

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	E17607-0002
<b>Claimant:</b>	Enhanced Environmental & Energy Services, Inc.
<b>Type of Claimant:</b>	OSRO
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	██████████
<b>Amount Requested:</b>	\$71,169.07

### I. INTRODUCTION

The U.S. Environmental Protection Agency (USEPA) was notified of a discharge from a 400-barrel aboveground storage tank at the Metairie Energy facility on January 31, 2017. It was later determined that the discharge had originated at this storage tank five months prior to the discovery date and had not been reported nor removed. The tank, identified as Tank No. 2, lacked secondary containment and the discharge migrated to a wetland connected to the Port Allen Lock, which connects with the Intracoastal Waterway, a navigable water of the United States. The discharge volume was approximately 200 to 400 barrels. The responsible party (RP) for the incident is Metairie Energy Company, Inc. (Metairie) because it operated the tank and its associated oil and gas wells.

### II. CLAIMANT

Enhanced Environmental and Energy Services, Inc. (E3 or Claimant) executed a Short Form Service Contract with A&M Associates, Metairie's representative for the incident, on February 1, 2017. The Contract provided that E3 would perform services as an independent contractor. E3 provided removal activities from February 2 through February 7, 2017. The activities were limited to the contaminated surface water in the wetlands and on vegetation and debris in the area.

### III. CLAIM HISTORY

On June 28, 2017, NPFC received a removal cost claim from E3 for reimbursement of its uncompensated removal costs of in the amount of \$71,169.07.<sup>1</sup> This amount was based on invoice #SI-02143 in the amount of \$44,453.81 and invoice #SI-02166 in the amount of \$26,715.26.<sup>2</sup> The claim submission consisted of: Cover letter, OSLTF Claim Form, E3 Invoice # SI-02166, E3 Invoice # SI-02143, supporting daily field logs, and the April 27, 2017 letter from RP Counsel denying costs.<sup>3</sup>

On November 28, 2017, the NPFC denied the claim on the grounds that the Claimant's costs were not associated with oil removal activities. The NPFC stated that should the

<sup>1</sup> See, OSLTF Claim Form dated June 20, 2017.

<sup>2</sup> See, Enhanced Environmental & Energy Services Claim Package E17607-0002 received June 28, 2017.

<sup>3</sup> See, Enhanced Environmental & Energy Services Claim Package E17607-0002 received June 28, 2017.

Claimant request reconsideration, it must establish that the product discharged from the AST was an OPA oil and that the removal costs were associated with the removal of an OPA oil.

#### IV. INITIAL DENIAL

The NPFC's denial of the claim was based on the Sampling and Analysis Reports for Tank No. 2, the source of the January 31, 2017 discovery at Metairie. The NPFC, during its early adjudication process, requested information associated with the incident from LOSCO.<sup>4</sup> On July 26, 2017, the NPFC received a thumb drive containing LOSCO's files for the incident. The LOSCO documentation included two sample analyses reports. One report, dated February 10, 2017, is an eight (8) page Revised Work Plan/Sampling and Analysis Plan. The second report, dated March 8, 2017, is a five hundred and fifteen (515) page sample analysis report dated March 8, 2017.

██████████, Metairie's RP representative, arranged for sampling and analysis of the three Metairie tanks on February 3, 2017, several days after discovery of the discharge. Specific to this claim is the analysis of Tank No. 2 (LA 30190-2), the source of the discharge. The analysis of Tank No. 2 reflected high levels of heavy metals along with 4-Bromofluorobenzene and 1,4 Difluorobenzene, which are hazardous substances listed under CERCLA.<sup>5</sup>

The NPFC, on August 29, 2017, requested that Mr. ██████████ ██████████ review the results of the analysis and provide comment as to the constituents identified within the sample analysis. Specifically, he was asked: (1) if there were Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) hazardous substances identified within the sample analysis; (2) if the CERCLA hazardous substances identified in the sample analysis were indigenous to petroleum or added to petroleum during the refining process, and (3) if the CERCLA hazardous substances identified in the sample analysis were in excess of what was naturally occurring in oil or were added to the oil after the refining process. Further, he was asked, based upon the information contained within the analysis, if the liquid or solid samples, were an oil under the Federal Water Pollution Control Act (FWPCA) or the Oil Pollution Act of 1990 (OPA).

On October 26, 2017, Mr. ██████████ issued an official Memorandum, "Review of the Liquid and Core Sample Analysis associated with the Metairie Energy Company oil spill, FPN E17607" to Mr. ██████████ Chief of NPFC Claims Division. He stated that the sample analysis results reported for SAMPLE JAR TANKs # 1, #2 and #3 all support that the spilled material was production water, and that the production water contained numerous components that are CERCLA hazardous substances. These components are often found in flow-back or produced water associated with oil drilling operations, but are not considered to be oil or petroleum products. These components can be naturally occurring in crude oil, but in this case, the sample

---

<sup>4</sup> LOSCO is the state agency authorized to oversee and regulate oil and gas wells. It conducts inspections and monitors removal actions at its regulations facilities. Its inspections included the Metairie facility.

