

CLAIM DETERMINATION

Claim Number:	H19001-0001
Claimant:	Pride Keen Limited/Shipowners' Mutual Protection Indemnity Assoc.
Type of Claimant:	RP
Type of Claim:	Limit of Liability
Claim Manager:	(b), (b) (6)
Amount Requested:	\$1,757,962.60
Action Taken:	Denied

I. EXECUTIVE SUMMARY:

On October 23, 2018, U.S. Coast Guard Sector Guam established Port Heavy Weather Condition (PHWC) Yankee in advance of Typhoon Yutu within the ports of Guam and Commonwealth of the Northern Mariana Islands (CNMI) which required all vessels greater than or equal to 200 GT to depart port or to have obtained written authorization from the Captain of the Port (COTP) prior to the establishment of PHWC Yankee to remain in port. In addition, the order established that upon setting PHWC Zulu, all ports and marinas would be closed and all cargo/bunkering operations within the port must stop.¹ The motor yacht GRAND MARIANA² which was subject to, and aware of the Order, failed to depart port at the direction of the COTP and failed to request a waiver to remain in port.³ On October 26, 2018, the GRAND MARIANA grounded and posed a substantial threat to discharge oil into Tanapag Harbor, Saipan, a navigable waterway of the United States.⁴ Sector Guam notified the National Response Center (NRC) of the incident.⁵ Pride Keen Limited, (Pride Keen) the owner and operator of the GRAND MARIANA, arrived on-scene and hired Oil Spill Response Operations Company (OSROCO) and T&T Marine (T&T) to assess the damage to the GRAND MARIANA and to the remove fuel which posed a substantial threat of discharge into Tanapag Harbor.⁶ Sector Guam responded and issued an Administrative Order (Admin Order) to Pride Keen to remove the fuel from the GRAND MARIANA by October 27, 2018,⁷ and provided additional time after Pride Keen failed to remove the fuel within the deadline.⁸

¹ CG Sector Guam PHWC Yankee order issued October 23, 2018. PHWC Yankee order was distributed to the CNMI port community via email by MSD Saipan. There were five individuals representing the GRAND MARIANA on that email distribution to include (b), (b) (6).

² The GRAND MARIANA, VIN 1008437, is a 123.7-foot, 444 GT passenger yacht with a fiberglass hull. It was built on September 1, 2003 and is Cayman Islands flagged. See, CG Vessel Critical Profile for the GRAND MARIANA I, VIN 1008437. Note, the proper name of the vessel is the GRAND MARIANA. See CG Sector Guam response to the NPFC dated September 15, 2020, response to question 5.

³ CG Sector Guam response to the NPFC dated July 28, 2020, response to question 1.

⁴ Coast Guard Pollution Report Message (CG POLREP) 1 DTG R310705Z Oct 18.

⁵ National Response Center Report #1228564, reported on October 25, 2018 at 0700 EST.

⁶ CG POLREP 1 DTG R310705Z Oct 18.

⁷ CG Sector Guam Admin Order issued to Pride Keen Limited dated October 26, 2018. The Admin Order required Pride Keen to remove the fuel from all tanks, engines, fuel lines and all other sources onboard that contained oil. In addition, the Admin Order required Pride Keen to conduct a full environmental impact assessment and provide a proposed salvage plan in writing to the cognizant CG on-scene coordinator and territory on-scene coordinator.

⁸ CG POLREP 2 DTG R020809Z Nov 18.

On November 1, 2018, Sector Guam issued a Notice of Federal Assumption to Pride Keen⁹ and assumed control of the pollution removal activities as Pride Keen had failed to abate or remove the threat of pollution from the GRAND MARIANA.¹⁰

On November 22, 2018, Sector Guam issued an Admin Order to Pride Keen to activate their non-tank vessel response plan (VRP) and to provide proof of a valid contract with a competent company by November 24, 2018. In addition, Pride Keen was ordered to remove the remaining fuel from the GRAND MARIANA and relocate the vessel to a place suitable for disposal or repair.¹¹ Pride Keen failed to comply with the requirements of the Admin Order and Sector Guam maintained control of the pollution removal activities.

On December 18, 2018, Pride Keen confirmed its pollution and environmental liability insurance coverage for the GRAND MARIANA through its insurer, Shipowners' Mutual Protection & Indemnity Association (Shipowners').¹²

On April 10, 2019, Pride Keen finalized a contract with Resolve Marine Salvage & Fire (Resolve) to remove the fuel and re-float/remove the GRAND MARIANA.¹³

On May 10, 2019, Sector Guam terminated the Admin Order issued to Pride Keen dated November 22, 2018, as Pride Keen had signed a contract with Resolve to remove the threat of oil discharge from the vessel and to either repair, refloat, or dismantle the vessel.¹⁴

On July 10, 2019, Resolve successfully refloats the GRAND MARIANA and towed the vessel to a pier for repair.¹⁵

Pride Keen Limited is the owner of the GRAND MARIANA. Shipowners' provided pollution and environmental liability insurance¹⁶ and incurred the costs associated with the salvage of the GRAND MARIANA. As a result, Shipowners' along with Pride Keen (Claimants), have submitted an entitlement to a limit of liability claim to the CG National

⁹ CG Sector Guam Notice of Federal Assumption issued to Pride Keen Limited dated November 1, 2018.

¹⁰ CG POLREP 2 DTG R020809Z Nov 18.

¹¹ CG Sector Guam Admin Order issued to Pride Keen Limited dated November 22, 2018. The Admin Order required Pride Keen to Activate its Vessel Response Plan; produce proof of a valid contract with a competent company by 1800 (CHST) on November 24, 2018 to remove the remaining threat of a discharge of oil to the waters of the United States – including taking immediate actions necessary to repair, refloat, or dismantle the vessel and remove it from its current location and relocate it to a place suitable for disposal or repair; conduct a full environmental impact assessment and obtain necessary federal and territory environmental permits to carry out the plan; provide any proposed salvage plans or deconstruction/wreck removal plans in writing to the cognizant Coast Guard on scene representative and territory on scene coordinator; and provide the Unified Command immediate notification of any delays incurred that impact the completion of this project.

¹² BlankRome on behalf of Shipowners' Mutual Protection & Indemnity Association and Pride Keen claim submission dated May 14, 2020, page 3.

¹³ BIMCO Wreckstage contract between Pride Keen, Ltd. and Resolve Marine Salvage & Fire dated April 1, 2019

¹⁴ CG Sector Guam Admin Order termination letter issued to Pride Keen dated May 10, 2019.

