

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGPE24602-URC001
Claimant:	E3 OMI, LLC
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$2,925,795.41
Action Taken:	Denial

EXECUTIVE SUMMARY:

On December 25, 2023, at approximately 16:35 local time, the United States Coast Guard's National Response Center ("NRC") received notification of an unknown rainbow sheen sighting in Moses Bayou, from a nearby resident.² Following the initial response by the City of Texas, City Emergency Manager³, E3 OMI ("E3 OMI" or "Claimant") responded to the incident location and found a separation tank on the site of an active onshore facility described as an oil field production disposal facility⁴ located in Galveston County, Texas.⁵

The United States Environmental Protection Agency (USEPA) Region VI is the Federal On Scene Coordinator (FOSC) for the incident.⁶ Sawtooth Operating Company, Inc. ("Sawtooth" or RP"), is the owner/operator of the onshore facility presently and is the responsible party (RP),⁷ as defined by the Oil Pollution Act of 1990.⁸ On December 27, 2023, E3 OMI, LLC ("E3 OMI" or "Claimant") was contracted by Sawtooth to respond to the incident.⁹

The separation tank located on the facility grounds overfilled causing the contents of the tank to overflow the top of the tank, and past a low spot in the secondary containment, resulting in a discharge into adjacent areas.¹⁰ The contents flowed east along the site access road to the

¹ This determination is written for the sole purpose of adjudicating a claim against the Oil Spill Liability Trust Fund (OSLTF). This determination adjudicates whether the claimant is entitled to OSLTF reimbursement of claimed removal costs or damages under the Oil Pollution Act of 1990. This determination does not adjudicate any rights or defenses any Responsible Party or Guarantor may have or may otherwise be able to raise in any future litigation or administrative actions, to include a lawsuit or other action initiated by the United States to recover the costs associated with this incident. After a claim has been paid, the OSLTF becomes subrogated to all of the claimant's rights under 33 U.S.C. § 2715. When seeking to recover from a Responsible Party or a Guarantor any amounts paid to reimburse a claim, the OSLTF relies on the claimant's rights to establish liability. If a Responsible Party or Guarantor has any right to a defense to liability, those rights can be asserted against the OSLTF. Thus, this determination does not affect any rights held by a Responsible Party or a Guarantor.

² See, USCG NRC Report # 1387571 dated December 25, 2023. See also, email from RP to NPFC dated June 11, 2024, Exhibit 5.

³ See, email from RP to NPFC dated June 11, 2024, Exhibit 5.

⁴ See, USEPA Region 6 POLREP #2, dated January 2, 2024, section 1.1.1.

⁵ Id. See also, email from RP to NPFC dated June 11, 2024, Exhibit 5.

⁶ See, email from USEPA Region 6 to NPFC dated June 4, 2024.

⁷ See, email from USEPA Region 6 to NPFC dated June 4, 2024.

⁸ 33 U.S.C. § 2701 (32).

⁹ See, E3 OMI Short Form Service Contract signed by E3 OMI and Sawtooth.

¹⁰ See, USEPA Region 6 POLREP #3, dated February 20, 2024, section 2.1.1.

stormwater ditch on the west side of Century Boulevard, then 22 yards into a stormwater drain before flowing underground in a concrete storm pipe for approximately 1,320 yards before discharging into the nearby Moses Bayou; a tributary of Moses Lake, and navigable waterway of the United States.¹¹

E3 OMI presented revised invoices affiliated with all costs to Sawtooth on March 25, 2024.¹² Having not received payment from the RP, E3 OMI presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$2,925,795.41 on June 23, 2024.¹³

A mixture of oil and hazardous substances is not “oil” within the meaning of the OPA.¹⁴ Claims for removal costs and damages for a commingled spill are not compensable under OPA.¹⁵ In its submission, E3 OMI alleges that crude oil discharged from the facility belonging to Sawtooth Operating Company, Inc.¹⁶ However, in support of its assertion, E3 OMI only submitted soil sample analysis data.¹⁷ The chain of custody attendant with the sample identifies this sample as being a solid,¹⁸ and not the liquid substance that spilled from the tank.¹⁹ It did not submit any analysis, nor does the administrative record indicate that any samples were taken, from the liquid materials that spilled from the tank. Even so, the date when soil samples were taken is listed as January 11, 2024,²⁰ which is seventeen days after the incident occurred. The NPFC compared this information with information it gathered from the FOSC and RP.

