

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

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

[48] *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).

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.[49]

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.[50]

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

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

[50] 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 (2nd Cir. 1978), the court considered whether the vessel owner's willful misconduct precluded limited liability for an oil spill under the FWPCA. In its analysis, the court defined "willful misconduct" as follows:

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

The test for determining "willful misconduct" under the OPA is an objective test, not a subjective test. Thus, a determination of "willful misconduct" under the OPA does not always require proof of specific intent to harm. Rather, "willful misconduct" can be established with facts showing recklessness. These concepts are illustrated in *Safeco v. Burr*, 551 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

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."[51] This is not an impossible burden to carry. [52] A responsible party satisfies its burden by showing with a preponderance of the evidence 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 every single federal regulation regardless of whether compliance had no connection whatsoever 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.[53]

In this case, Claimants satisfied their burden of proving an entitlement to limited liability. Tishman timely accepted responsibility for the incident and provided appropriate cooperation and assistance with respect to the removal action. Moreover, Claimants have shown that this

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statutory condition to civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well, [citations omitted]. This construction reflects common law usage, which treated actions in 'reckless disregard' of the law as 'willful' violations." *Id*. *See also, Fryer v. A.S.A.P.*, 658 F.3d 85, 91 (1st Cir. 2011), *quoting Safeco*, 551 U.S. 47, 57 (2007)("In a series of decisions beginning in 1985, the Supreme Court has 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.").

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

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

> The party whose contention requires proof of a negative fact generally has the burden of evidence to prove that fact, except as the rule may be modified by the fact that the evidence as to such issue is peculiarly within the adverse party's knowledge or control. In deciding, however, what quantum of evidence shall be deemed sufficient, the practical limitations on proof imposed by the nature of the subject matter or the relative situation of the parties will be considered.
> The court will more promptly discharge a litigant from the burden of evidence where the proposition is a negative one, and the **burden of evidence is sustained by proof which renders probable the existence of the negative fact**, nothing in the nature of a demonstration being required. 31A *C.J.S. Evidence* § 200 (2015)(internal footnotes omitted)(emphasis added).

[53] *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).

incident was probably not proximately caused by their willful misconduct, gross negligence, or regulatory violation.

E. Removal Costs Compensable by the OSLTF:

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan ("NCP").[54] The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.[55] The claimant bears the burden of providing all evidence, information, and documentation deemed relevant and necessary by the Director of the NPFC, to support and properly process the claim.[56]

Before reimbursement can be authorized for uncompensated removal costs, the claimant must demonstrate by a preponderance of the evidence:

(a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
(b) That the removal costs were incurred as a result of these actions;
(c) That the actions taken were directed by the FOSC or determined by the FOSC to be consistent with the National Contingency Plan.
(d) That the removal costs were uncompensated and reasonable.[57]

In this case, Claimants seek reimbursement of removal costs incurred in excess of the limit of liability under 33 U.S.C. § 2704. Under the OPA, the limit of liability applicable to the STUYVESANT was $1,893,100.00. Claimants contend that they incurred $2,465,171.94 in removal costs. As a result, Claimants seek a total of $572,071.94 as compensation for their removal costs incurred in excess of the limit. The NPFC reviewed the documentation submitted by Claimants to adjudicate whether the claimants had incurred all costs claimed. NPFC's adjudication focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined to be consistent with the NCP, and (4) whether the costs were adequately documented and reasonable.

The NPFC analyzed each of these factors and determined the majority of the removal costs incurred by the claimants and submitted herein are compensable removal costs based on the supporting documentation provided. The NPFC determined all approved costs invoiced at the appropriate rate sheet pricing were billed in accordance with the rate schedule provided. All approved costs were supported by adequate documentation which included invoices, proofs of payment, and/or FOSC statements.

The amount of compensable removal costs totals $57,282.35, while $514,789.59 of the claimed removal costs were deemed not compensable. The claimed removal costs denied fell

[54] *See generally,* 33 U.S.C. § 2712 (a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.
[55] 33 CFR Part 136.
[56] 33 CFR 136.105.
[57] 33 CFR 136.203; 33 CFR 136.205.

into two distinct categories. Either documentation provided by the claimant demonstrated that the claimant did not actually incur the claimed cost; or in the cases when the claimed cost was incurred, the claimant failed to provide adequate documentation that the claimed cost was compensable under OPA.[58] Enclosure (3) provides a detailed accounting for each specific amount that was denied.

III. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Claimants' request to limit liability is approved. Claimants' request for uncompensated removal costs is approved in the amount of **$57,282.35.** However, $514,789.59 in claimed removal costs are denied.[59]

This determination is a settlement offer;[60] the Claimants have 60 days in which to accept this offer. Failure to do so automatically voids the offer.[61] The NPFC reserves the right to revoke a settlement offer at any time prior to acceptance.[62] Moreover, this settlement offer is based upon the unique facts giving rise to this claim and is not precedential.

Claim Supervisor: [redacted]

Date of Supervisor's review: ***August 27, 2020***

Supervisor Action: ***Approved***

[58] The NPFC exchanged multiple emails and participated in phone conversations with the claimant explaining the type of documentation the claimant would need to provide for the NPFC to be able to approve these costs. Despite the dialogue, the claimant was not able to support these costs; and therefore the law and regulations demand these costs be denied.

[59] *See*, Enclosure 3.

[60] Payment in full, or acceptance by the claimant of an offer of settlement by the Fund, is final and conclusive for all purposes and, upon payment, constitutes a release of the Fund for the claim. In addition, acceptance of any compensation from the Fund precludes the claimant from filing any subsequent action against any person to recover costs or damages, which are the subject of the uncompensated claim. Acceptance of any compensation also constitutes an agreement by the claimant to assign the Fund any rights, claims, and causes of action the claimant has against any person for the costs and damages which are the subject of the compensated claims and to cooperate reasonably with the Fund in any claim or action by the Fund against any person to recover the amounts paid by the Fund. The cooperation shall include, but is not limited to, immediately reimbursing the Fund for any compensation received from any other source for the same costs and damages and providing any documentation, evidence, testimony, and other support, as may be necessary for the Fund to recover from any person. 33 CFR 136.115(a).

[61] 33 CFR 136.115(b).

[62] *Id*.