¹⁵ CG POLREP 9 (F) DTG R1005162Z Oct 19

¹⁶ Certificate of Insurance No. 56596/902235/520399/4 issued by Yachtowners to Pride Keen Limited with effective dates December 21, 2017 – December 21, 2018, providing Pollution & Environmental Liability Insurance in the amount of \$5,000,000.00.

Pollution Funds Center (NPFC) for \$1,757,962.60.¹⁷ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and concluded that Claimants have not demonstrated an entitlement to limited liability for their uncompensated removal costs and damages under the Oil Pollution Act (OPA) that exceed their limit of liability.¹⁸ Specifically, the Claimants have not demonstrated that they are entitled to a limitation of liability as the evidence in this case indicates that the incident was proximately caused by Pride Keen's violation of an applicable Federal safety, construction, or operating regulation. In addition, Pride Keen failed to report the incident as required by law and failed to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or without sufficient cause, to comply with an order issued under proper authority. Each of these is an independent basis to deny the claim.

II. FACTUAL BACKGROUND:

A. CG Sector Guam

Sector Guam's area of responsibility (AOR) in the Western Pacific includes the Commonwealth of the Northern Mariana Islands (CNMI) and is subject to frequent heavy weather, including the potential for organized, tropical cyclones classified by maximum sustained wind speeds. In the Eastern Hemisphere, these cyclones are called typhoons, and they can form and intensify rapidly. Based upon the meteorological conditions in the Sector Guam AOR, the typhoon season for the Sector Guam AOR extends from January 1 through December 31. Therefore, the Sector Guam AOR remains in Port Heavy Weather Condition (PHWC) WHISKEY (winds of 39 mph and above possible within 72 hours) as a default condition.¹⁹ Changes to PHWCs are communicated throughout the port community through a variety of means. Within the CNMI, changes to PHWC are distributed via email to port community members from an email distribution list maintained by the CG Marine Safety Detachment (MSD) Saipan. That email distribution list is updated upon request from a member of the port community or at the discretion of MSD Saipan. Additionally, changes to PHWC are announced at briefings in the CNMI emergency operational center. Lastly, MSD Saipan personnel conduct port assessments after each PHWC change. Vessels identified in port during this assessment are contacted and reminded to make appropriate preparations for heavy weather or to prepare to leave port. The vessel owners failing to comply with the direction provided by MSD Saipan are subject to COTP orders mandating their compliance.²⁰

Additionally, Apra Harbor/Port of Guam, Tanapag Harbor/Port of Saipan, Port of Rota, and the Port of Tinian are not considered safe havens during a typhoon due to their low topography. Specifically, these ports do not provide adequate windbreak or barriers against tidal surges;

¹⁷ BlankRome on behalf of Shipowners' Mutual Protection & Indemnity Association and Pride Keen claim submission with a sum certain of \$1,660,867.79 dated May 14, 2020. *See also* letter from BlankRome to the NPFC dated June 25, 2020, amending the sum certain to \$1,758,237.79 after identifying and providing additional uncompensated costs in support of their claim. *See also* letter from BlankRome to the NPFC dated August 14, 2020, amending the sum certain to \$1,757,962.60 after identifying a mistake within their claim submission.

¹⁸ 33 U.S.C. § 2703(a) and 33 U.S.C. § 2704(a).

¹⁹ CG Sector Guam Heavy Plan dated April 22, 2015.

²⁰ Email from Sector Guam to the NPFC dated October 22, 2020.

therefore, there is no harbor of refuge within the Sector Guam COTP AOR.²¹ As a result, Sector Guam has determined that the risk of damage to the ports during heavy weather is minimized when the number of commercial vessels in port is decreased and requires all ocean-going commercial vessels and ocean-going tug/barge combinations over 200 gross tons (GT) generally be required to depart the port by order of the COTP when heavy weather approaches. However, if any vessels 200 GT or over are unable to depart the port, that vessel must request a waiver from the COTP to remain in port by submitting a Remaining in Port Checklist which identifies the vessel's need to remain in port and provides important information such as the vessel's location, amount of fuel on-board and operational status of the vessel's machinery (main engines, generators, bilge pumps, firefighting pumps, etc.).²²

On October 22, 2018, Sector Guam established PHWC X-Ray in advance of Typhoon Yutu within the ports of Guam and CNMI which informed all vessel masters to prepare for PHWC Yankee which they estimated would be issued on October 23, 2018. Specifically, the order established that upon setting PHWC Yankee, all vessels 200GT and over were required to depart port or request a waiver from the COTP to remain in port by submitting a Remaining in Port Checklist.²³ During their port assessment, MSD Saipan personnel discovered the GRAND MARIANA in port and unable depart port in advance of Typhoon Yutu. As a result, MSD Saipan issued a Notice of Federal Interest (NOFI) to Pride Keen advising them of the GRAND MARIANA's substantial threat to discharge oil into Saipan Harbor and of Pride Keen's responsibilities and financial liability in the event of an oil spill from their vessel.²⁴

On October 23, 2018, Sector Guam established PHWC Yankee in advance of Typhoon Yutu within the ports of Guam and CNMI which required all vessels greater than or equal to 200 GT to depart port or to have obtained written authorization from the COTP prior to the establishment of PHWC Yankee to remain in port. In addition, the order established that upon setting PHWC Zulu, all ports and marinas would be closed and all cargo/bunkering operations within the port must stop.²⁵ The GRAND MARIANA²⁶ failed to depart port at the direction of the COTP and failed to request a waiver to remain in port.²⁷

²¹ The CG Captain of the Port enforces regulations for the protection and security of coastal and inland operational areas, including vessels, harbors, and waterfront facilities; anchorages; bridges; safety and security zones; and ports and waterways.

²² CG Sector Guam Heavy Plan dated April 22, 2015. Sector Guam's authority to implement and enforce the Port Heavy Weather Conditions identified within their Heavy Weather Plan resides in part within the Ports and Waterways Safety Act which provides the CG Captain of the Port broader regulatory authority over regulated and non-regulated areas such as improvements in the supervision and control of all types of vessels operating in U.S. navigable waters.

²³ CG Sector Guam PHWC X-Ray order issued October 22, 2018 - PHWC X-Ray order was distributed to the CNMI port community via email by MSD personnel. There were four individuals representing the GRAND MARIANA on the email distribution to include (b), (b) (6). Additionally, Mr. (b), (b) (6), was also notified of the PHWC X-RAY order via email. See, email from MSD Saipan to Mr. (b), (b) (6).