The NPFC reviewed the Pollution Reports (POLREPS) that were submitted by the EPA. It also discussed the data in the POLREPS with the FOSC. The FOSC explained that the spill was a mixture of crude oil and produced water.²¹ The NPFC also engaged the RP for a description of the tank in question. The RP also confirmed that while the tank contained some crude oil atop the produced water, the tank contained predominantly produced water.²² Finally, the NPFC reviewed the facility Spill Prevention Control and Countermeasure (SPCC) plan which confirmed the contents of the spill came from a produced water tank.²³

The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that it must be denied.

I. DETERMINATION PROCESS:

¹¹ See, USEPA Region 6 POLREP #3, dated February 20, 2024, section 1.1.2.2.

¹² See, email from RP to NPFC dated June 11, 2024, Exhibits 3 and 6.

¹³ E3 OMI original claim submission dated May 30, 2024.

¹⁴ See, e.g., *Munoz v. Intercontinental Terminals Co.*, 845 F.4th 343 (5th Cir. 2023).

¹⁵ *Id.*

¹⁶ E3 OMI original claim submission.

¹⁷ See, Enthalpy Analytical sample analysis, reported January 26, 2024.

¹⁸ *Id.*

¹⁹ *Id.* Additionally, the chain of custody also states the custody seals were not intact when received by the lab, bringing to question the integrity of the samples being analyzed.

²⁰ See, Enthalpy Analytical sample analysis, reported January 26, 2024, pg. 17.

²¹ See, emails from FOSC to NPFC dated June 4, 2024 and June 14, 2024 respectively.

²² See, email from RP to NPFC dated June 11, 2024.

²³ See, Spill Prevention Control and Countermeasure (SPCC) Plan for the [facility] dated March 22, 2024.

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²⁴ As a result, 5 U.S.C. § 555(e) requires the NPFC to provide a brief statement explaining its decision. This determination is issued to satisfy that requirement.

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.²⁵ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.²⁶ 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 makes its determination based on the preponderance of the credible evidence.

II. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On December 25, 2023, at approximately 16:35 local time, the United States Coast Guard's National Response Center (NRC) received notification from a nearby resident who noticed a rainbow sheen in Moses Bayou.²⁷ On December 26, 2023, a subsequent notification was made to the NRC by the Texas City Fire Department that an unknown sheen from an unknown source was discovered in Moses Bayou; a tributary of Moses Lake, a navigable waterway of the United States.^{28,29}

The separation tank located on the facility grounds overfilled causing the contents of the tank to overflow the top of the tank, and past a low spot in the secondary containment, resulting in a discharge into adjacent areas.³⁰ The contents flowed east along the site access road to the stormwater ditch on the west side of Century Boulevard, then 22 yards into a stormwater drain before flowing underground in a concrete storm pipe for approximately 1,320 yards before discharging into the nearby Moses Bayou; a tributary of Moses Lake, and navigable waterway of the United States.³¹

Responsible Party

²⁴ 33 CFR Part 136.

²⁵ See, e.g., *Boquet Oyster House, Inc. v. United States*, 74 ERC 2004, 2011 WL 5187292, (E.D. La. 2011), "[T]he Fifth Circuit specifically recognized that an agency has discretion to credit one expert's report over another when experts express conflicting views." (Citing, *Medina County v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010)).

²⁶ See, e.g., *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center*, 71 Fed. Reg. 60553 (October 13, 2006) and *Use of Reports of Marine Casualty in Claims Process by National Pollution Funds Center* 72 Fed. Reg. 17574 (concluding that NPFC may consider marine casualty reports but is not bound by them).

²⁷ See, USCG NRC Report # 1387571 dated December 25, 2023. See also, email from the RP to NPFC dated June 11, 2024, Exhibit 5.

²⁸ Although an employee of Sawtooth Operating Company (RP) discovered the spill incident on December 25, 2023, the RP did not contact the NRC to report the spill. Furthermore, cleanup operations did not take place until December 27, 2023.

²⁹ USCG NRC Report # 1387593 dated December 26, 2023.

³⁰ USEPA Region 6 POLREP #3, dated February 20, 2024, section 2.1.1.

³¹ USEPA Region 6 POLREP #3, dated February 20, 2024, section 1.1.2.2.

The spill occurred at an onshore facility as defined by the Oil Pollution Act of 1990 (OPA).³² OPA defines the Responsible Party (RP) for a discharge from an onshore facility as “any person or entity owning or operating such facility.”³³ Sawtooth Operating Company, Inc., is the confirmed owner/operator of the onshore facility described as an oil field production disposal facility located in Galveston County, Texas at the time the incident occurred.³⁴ The FOSC identified Sawtooth as the responsible party.³⁵

Recovery Operations

On December 27, 2023, Sawtooth contracted E3 OMI to respond to the incident.³⁶ Initial booms were deployed to prevent oil from leaving the facility and entering Moses Lake, and additional booms were deployed to limit the migration of crude oil further down Moses Bayou and to allow for vacuum truck recovery.³⁷

On December 27, 2023, USEPA arrived on site and met with both Sawtooth’s representative, E3 OMI, and local government representatives to discuss projected activities.³⁸ USEPA conducted community air monitoring between December 28, 2023, through December 30, 2023, and monitored for volatile organic compounds (VOC).³⁹

Removal and disposal of contaminated water and spilled material was performed daily between January 2, 2024 and February 6, 2024, at which point, both crude oil and produced water had been recovered.⁴⁰ On February 6, 2024, USEPA conducted their final site inspection.⁴¹ E3 OMI returned to the site several times to recover equipment and crude oil/oily water for disposal, with their last date of recorded decontamination and disposal being March 7, 2024.⁴²

III. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)⁴³ require all claims for removal costs must be presented to the responsible party before seeking compensation from the NPFC.⁴⁴

³² An “onshore facility means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land.” 33 U.S.C. § 2701(24).

³³ 33 U.S.C. § 2701(32)(b)

³⁴ 33 U.S.C. § 2701(26), 33 U.S.C. § 2701(32).

³⁵ *See*, USEPA Region 6 POLREP #3, dated February 20, 2024. *See also*, email from USEPA Region 6 to NPFC dated June 4, 2024

³⁶ *See*, E3 OMI Short Form Service Contract executed by E3 OMI and Sawtooth.

³⁷ *See*, USEPA Region 6 POLREP #3, dated February 20, 2024. *See also*, email from RP to NPFC dated June 11, 2024, Exhibit 4.

³⁸ *See*, USEPA Region 6 POLREP #3, dated February 20, 2024..

³⁹ *Id.*

⁴⁰ *Id.* *See also*, email from USEPA Region 6 to NPFC dated June 14, 2024.

⁴¹ *Id.*

⁴² *See*, Intra-Services, Inc. Invoice 03-24-141, dated March 8, 2024, found in E3 OMI Invoice OMI-14266, pg. 5 of 5.

⁴³ 33 U.S.C. § 2701 *et seq.*

⁴⁴ 33 CFR 136.103.

As of June 23, 2024, E3 OMI satisfied its presentment requirement under OPA, and the RP did not deny liability or settle the claim within the ninety-day timeframe following presentment.⁴⁵ E3 OMI presented revised invoices affiliated with all costs to Sawtooth on March 25, 2024.⁴⁶ The RP has not paid the costs subject of the claim.

IV. CLAIMANT AND NPFC:

On May 31, 2024, E3 OMI presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$2,925,795.41.⁴⁷ E3 OMI provided its supporting invoices, disposal records, Incident Action Plans (IAP's), bill of lading documents, demand letters, event logs, and sampling analysis data.⁴⁸

V. DISCUSSION:

An RP 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.⁴⁹ An RP's liability is strict, joint, and several.⁵⁰ 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 legal defenses, corporate forms, and burdens of proof unfairly favoring those responsible for the spills."⁵¹ OPA was intended to cure these deficiencies in the law.

OPA provides a mechanism for compensating parties who have incurred removal costs where the responsible party has failed to do so. Removal costs are defined as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident."⁵² The term "remove" or "removal" means "containment and removal of oil [...] from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches."⁵³

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

⁴⁵ *Id.*

⁴⁶ Email from RP to NPFC dated June 11, 2024, Exhibits 3 and 6.

⁴⁷ E3 OMI original claim submission.

⁴⁸ *Id.*

⁴⁹ 33 U.S.C. § 2702(a).

⁵⁰ *See*, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

⁵¹ *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).

⁵² 33 U.S.C. § 2701(31).

⁵³ 33 U.S.C. § 2701(30).