²⁴ MSD Saipan Notice of Federal Interest issued to Pride Keen Limited dated October 22, 2018. In addition, on the same day, MSD Saipan issued a Notice of Federal Interest to Pride Keen for the substantial threat of oil discharge posed by the GRAND MARIANA II as this vessel had also failed to depart port in advance of Typhoon Yutu. See email from Sector Guam to the NPFC dated October 8, 2020.

²⁵ CG Sector Guam PHWC Yankee order issued October 23, 2018. PHWC Yankee order was distributed to the CNMI port community via email by MSD Saipan. There were five individuals representing the GRAND MARIANA on that email distribution to include S. (b), (b) (6).

As a result, Sector Guam issued an Admin Order to Pride Keen which required the removal of all fuel from the GRAND MARIANA's fuel tanks, engines, fuel lines, and any other potential sources onboard that may have oil products in them in advance of the impending typhoon and prior to shifting to the designated mooring.²⁸ Pride Keen failed to comply with the Admin Order as their efforts to remove fuel from the GRAND MARIANA were unsuccessful.²⁹

Later that day, Sector Guam established PHWC Zulu within the port of Guam and CNMI which closed all ports and marinas and stopped all cargo/bunkering operations within the port.³⁰

On October 24, 2018, the GRAND MARIANA was moved to a mooring within Tanapag Harbor, but due to deteriorating weather, it was deemed unsafe for divers to properly moor the vessel as desired. As a result, the vessel was anchored within the lagoon with two anchors set out to secure her position.³¹

During the passage of Typhoon Yutu, the GRAND MARIANA broke her moorings within Tanapag Harbor and grounded approximately 150 meters off of Micro Beach in Tanapag Harbor, Saipan. At the time of the grounding, the GRAND MARIANA contained approximately 15,500 gallons of fuel.³²

On October 27, 2018, Sector Guam returned to PHWC Whiskey within the CNMI following the passage of Typhoon Yutu.³³

B. Response

On October 26, 2018, Pride Keen responded and hired OSROCO and T&T Marine to assess the damage sustained by the GRAND MARIANA and to remove the 15,500 gallons of fuel which posed a substantial threat of discharge into Tanapag Harbor. A survey of the vessel confirmed that the vessel was hard aground and identified three cracks in the hull with free communication with the sea.³⁴

Sector Guam responded as the CG Federal On-Scene Coordinator (FOSC) to provide oversight of Pride Keen's spill response.³⁵ Sector Guam issued an Admin Order to Pride Keen

²⁶ The GRAND MARIANA, VIN 1008437, is a 123.7-foot, 444 GT passenger yacht with a fiberglass hull. It was built on September 1, 2003 and is Cayman Islands flagged. *See*, CG Vessel Critical Profile for the GRAND MARIANA I, VIN 1008437. Note, the proper name of the vessel is the GRAND MARIANA. *See* CG Sector Guam response to the NPFC dated September 15, 2020, response to question 5.

²⁷ CG Sector Guam response to the NPFC dated July 28, 2020, response to question 1.

²⁸ CG Sector Guam Administration Order issued to Pride Keen Limited dated October 23, 2018.

²⁹ CG Sector Guam response to the NPFC dated July 28, 2020, response to question 2.

³⁰ CG Sector Guam PHWC Zulu order issued October 23, 2018. PHWC Zulu order was distributed to the CNMI port community via email by MSD personnel. There were five individuals representing the GRAND MARIANA on the email distribution to include S. (b), (b) (6). *See* email with PHWC Zulu order attached dated October 23, 2018.

³¹ Claimants' letter to the NPFC dated July 10, 2020, response to question 7.

³² Claim submission dated May 14, 2020.

³³ CNMI-FEMA Joint Information Center release dated October 27, 2018.

³⁴ CG POLREP 1 DTG R310705Z Oct 18.

³⁵ *Id.*

to remove the fuel from all tanks, engines, fuel lines and all other sources onboard the GRAND MARIANA that contained oil by October 27, 2018.³⁶ Pride Keen failed to meet the deadline established within the Admin Order and was provided additional time to continue working with their insurance company in an effort to secure funding for their oil spill response organization (OSRO) and remove the fuel from the vessel. However, even with the extra time provided by Sector Guam, Pride Keen's efforts to remove the fuel from the vessel were unsuccessful as they failed to execute a contract with OSROCO and T&T Marine and provided inconsistent answers to the FOSC when questioned about their response efforts.³⁷

On November 1, 2018, Sector Guam issued a Notice of Federal Assumption to Pride Keen assuming responsibility for the response/removal activities as Pride Keen's efforts to abate the pollution threat or to remove the oil from the GRAND MARIANA were deemed unsatisfactory by the FOSC.³⁸

On November 22, 2018, Sector Guam issued an Admin Order to Pride Keen summarizing that the owner's previous actions to abate the pollution threat were unsatisfactory and as a result, Sector Guam had assumed responsibility for the response. Additionally, because all the oil had not been removed from the GRAND MARIANA,³⁹ the vessel still posed a substantial threat to discharge oil into a navigable waterway. Pride Keen ultimately failed to comply with this Admin Order, as well.

On November 23, 2018, Pride Keen sought reconsideration of Sector Guam's November 22, 2018, Admin Order. In that reconsideration letter, Pride Keen acknowledged its obligations to fund the response effort, but relayed its understanding that once the USCG assumed control of the response on November 1, 2020, Pride Keen was required to "stand down" on the response "unless and until the Coast Guard and its hired contractor had completed that portion of the project or notified [Owner] otherwise." Pride Keen therefore sought clarification of its obligations pursuant to the Notice of Federal Assumption and subsequent Administrative Orders.⁴⁰

On November 24, 2018, Sector Guam responded to Pride Keen's letter in which they reiterated the intent of their Admin Order which was to afford Pride Keen the opportunity to assume responsibility for the remaining pollution removal, to include removing the vessel from its current location. Otherwise, removal of pollutants via destruction of the vessel in-situ would be requested. Additionally, Sector Guam's order to Pride Keen's to activate their VRP was explained as an effort to assist Pride Keen in meeting the expectations of the order. Specifically, Pride Keen's VRP plan had detailed information about the capabilities and resources of Pride

³⁶ CG Sector Guam Admin Order issued to Pride Keen Limited dated October 26, 2018. The Admin Order required Pride Keen to remove the fuel from all tanks, engines, fuel lines and all other sources onboard that contained oil. In addition, the Admin Order required Pride Keen to conduct a full environmental impact assessment and provide a proposed salvage plan in writing to the cognizant CG on-scene coordinator and territory on-scene coordinator.

³⁷ CG POLREP 2 DTG R020809Z Nov 18.

³⁸ CG Notice of Federal Assumption issued to Pride Keen on November 1, 2018.

³⁹ Between November 1 – November 24, 2018, the OSRO working on behalf of the Coast Guard recovered approximately 14,445 gallons of fuel from the GRAND MARIANA and demobilized from the site with the understanding that it would return daily to remove any oiled sorbents from within the accommodation spaces or engine room. Approximately 1,000 gallons of fuel remained onboard the vessel. See, POLREP 7 R122317Z Dec 2018.

⁴⁰ Claim submission dated May 14, 2020.

Keen's pre-determined, contracted oil spill removal organization and the contracted salvage, marine firefighting and lightering company. However, and throughout the response to the casualty, there were several questions by various Pride Keen representatives relating to general response operations, expectations and requirements that were clearly outlined within Pride Keen's VRP.

Throughout the response the Coast Guard continually reminded Pride Keen's representatives of its obligations to activate their VRP and to contact the qualified individual (QI) identified within their VRP but Pride Keen failed to do so. In its November 24 letter, the Coast Guard again reiterated these basic principles of incident response. The letter closed with the Coast Guard reminding that it will continue to abate the pollution threat, up to and including requesting permission to destroy the vessel in-situ unless Pride Keen could demonstrate its ability to take over the response and salvage operations pursuant to their VRP and federal requirements.⁴¹

On November 25, 2018, Pride Keen sought further clarification of the Sector Guam's November 24, 2018, letter and explained that the basis for its inability to implement the Vessel Response Plan was an underlying coverage dispute with its insurer. Pride Keen went on to request some leeway from the USCG in light of the difficulties it faced in securing the requisite contracts because the responders listed in Pride Keen's VRP would not respond without security posted by the insurer and requested it be authorized to proceed with a local salvor.⁴²

On December 18, 2018, Pride Keen confirmed its insurance coverage for the GRAND MARIANA through Shipowners' to Sector Guam.⁴³ However, Sector Guam remained in control of the response as Pride Keen had neither activated their VRP nor did they present the FOSC with a salvage plan that was acceptable by regulatory standards.⁴⁴

On January 4, 2019, Sector Guam authorized Pride Keen to deviate from their VRP to tender multiple salvage companies.⁴⁵

On April 10, 2019, Pride Keen finalized a contract with Resolve to remove the fuel and re-float/remove the GRAND MARIANA.⁴⁶

On May 10, 2019, Sector Guam terminated the Admin Order issued to Pride Keen dated November 22, 2018, as Pride Keen had signed a contract with a Resolve to remove the threat of oil discharge from the GRAND MARIANA and to either repair, refloat, or dismantle the vessel.⁴⁷

On July 10, 2019, Resolve successfully refloats the GRAND MARIANA and towed the vessel to a pier within Saipan harbor.⁴⁸

⁴¹ Letter from CG Sector Guam to Pride Keen Limited dated November 24, 2018.

⁴² Claim submission dated May 14, 2020.

⁴³ *Id.*

⁴⁴ CG Sector Guam response to the NPFC dated July 28, 2020, response to question 8.

⁴⁵ CG Sector Guam response to the NPFC dated July 28, 2020, response to question 11.

⁴⁶ BIMCO Wreckstage contract between Pride Keen, Ltd. and Resolve Marine Salvage & Fire dated April 1, 2019.

⁴⁷ CG Sector Guam Admin Order termination letter issued to Pride Keen dated May 10, 2019.

⁴⁸ CG POLREP 9 (F) DTG R1005162Z Oct 19.

C. Responsible Party and the Claim

Pride Keen Limited is the owner of the GRAND MARIANA. Shipowners' provided pollution and environmental liability insurance⁴⁹ and incurred the costs associated with the salvage of the GRAND MARIANA. Shipowners', along with Pride Keen, have submitted an entitlement to a limited liability claim to the NPFC for \$1,757,962.60.⁵⁰

III. LEGAL DISCUSSION:

A. Adjudication of OSLTF Claims

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.⁵¹ 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.

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.

B. Responsible Party Claims

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.⁵² Further, a responsible party's liability is strict, joint, and several.⁵³ In the case of a vessel, the responsible party includes any person owning, operating or demise chartering the vessel.⁵⁴ 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."⁵⁵ OPA was intended to cure these deficiencies in the law.

⁴⁹ Certificate of Insurance No. 56596/902235/520399/4 issued by Yachtowners to Pride Keen Limited with effective dates December 21, 2017 – December 21, 2018, providing Pollution & Environmental Liability Insurance in the amount of \$5,000,000.00.

⁵⁰ Original claim submission with a sum certain of \$1,660,867.79. Subsequently, the claimants amended the sum certain twice. The first time to \$1,758,237.79 and then to \$1,757,962.60.

⁵¹ 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" See also, *Taylor Energy Company LLC v. U.S.*, 2020 WL 6075693 (D.D.C. 2020).

⁵² 33 U.S.C. § 2702(a).

⁵³ See, H.R. Conf. Rep. No. 101-653, 102, 1990 U.S.C.C.A.N. 779 (August 1, 1990).

⁵⁴ 33 U.S.C. § 2701(32)(A).

⁵⁵ *Apex Oil Co., Inc. v. United States*, 208 F. Supp. 2d 642, 651-52 (E.D. La. 2002)(citing S. Rep. No. 101-94 (1989); 1990 U.S.C.C.A.N. 722.).

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

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

- (1) the responsible party is entitled to a defense to liability under section 2703 of this title; or
- (2) the responsible party is entitled to a limitation of liability under section 2704 of this title.

Under the plain meaning of 33 U.S.C. § 2708(a), a responsible party must demonstrate that either a defense or limited liability applies before the OSLTF can reimburse removal costs or 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.⁵⁶ 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.⁵⁷

⁵⁶ 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).