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.

documentation deemed relevant and necessary by the Director of the NPFC, to support and properly process the claim.⁵⁶

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.**⁵⁷

An “incident” under OPA is defined as 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.**⁵⁸

OPA defines “oil” as “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101 (14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC § 9601) and which is subject to the provisions of that Act [42 USCA Section 9601 et seq.]”⁵⁹

CERCLA defines “hazardous substance” broadly.⁶⁰ However, the definition of “hazardous substance” under CERCLA specifically excludes “petroleum, including crude oil or any fraction thereof...”⁶¹ Further, the definition goes on to exclude “natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).”⁶²

Produced water

When it is initially extracted from subsurface geological structures, unrefined crude oil typically includes portions of natural gas, silt, water, and sand, in addition to any chemical additives previously used during production to enhance extraction of the crude. In order to obtain a marketable product, some of these constituents must be removed from the crude oil. The separation process generates various types of wastes like produced water, cuttings, and drilling fluids. Produced water refers to the water separated from the crude oil.⁶³

⁵⁶ 33 CFR 136.105.

⁵⁷ 33 U.S.C. § 2701(14).

⁵⁸ 33 U.S.C. § 2701(14)(emphasis added).

⁵⁹ 33 U.S.C. § 2701(14).

⁶⁰ “Hazardous substance means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C. 2606].”

⁶¹ *Id.*

⁶² *Id.*

⁶³ Produced water is more fully as follows:

In addition to small parts of crude oil, produced water may include other contaminants that can be difficult to remove. The concentrations and types of pollutants in production water may vary significantly depending upon factors like the well's location and any treatment of the water. Produced water commonly includes varying concentration of organic compounds, inorganic compounds, and radionuclides, many of which are classified as CERCLA-listed hazardous substances such as:

- Organic compounds: benzene, naphthalene, toluene, phenanthrene, bromodichloromethane, and pentachlorophenol;
- Inorganics: lead, arsenic, barium, antimony, sulfur, and zinc;
- Radionuclides: uranium, radon, and radium⁶⁴

E3 OMI did not provide sample analysis for the liquid that spilled from the operational steel tank (2,000 barrel).⁶⁵ E3 OMI provided a copy of CTEH's Environmental Sampling and Analysis Plan dated January 2, 2024,⁶⁶ however no water samples were provided to demonstrate the chemical composition of the product that discharged from the tank.

A commingled spill

Notwithstanding the statutory definitions, a question sometimes exists when the release involves a mixture of oil and hazardous substances that have commingled before substantially threatening to discharge, or discharging into a navigable waterway, such as the facts in this case.

The analysis of these types of releases must begin by analyzing the purpose of each of the statutes and how Congress and the agencies have intended them to apply.

OPA's legislative history clearly highlights the intent of Congress that OPA liability and, by extension OPA claim compensation, only applies to discharges of "oil" and not "oil mixed with hazardous substances".

A term used to describe water produced from a wellbore that is not a treatment fluid. The characteristics of produced water vary and use of the term often implies an inexact or unknown composition. It is generally accepted that water within the pores of shale reservoirs is not produced due to its low relative permeability and its mobility being lower than that of gas.

Schlumberger Oilfield Glossary, available online at: www.glossary.oilfield.slb.com/Terms/p/produced_water.aspx.

⁶⁴ See, United States Environmental Protection Agency, Office of Compliance, *Profile of the Oil and Gas Extraction Industry*, p 39 (October 2000) available online at: <https://archive.epa.gov/sectors/web/pdf/oilgas.pdf>. See also, United States Department of the Interior, Bureau of Reclamation, *Oil and Gas Produced Water Management and Beneficial Use in the Western United States*, p. 41-60 (September 2011) available online at: <https://www.usbr.gov/research/dwpr/reportpdfs/report157.pdf>; United States Environmental Protection Agency, *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources*, p. ES-17 (June 2015) (External Review Draft)—EPA/600/R-15/047, available online at http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=523539. Additionally, many other constituents found within produced water are CERCLA hazardous materials. (A listing of CERCLA hazardous substances is found at 40 CFR 302.4).

⁶⁵ One-barrel equals 42 gallons.

⁶⁶ See, E3 OMI original claim submission.