⁵⁷ OPA's legislative history supports NPFC's conclusion that a responsible party has the burden of showing an entitlement to OSLTF compensation under 33 U.S.C. § 2708. As explained in the House Conference Report on OPA:

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

H.R. Conf. Rep. 101-653, 110, 1990 U.S.C.C.A.N. 779 (August 1, 1990) (emphasis added). See also, *Apex Oil Co., Inc. v. United States*, 208 F.Supp.2d 642 (E.D. La., 2002)(claimant failed to carry its burden of proof with respect to the "act of God" defense); *International Marine Carriers v. OSLTF*, 903 F.Supp. 1097 (S.D. Tex. 1994)(claimant must show elements of a "third party" defense by a preponderance of the evidence); *Bean Dredging, LLC v. United States*, 773 F.Supp.2d 63, 86 (D.D.C. 2011)(the responsible party "had the burden of proof of establishing its entitlement to reimbursement on the administrative level" . . .); and *Water Quality Ins. Syndicate v. United States*, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009)(holding that Water Quality Insurance Syndicate must prove that its insured was entitled to limited liability when making a claim against the OSLTF under 33 U.S.C. § 2708).

Placing the burden of proof on a responsible party claimant seeking compensation under 33 U.S.C. § 2708 is consistent with the general rule that a party seeking relief bears the burden of proving an entitlement to that relief. Requiring a responsible party claimant to prove its entitlement to OSLTF compensation is also consistent with the general rule that a party with particular knowledge of the facts ought to bear the burden of proving those facts. As the owner and operator of GRAND MARIANA, Pride Keen 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 peculiarly well positioned to

C. Limitation of Liability

Under 33 U.S.C. § 2704 (a), a responsible party may limit its liability for removal costs and damages. However, OPA's limited liability will not apply if the incident was proximately caused by the responsible party's willful misconduct, gross negligence, or violation of a federal regulation.⁵⁸ Also, under 33 U.S.C. § 2704 (c)(2), limited liability will not apply when the responsible party fails:

- (A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;
- (B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or
- (C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

Claimants assert that they are entitled to limited liability under 33 U.S.C. § 2704 (a). If successful, Claimants would be permitted under 33 U.S.C. § 2708 to recover from the OSLTF their compensable removal costs and damages that exceed the applicable OPA limit of liability. Before the OSLTF can reimburse any costs or damages, Claimants must carry their burden of proving an entitlement to limited liability⁵⁹

When submitting a limit of liability 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."⁶⁰ This is not an impossible burden to carry.⁶¹ A responsible party will meet its burden

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.

⁵⁸ 33 U.S.C. § 2704 (c)(1).

⁵⁹ See, 33 U.S.C. § 2708.

⁶⁰ *United States v. Grogg*, 9 F.2d 424, 426 (W.D. Va. 1925).

⁶¹ The treatise, *Corpus Juris Secundum*, explains how a party can prove a negative contention with the following:

The party whose contention requires proof of a negative fact generally has the burden of evidence to prove that fact, except as the rule may be modified by the fact that the evidence as to such issue is peculiarly within the adverse party's knowledge or control. In deciding, however, what quantum of evidence shall be deemed sufficient, the practical limitations on proof imposed by the nature of the subject matter or the relative situation of the parties will be considered.

The court will more promptly discharge a litigant from the burden of evidence where the proposition is a negative one, and the **burden of evidence is sustained by proof which renders probable the existence of the negative fact**, nothing in the nature of a demonstration being required.

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

by showing that it is more likely than not that the incident was not proximately caused by willful misconduct, gross negligence, or a regulatory violation.

The quantum of proof required from a responsible party seeking OSLTF reimbursement will vary depending upon the facts of the case. Nevertheless, a responsible party should not be required to conclusively disprove every possible contention supporting unlimited liability. Rather, a responsible party will generally satisfy its burden by showing that OPA's exceptions to limited liability probably do not apply. For example, the NPFC does not require detailed proof of compliance with federal regulations that have no apparent connection to the oil spill. Therefore, in some cases a responsible party's regulatory compliance could be shown by generalized evidence establishing a probability that no regulatory violation occurred. However, if the facts of an OPA incident raise the issue of whether the incident was proximately caused by a regulatory violation, then a responsible party must carry its burden of proving compliance with the specific regulation at issue. If a responsible party fails to carry its burden of proof, then the claim should be denied.⁶²

When analyzing whether a responsible party has met its burden of proof, it is important to note that the terms "gross negligence" and "willful misconduct" have distinct meanings under the OPA.⁶³ The NPFC defines those terms as follows:⁶⁴

⁶² *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).

⁶³ 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

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.⁶⁵

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.⁶⁶

[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.”).

⁶⁴ 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).

⁶⁵ 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.”).

⁶⁶ 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 probable consequences.** [citation omitted]. If the harm results from an omission, the omission must be intentional, and the

IV. ANALYSIS OF CLAIMANTS' CLAIM:

After a review of the information provided by the Claimants within their claim submission, the additional information provided by the Claimants in support of their claim, and the information it obtained independently, the NPFC concludes that the facts demonstrate that claim can, and must, be denied as several exceptions found at 33 U.S.C. 2704(c) apply to the responsible party.

The NPFC specifically finds that:

1. This incident was proximately caused by Pride Keen's violation of applicable Federal safety, construction, or operating regulation.⁶⁷
2. The RP did not report this incident as required by law.⁶⁸
3. The RP did not provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities.⁶⁹
4. The RP failed or refused, without sufficient cause, to comply with an order issued under 33 U.S.C. § 1321(c) or (e).⁷⁰

Each exception provides an independent basis to deny the claim. As such, the claim is denied.

A. Violation of a Federal Safety Regulation

The regulations implementing the Ports and Waterways Safety Act⁷¹ are codified at 33 CFR Part 160. Specifically, 33 CFR 160.105 requires "[e]ach person who has notice of the terms of

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 requisite action constitutes recklessness.** *Id.* (emphasis added).

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

⁶⁷ 33 U.S.C. § 2704(c)(1)(B).

⁶⁸ 33 U.S.C. § 2704(c)(2)(A).

⁶⁹ 33 U.S.C. § 2704(c)(2)(B).

⁷⁰ 33 U.S.C. § 2704(c)(2)(C).

⁷¹ At the time of the incident, codified at 33 U.S.C. § 1221 *et seq.* Three of the specified reasons behind the passage of the Act are relevant in this determination: (1) [to] reduce the possibility of vessel or cargo loss, or damage to life,

an order issued under this subpart must comply with that order.” Pride Keen failed to comply with two of Sector Guam’s COTP orders dated October 22, 2018 and October 23, 2018, respectively.