The definition [of oil] has been modified... to clarify that it does not include any constituent or component of oil which may fall within the definition of "hazardous substances", as that term is defined for the purposes of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). **This ensures that there will be no overlap in the liability provisions of CERCLA and the Oil Pollution Act.**⁶⁷

The legislative history of CERCLA likewise is instructive: "The reported bill [CERCLA] does not cover spills or other releases **strictly** of oil."⁶⁸ Contemporaneous congressional debate further elucidated how it intended CERCLA to apply to spills of oil mixed with hazardous substances.⁶⁹ Both Representative Edgar and Senator Randolph specifically discussed oil slicks that were mixed with hazardous materials present on a navigable waterway, with the intent of ensuring the final legislation was broad enough to cover these events. By all accounts, it was.

Since the passage of CERCLA, the EPA has promulgated several policy documents explaining its position with respect to discharges of oil. Taken holistically and simplistically, the policies explain that CERCLA excludes discharges of oil⁷⁰ but CERCLA could impose liability on certain discharges of substances that contain oil in an adulterated form. Because of the adulteration of the oil, if released, it would be considered a "hazardous material" not "oil" as defined.⁷¹ While most of the jurisprudence in this area concerns cases where the EPA is asserting jurisdiction under CERCLA and the defendant asserts the "petroleum exclusion" as a defense, the decisions discussing the intent and application of CERCLA are instructive to how to analyze a commingled spill. For example, one court after reviewing the legislative history of CERCLA and analyzing EPA's policy documents on CERCLA's application to oil concluded pointedly, "the EPA determined that the purpose of the petroleum exclusion was 'to remove from CERCLA jurisdiction spills only of oil, not releases of hazardous substances mixed with oil.'"⁷²

Moreover, the Tenth Circuit analyzed the commingling of petroleum products and hazardous materials in the soil and floating in the groundwater beneath an oil refinery.⁷³ In that case, the sampling results and expert testimony confirmed that certain soil at the refinery, as well as the petroleum plume in the groundwater aquifer beneath the refinery, contained a mixture of

⁶⁷ H. R. Rep. No. 653, 101st Cong., 2d Sess. 102 (1990). S. Rep. No. 101-94 (1989) (emphasis added).

⁶⁸ S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980) (emphasis added).

⁶⁹ See, e.g., at 126 Cong. Rec. H11798 (Rep. Edgar) (oil slicks and industrial oil waste); 126 Cong. Rec. S14963 (daily ed. November 24, 1980) (Sen. Randolph) (contaminated oil slick), and other petroleum products containing hazardous substance additives intended to be addressed by the legislation including PCBs in transformer fluid, *id.* at S14963 (Sen. Randolph) and S14967 (Sen. Stafford); dioxin in motor fuel used as a dust suppressant, *id.* at S14974 (Sen. Mitchell); PCB's in waste oil, *id.* (Sen. Mitchell) and contaminated waste oil, *id.* at S14980 (Sen. Cohen).

⁷⁰ This has become known colloquially as EPA's "petroleum exclusion".

⁷¹ Several courts have analyzed whether or not a particular discharge falls under CERCLA or has been exempted from CERCLA jurisdiction because of the application of the "petroleum exclusion". For example, when discussing lead in waste oil discharge: "If the lead results from its use as an additive to petroleum products, and was found at the level expected of purely petroleum additives, it would fall under the petroleum exclusion and would not be a "hazardous substance" for the purpose of CERCLA liability. If, on the other hand, the level exceeded the amount that would have occurred in petroleum during the refining process, then the petroleum exclusion would not apply." *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377 (E.D. Cal. 1991). See also, e.g., *State of Wash. v. Time Oil Co.*, 687 F.Supp. 529 (W.D. Wa. 1988), *City of New York v. Exxon*, 744 F. Supp. 474 (S.D.N.Y. 1990).

⁷² *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1383-4 (E.D. Cal. 1991).

⁷³ *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886 (10th Cir. 2000).

petroleum and hazardous wastes.⁷⁴ In holding that the petroleum exclusion did not apply to these facts, the court indicated that in order for CERCLA to be inapplicable, the moving party would have to have provided testing to show that unadulterated petroleum was the *only* contaminant in the ground water plume. Moreover, the court would have required an expert to opine that the hazardous waste *did not commingle* with petroleum products.⁷⁵

Contents of the Tank

A mixture of oil and hazardous substances is not “oil” within the meaning of the OPA.⁷⁶ Claims for removal costs and damages for a commingled spill are not compensable under OPA.⁷⁷ In its submission, E3 OMI alleges that crude oil discharged from the facility belonging to Sawtooth Operating Company, Inc.⁷⁸ However, in support of its assertion, E3 OMI only submitted soil sample analysis data.⁷⁹ The chain of custody attendant with the sample identifies this sample as being a solid,⁸⁰ and not the liquid substance that spilled from the tank.⁸¹ It did not submit any analysis, nor does the administrative record indicate that any samples were taken, from the liquid materials that spilled from the tank. Even so, the date when soil samples were taken is listed as January 11, 2024,⁸² which is seventeen days after the incident occurred. The NPFC compared this information with information it gathered from the FOSC and RP.