The October 22 COTP Order established PHWC X-RAY which required all vessel masters to prepare for PHWC Yankee which the COTP estimated would be issued on October 23, 2018. Vessels are required to depart port upon the setting of Port Heavy Weather Condition Yankee, as detailed within the Sector Guam Heavy Weather Plan. As the GRAND MARIANA was not in an operational status at the time, it was clearly not prepared, nor was it preparing, to depart port as mandated by the October 22 COTP Order. Notably, when MSD Saipan attended the GRAND MARIANA on October 22 it noted that it appeared unable depart port in advance the typhoon. As a result, MSD Saipan issued a Notice of Federal Interest (NOFI) to Pride Keen advising them of the GRAND MARIANA’s substantial threat to discharge oil into Saipan Harbor and of Pride Keen’s responsibilities and financial liability in the event of an oil spill from their vessel.⁷²

While the violation of the October 22 Order is important for context, ultimately the violation of the October 23 COTP Order was the proximate cause of the incident. The October 23 Order established PHWC Yankee and required all commercial vessel greater than or equal to 200 GT – which would include the GRAND MARIANA - to depart port or to have obtained written authorization from the COTP in advance of PHWC Yankee to remain in port.

The NPFC asked the Claimants why the GRAND MARIANA failed to depart port at the direction of the COTP. The Claimants responded that it did not believe the GRAND MARIANA had to depart port, notwithstanding the Order, as she was not capable of safely outrunning the Typhoon.⁷³ The NPFC notes that there was no discussion between the GRAND MARIANA and the COTP, nor did the GRAND MARIANA appeal the Order.

The NPFC also asked Sector Guam why it thought the GRAND MARIANA failed to depart port at the direction of the COTP. Sector Guam responded that the GRAND MARIANA was unable to get underway due to lack of necessary crew manning. Specifically, Pride Keen’s captains and crew were shared among the four, local GRAND MARIANA vessels, and lacked sufficient captains to get their fleet underway.⁷⁴ Sector Guam also attributed the GRAND

property, or the marine environment; (2) [to] prevent damage to structures in, on, or immediately adjacent to the navigable waters of the United States or the resources within such waters; (3) [to] insure that vessels operating in the navigable waters of the United States shall comply with all applicable standards and requirements for vessel construction, equipment, manning, and operational procedures. 33 U.S.C. § 1221(c).

⁷² MSD Saipan Notice of Federal Interest issued to Pride Keen Limited dated October 22, 2018. In addition, on the same day, MSD Saipan issued a Notice of Federal Interest to Pride Keen for the substantial threat of oil discharge posed by the GRAND MARIANA II as this vessel had also failed to depart port in advance of Typhoon Yutu. *See* email from Sector Guam to the NPFC dated October 8, 2020.

⁷³ Pride Keen had actually requested permission to leave the GRAND MARIANA alongside the pier but that request was denied by the Commonwealth Port Authority and Pride Keen was directed to move their vessel to anchor. *See*, CG Sector Guam response to the NPFC dated July 28, 2020, response to question 2.

⁷⁴ CG Sector Guam response to the NPFC dated July 28, 2020, response to question 1. As evidence to this statement, Pride Keen’s GRAND MARIANA II also failed to depart Tanapag Harbor in advance of Typhoon Yutu and as a result, broke her moorings and grounded in Tanapag Harbor. *See*, CG Sector Guam response to the NPFC received August 31, 2020, but mistakenly dated September 30, 2020, response to question 5. The GRAND MARIANA II, VIN 71134, is a 115-foot, 295 GT passenger yacht with a fiberglass hull. It was built on January 1, 1988 and is flagged in the Marshall Islands. *See*, CG Vessel Critical Profile for the GRAND MARIANA II, VIN 71134. Lastly, CG Sector Guam issued two Administrative Orders to the Pride Keen and two Captain of the Port

MARIANA's failure to get underway to inoperable main engines as at least one of the GRAND MARIANA main engines was disassembled for repair.

It is clear from the record that the vessel's representatives were aware of the Order,⁷⁵ that the Grand Mariana did not depart port, nor did it obtain written authorization from the COTP to remain in port.⁷⁶ As a result of its noncompliance, the GRAND MARIANA remained in port without permission, broke her moorings and grounded during the typhoon which resulted in the vessel posing a substantial threat to discharge oil into Tanapag Harbor. The violations of the orders issued under the authority of the Ports and Waterways Safety Act are the proximate cause of this incident and a reason this claim must be denied.

B. Failure to Report the Incident

A responsible party is required to timely notify the National Response Center of the discharge of oil.⁷⁷ After a review of the information provided by the Claimant within their claim submission, the additional information provided by the Claimant in support of their claim, and the information it obtained independently, the NPFC concludes that the facts demonstrate that Pride Keen failed to report the incident. While the Claimants assert that they reported the incident⁷⁸ when the NPFC asked them to provide proof of their notification, they could not and have not, to date.⁷⁹ The NPFC finds that the responsible party has not met its burden of proving that they reported the incident and this failure is a reason this claim must be denied.

C. Failure to Provide All Reasonable Cooperation and Assistance Requested

Pride Keen failed to activate the QI or alternate QI as identified within their VRP as required in response to the grounding of the GRAND MARIANA and the substantial threat of the discharge of oil. Federal regulations require that one QI and at least one alternate QI be identified in the VRP.⁸⁰ These regulations discuss the activation of a QI for incidents such as this

(COTP) Orders to Pride Keen as a result of the GRAND MARIANA II's grounding. *See*, Admin Orders issued by CG Sector Guam to Pride Keen dated October 23 and October 26, 2018, and COTP Orders issued CG Sector Guam to Pride Keen dated November 2018 and January 16, 2019.

⁷⁵ In advance of Typhoon Yutu, Sector Guam's established PHWC X-Ray and distributed the order to the CNMI port community via email by MSD personnel. There were four individuals representing the GRAND MARIANA on the email to include (b), (b) (6). *See*, email with PHWC X-Ray order. Additionally, Mr. (b), (b) (6), was also notified of the PHWC X-RAY order via email. *See*, email from MSD Saipan to Mr. (b), (b) (6). Sector Guam's PHWC Yankee order was distributed to the CNMI port community via email by MSD personnel. There were five individuals representing the GRAND MARIANA on that email to include S. (b), (b) (6). *See*, email with PHWC Yankee order attached dated October 23, 2018. Sector Guam's PHWC Zulu order was distributed to the CNMI port community via email by MSD personnel. There were five individuals representing the GRAND MARIANA on that email to include S. (b), (b) (6). *See*, email with PHWC Zulu order attached dated October 23, 2018.

⁷⁶ CG Sector Guam response to the NPFC dated July 28, 2020, response to question 1. Further, Pride Keen submitted a Remaining in Port Checklist to Sector Guam two months earlier, in advance of Typhoon Mangkhut. This further confirms that Pride Keen was aware of their responsibilities to maintain the GRAND MARIANA in an operational status and/or to notify Sector Guam if their vessel was unable to depart port upon PHWC Yankee.

⁷⁷ *See, e.g.*, 33 U.S.C. 1321(b)(5). *See generally*, 33 U.S.C. § 2704(c)(2)(A).

⁷⁸ Claim submission dated May 14, 2020, page 5.

⁷⁹ Claimants' letter to the NPFC dated July 10, 2020, response to question 2.

⁸⁰ 33 CFR 155.5026.

one.⁸¹ VRPs are reviewed and approved by the Coast Guard; and any amendments to the plan must also be approved by the Coast Guard.⁸² Absent an approved amendment, any deviation from the VRP (to include a deviation from using the identified QI) must be specifically approved by the Captain of the Port.⁸³

The NPFC asked Sector Guam about the absence of Pride Keen's QI. Sector Guam responded that Pride Keen did not bring in the QI designated within their VRP at any point during the response, which would have helped streamline the response and ensure the cleanup actions were conducted in accordance with the VRP. Specifically, Sector Guam contacted Mr. Aaron Meadows-Hill, Manager at ECM Maritime Services (ECM),⁸⁴ who stated that the owners or owners' representative told him that his services as QI would not be required, as they had representatives on scene. Sector Guam repeatedly directed Pride Keen activate the QI identified within their VRP⁸⁵ and summarized that a lack of a QI in the critical beginning stages delayed and muddled the response process. Representatives from Pride Keen, Phoenix Marine Services, and Imperial Pacific International were all part of initial interactions with the USCG, but none had the pollution response or salvage experience expected of a QI.⁸⁶

The NPFC asked Claimants why they did not provide the QI identified within their VRP. The Claimants responded that the QI identified within their response plan was ECM but they were not on site in Saipan. Because ECM was not based on Saipan, Pride Keen wanted local involvement in the response effort.⁸⁷

Despite the regulations and several discussions between the Captain of the Port and Pride Keen to use their identified QI (or alternate QI) as outlined in the VRP, Pride Keen failed to do so. Pride Keen continued to use a non-approved QI which is not only in discord with federal regulations, it also significantly contributed to the dysfunctional response to this incident by the responsible party. There is no evidence in the record, nor does Pride Keen provide any, that it requested a deviation from the VRP – and if a request had been made – that it had been approved by the Captain of the Port. As such, and specifically based on the repeated demands of the Coast Guard to use its identified QI, Pride Keen did not – and the NPFC finds that Pride Keen did not provide all reasonable cooperation and assistance as requested as that term is used in 33 U.S.C. 2704(c). The lack of reasonable cooperation and assistance is a reason that this claim is denied.

D. Failure or refusal, without sufficient cause, to comply with an order issued under 33 U.S.C. § 1321(c) or (e)

Sector Guam, as the FOOSC, issued three orders under the authority of 33 U.S.C. § 1321. Pride Keen failed to comply with any of them. Where cause was provided as a reason for non-compliance, the NPFC finds that the cause was insufficient as discussed below.

⁸¹ See generally, 33 CFR 155.5035.

⁸² 33 CFR 155.1065; 33 CFR 155.1070.

⁸³ Or the President. 33 CFR 155.5012.

⁸⁴ ECM Maritime Services, LLC, was designated as the QI and Incident Management Team within Pride Keen's NTVRP approved by the CG on April 17, 2017 and valid thru April 17, 2022. Specifically, there were 16 individuals identified as ECM QIs within the approved NTVRP. See, GRAND MARIANA NTVRP.

⁸⁵ Letter from CG Sector Guam to Pride Keen dated November 24, 2018.

⁸⁶ CG Sector Guam response to the NPFC dated July 28, 2020, response to question 3.

⁸⁷ Claimants' letter to the NPFC dated July 10, 2020, response to question 12.

Admin Order dated October 23, 2018

Pride Keen failed to comply with Sector Guam Admin Order dated October 23, 2018, which required the removal of fuel from the GRAND MARIANA prior to Typhoon Yutu. In an effort to better understand the events leading up to and following the grounding of the GRAND MARIANA, the NPFC asked the Claimants why Pride Keen failed to comply with the Admin Order and remove the fuel from their vessel. The Claimants responded that the fuel delivery point and transfer manifold on the GRAND MARIANA was not set up to transfer fuel ashore as OSROCO had expected and, after trying for several hours, it was finally confirmed that OSROCO could not pump out fuel in this way. Ultimately no fuel was removed from the GRAND MARIANA. Thereafter, the only options were to remove each tank lid to extract the fuel directly or cut/modify the fuel transfer manifold, both of which were complex steps and likely to be unsuccessful given the tight time frame and the approaching typhoon.⁸⁸

The NPFC also asked Sector Guam why it believed Pride Keen failed to remove the fuel from the GRAND MARIANA. Sector Guam stated that the crew of the GRAND MARIANA lacked the skills and knowledge needed to remove the fuel from the vessel and as such, it was unable to do so. Specifically, the crew could not figure out how to properly align the system to pump fuel out of the vessel in the time required prior to the storm making landfall. The pumping was going too slow in order to remove the pollution threat from the vessel before having to secure the pumping operations, evacuate the crew and equipment, secure the vessel mooring, and enable all personnel to seek shelter before the impending typhoon's arrival.⁸⁹

The failure of the responsible party to either adequately acquire the proper contractor or ensure its crew was properly trained to remove fuel from its vessel is not sufficient cause to fail to comply with the Admin Order. As such, this is a reason that the claim must be denied.

Admin Order dated October 26, 2018

Pride Keen failed to comply with Sector Guam Admin Order dated October 26, 2018, which required the removal of fuel from the tanks, engines, fuel lines, and any other potential sources onboard the GRAND MARIANA. At this point, the vessel posed a substantial threat of discharge and it was required to activate its VRP. Initially it appeared that GRAND MARIANA activated its VRP, but ultimately it did not. It failed to use its identified QI as required and it failed to execute the required contracts (or provide financial security) with its identified OSRO to ensure cleanup.

The NPFC asked the Claimants why they failed to timely provide the requisite funding to an OSRO to continue cleanup. The Claimants responded that the grounding occurred on October 25, 2018, and Pride Keen activated its response plan by calling T&T Marine. However, T&T did not submit an action plan to Pride Keen until October 30, 2018. The plan was very basic and was insufficient for Shipowners' to determine what the proposed costs would be and why the operation was proposed to take 19 days. Shipowners' immediately inquired as to why more

⁸⁸ Claim submission dated May 14, 2020.