The NPFC reviewed the Pollution Reports (POLREPS) that were submitted by the EPA. It also discussed the data in the POLREPS with the FOSC. The FOSC explained that the spill was a mixture of crude oil and produced water.⁸³ The NPFC also engaged the RP for a description of the tank in question. The RP also confirmed that while the tank contained some crude oil atop the produced water, the tank contained predominantly produced water.⁸⁴ Finally, the NPFC reviewed the facility Spill Prevention Control and Countermeasure (SPCC) plan which confirmed the contents of the spill came from a produced water tank.⁸⁵

VI. CONCLUSION:

After careful analysis of all the supporting documentation the claimant and the entire administrative record, the NPFC determines and finds as a matter of fact that a mixture of produced water and crude oil was released at the time of the spill.

⁷⁴ *Id.*

⁷⁵ *Id.* at 894. *See also, Eastman v. Brunswick Coal & Lumber Co.*, No. CIV. 95-255-P-C, 1996 WL 911200, (D. Me. Apr. 19, 1996) (A truck loaded with diesel fuel (an OPA oil) overturned and caught fire releasing its contents, and in conjunction with the fire, hazardous materials mixed with the diesel fuel. This mixture entered the [plaintiffs'] soil and groundwater, and ultimately, a navigable waterway of the United States. The court indicated that the petroleum exception would not apply and these facts, if alleged and proven, would constitute a CERCLA release.

⁷⁶ *See, e.g., Munoz v. Intercontinental Terminals Co.*, 845 F.4th 343 (5th Cir. 2023).

⁷⁷ *Id.*

⁷⁸ E3 OMI original claim submission.

⁷⁹ *See*, Enthalpy Analytical sample analysis, reported January 26, 2024.

⁸⁰ *Id.*

⁸¹ *Id.* Additionally, the chain of custody also states the custody seals were not intact when received by the lab, bringing to question the integrity of the samples being analyzed.

⁸² *See*, Enthalpy Analytical sample analysis, reported January 26, 2024, pg. 17.

⁸³ *See*, emails from FOSC to NPFC dated June 4, 2024 and June 14, 2024 respectively.

⁸⁴ *See*, email from RP to NPFC dated June 11, 2024.

⁸⁵ Spill Prevention Control and Countermeasure (SPCC) Plan for the [facility] dated March 22, 2024.

A mixture of oil and hazardous substances is not “oil” within the meaning of the OPA.⁸⁶ Claims for removal costs and damages for a commingled spill are not compensable under OPA.⁸⁷ Given the RP’s confirmation that produced water and oil were contained in the tank that discharged, the FOSC’s confirmation that the substance spilled was a mixture of produced water and crude oil, the SPCC which indicates the spilled contents came from a produced water tank, combined with E3 OMI’s inability to substantiate that the spilled substance was *strictly* an OPA oil as required by law, the NPFC finds that E3 OMI has not met its burden of proof that the discharge into the Moses Bayou was strictly an OPA oil.

As such, the NPFC finds the claimant’s costs were not the result of a discharge of oil as defined by OPA and, therefore, the OSLTF is not available to pay this claim based on the administrative record and applicable law and regulations.

The NPFC has not specifically adjudicated the specific underlying claimed costs because it has denied the claim on the jurisdictional grounds of not being compensable under OPA.⁸⁸

VII. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, E3 OMI, LLC’s request for uncompensated removal costs is denied.

(b) (6)

Claim Supervisor: (b) (6)

Date of Supervisor’s review: 8/2/24

Supervisor Action: *Denial approved*

⁸⁶ See, e.g., *Munoz v. Intercontinental Terminals Co.*, 845 F.4th 343 (5th Cir. 2023).

⁸⁷ *Id.*

⁸⁸ Because NPFC has determined that the claimant is not entitled to compensation, NPFC did not adjudicate whether these claimed expenses met the other regulatory requirements outlined in 33 CFR Part 136.