⁸⁹ CG Sector Guam email to the NPFC dated July 28, 2020, response to question 2.

information was not included in T&T's plan and T&T advised that a more detailed plan would be forthcoming.

Additionally, on October 31, 2018, T&T advised Shipowners' that, in fact, a more detailed plan would not be provided and T&T intended to submit its preliminary action plan to USCG with more information to be provided following subsequent site visits. T&T also made a security demand to Pride Keen and Shipowners' for \$750,000.00. Upon receipt of that request, and in light of certain coverage issues between Shipowners' and Pride Keen, Shipowners' advised Pride Keen to post security directly, and Pride Keen took steps to do so. T&T then imposed a deadline on Pride Keen to post security by 10:00 a.m. on November 1, 2018, failing which they would demobilize. Pride Keen was unable to post security in less than twenty-four hours, and T&T indicated it would demobilize as a result.⁹⁰

When asked by the NPFC, Sector Guam stated that Pride Keen (through their various representatives) failed to activate their VRP despite being directed to do so several times. As a matter of courtesy, the FOOSC granted extra time that was requested by Pride Keen to comply with this Admin Order; however despite the extension, Pride Keen neither activated their VRP nor executed a contract with an OSRO to begin pollution remediation. The only reason Pride Keen provided for failing to comply with this order was the cost of the operation.⁹¹

Despite the federal regulations requiring it to do so and the FOOSC repeatedly requesting – and ultimately ordering – Pride Keen to activate its VRP, it failed to do so. The lack of the ability to properly contract, provide adequate financial security, or secure funding are not sufficient causes for the non-compliance with this Admin Order. As such, this is a reason the claim must be denied.

Admin Order dated November 22, 2018

Pride Keen failed to comply with Sector Guam's Admin Order dated November 22, 2018, which required among other things, to activate their VRP. After a month of dilatory action or inaction by the responsible party, the FOOSC ultimately ordered it to activate its VRP, which should have been done on October 26 – but still had not been.

Upon receipt of Sector Guam's Admin Order dated November 22, 2018, Pride Keen sought reconsideration in which they acknowledged its obligations to fund the response effort. Pride Keen explained its (mis)understanding that once the USCG assumed control of the response on November 1, 2018, Pride Keen was required to “stand down” on the response “unless and until the Coast Guard and its hired contractor had completed that portion of the project or notified [Owner] otherwise.”⁹² This is a surprising contention as Sector Guam continually encouraged

⁹⁰ Claimants' letter to the NPFC dated July 10, 2020, response to question 9.

⁹¹ Pride Keen should have been aware of and promptly responded to T&T's security demand. *See*, Clause 15, Payment, Security, Interest & Fees of T&T/OSROCO's contract with Pride Keen dated March 26, 2018, in which Pride Keen was notified of the potential for security for any projects likely to exceed \$100,000.00 in costs and acknowledged by Pride Keen by their signature on the contract.

⁹² Claim submission dated May 14, 2020. Additionally, and in a separate letter, Pride Keen explained that the basis for its inability to implement the Vessel Response Plan was an underlying coverage dispute with its insurer. Pride Keen went on to request some leeway from the USCG in light of the difficulties it faced in securing the requisite

Pride Keen to activate their VRP and hire a contractor to assume the response.⁹³ Pride Keen further explained that the basis for its inability to implement the VRP was an underlying coverage dispute with its insurer. Pride Keen requested some leeway from the USCG in light of the difficulties it faced in securing the requisite contracts because the responders listed in Pride Keen's VRP would not respond without security posted by the insurer and requested it be authorized to proceed with a local salvor.⁹⁴

On December 18, 2018, Pride Keen confirmed its insurance coverage for the GRAND MARIANA through Shipowners' to Sector Guam.⁹⁵ However, Sector Guam remained in control of the response as Pride Keen had neither activated their VRP nor did they present the FOSC with a salvage plan that was acceptable by regulatory standards.⁹⁶

On January 4, 2019, Sector Guam authorized Pride Keen to deviate from their VRP to tender multiple salvage companies.⁹⁷

On April 10, 2019, Pride Keen finalized a contract with Resolve to remove the fuel and re-float/remove the GRAND MARIANA.⁹⁸

On May 10, 2019, Sector Guam terminated the Admin Order issued to Pride Keen dated November 22, 2018, as Pride Keen had signed a contract with a Resolve to remove the threat of oil discharge from the GRAND MARIANA and to either repair, refloat, or dismantle the vessel.⁹⁹

The six months it took the RP to activate its VRP is inexcusable and none of the reasons provided by Pride Keen provide sufficient cause for the noncompliance with this Admin Order. Specifically troublesome is Pride Keen citing the continued lapse in insurance coverage between Pride Keen and its OSRO as a reason for noncompliance as one of the primary purposes of a VRP is the requirement that an OSRO to be always available through contract or other approved means. Since none of the explanations provided by Pride Keen rise to sufficient cause for non-compliance with the Admin Order, this is a reason to deny the claim.

V. CONCLUSION:

The Claimants have not demonstrated that they are entitled to a limitation of liability as the evidence in this case indicates that the incident was proximately caused by Pride Keen's violation of an applicable Federal safety, construction, or operating regulation. In addition, Pride Keen failed to report the incident as required by law and failed to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal

contracts because the responders listed in Pride Keen's NTVRP would not respond without security posted by the insurer and requested it be authorized to proceed with a local salvor.

⁹³ Letter from CG Sector Guam to Pride Keen dated November 24, 2018.

⁹⁴ Claim submission dated May 14, 2020.

⁹⁵ *Id.*

⁹⁶ CG Sector Guam response to the NPFC dated July 28, 2020, response to question 8.

⁹⁷ CG Sector Guam response to the NPFC dated July 28, 2020, response to question 11.

⁹⁸ BIMCO Wreckstage contract between Pride Keen, Ltd. and Resolve Marine Salvage & Fire dated April 1, 2019.

⁹⁹ CG Sector Guam Admin Order termination letter issued to Pride Keen dated May 10, 2019.

activities; or without sufficient cause, to comply with an order issued under proper authority. Each of these is an independent basis to deny the claim.

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

(b), (b) (6)

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

Date of Supervisor's review: *November 10, 2020*

Supervisor Action: *Denied*