<sup>5</sup> SGS Accutest, Lafayette, dated February 13, 2017.

<sup>6</sup> Mr. ██████████ is the Coast Guard's Chemical Engineer from the Hazardous Materials Division (CG-ENG-5).

results indicate that oil was not present, only CERCLA hazardous materials. He determined that the contents of this spill was not an oil or oil-like substance under OPA 90 or the FWPCA.<sup>7</sup>

During the adjudication of the claimed costs, the NPFC reviewed the disposal manifests submitted with Oil Mop's documentation in support of its claim. The wastes were disposed of as RCRA wastes, rather than as oil.

Based on Mr. [REDACTED]'s Memorandum and the disposal manifests the NPFC determined that the removal actions were conducted for the removal of CERCLA and/or RCRA hazardous substances and not an oil as defined by OPA. The NPFC denied the E3 claim on November 28, 2017.

## **V. REQUEST FOR RECONSIDERATION**

On December 27, 2017 the Claimant through its Corporate Administrator, Ms. [REDACTED], requested reconsideration of claim E1760-0002 via email to Ms. [REDACTED]. The Claimant argued that the NPFC made an error when it determined that the product was not an OPA oil. It stated its actions were performed pursuant to approved Incident Action Plans and that personnel with vast experience at the site believe the discharge was oil.

The Claimant sought permission from Oil Mop to incorporate the Oil Mop request for reconsideration and supporting documentation into the E3 request.<sup>8</sup> The NPFC confirmed with, and Oil Mop representative, Mr. [REDACTED], confirmed that, it granted permission to E3.<sup>9</sup> The Claimant references the Oil Mop letter brief and exhibits in its request for reconsideration.<sup>10</sup> The NPFC incorporated the Oil Mop letter brief and exhibits into the administrative record for the E3 claim.

### **NPFC Role in Adjudication of Claims Against the OSLTF**

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.<sup>11</sup> 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 on reconsideration is

---

<sup>7</sup> Mr. [REDACTED] also noted that the core samples analyses indicated the presence of drilling muds containing barium sulfate (barite), which is not a CERCLA hazardous substance. The analysis did not indicate the presence of petroleum or any products that are considered to fall under OPA 90/FWPCA.

<sup>8</sup> Oil Mop (OMI) was the primary response contractor for the incident. See Claim No. E17607-0001.

<sup>9</sup> See, OMI Request for Reconsideration dated December 27, 2017. OMI through its legal representative, Mr. [REDACTED] of Breazeale, Sachse & Wilson, LLP, requested reconsideration of claim E1760-0001 via email to Mr. [REDACTED].

<sup>10</sup> The Exhibit List is attached.

<sup>11</sup> 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 . . . ."

issued to satisfy that requirement. It is based on the unique facts giving rise to this claim and should not be viewed as precedent controlling other NPFC determinations.

During the adjudication of claims against the Fund, 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 evidence.

The NPFC's initial determination denying the claim, dated November 28, 2017, is hereby incorporated by reference. A request for reconsideration of an initial determination must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 C.F.R. 136.115(d). When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including new information provided by the claimant in support of its request for reconsideration. A claimant submitting a claim to the Fund has the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. 33 CFR 136.105(a).

### **ANALYSIS ON RECONSIDERATION**

The Claimant asserts that it incurred uncompensated costs for the removal of oil that discharged from Metairie's Tank No. 2. It argues that the NPFC erred when it determined that the discharge was not an OPA oil. It argues that its actions were performed pursuant to the approved Incident Action Plans to address oil at the site. Because Claimant relies on the Oil Mop reconsideration documentation in its argument, the NPFC bases its analysis primarily on the letter brief and exhibits, which were submitted by Mr. [REDACTED]. The NPFC determines if there is sufficient and credible evidence that the discharge from Tank No. 2 was an oil as defined by OPA.

#### *Whether the uncompensated costs were for the removal of oil as defined by OPA.*

Oil" means "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 U.S.C. 9601) which is subject to the provisions of that Act." 33 U.S.C. § 2701(23).

Mr. [REDACTED] argues that the definition of "oil" in OPA is broad and inclusive; it is "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes. Relying on *Rice v. Harken Exploration Company*, 89 F. Supp. 820, 822 (N.D. Tex.), he argues that salt water or produced brine meets the definition of an OPA oil because it is a naturally occurring waste product in the production of oil. He argues that the Metairie wells have produced oil for many decades and up to August 2016, the well was producing over one hundred barrels per month and that tests of the well show that the well was producing between 3 and 10% of "Water" along with the oil.<sup>12</sup> Seemingly, he is arguing that Tank No. 2 is

---

<sup>12</sup> [REDACTED] letter brief, Introduction.

associated with a well that produces water and oil well; therefore, the substance in Tank No. 2 is oil and water.

Claimant's reliance on *Rice v. Harken* is misplaced. The *Rice v. Harken* Court misstated the definition of an OPA oil in a footnote, when it stated that "[T]he definition of 'oil' in the OPA includes oil mixed with saltwater or produced brine, a naturally occurring waste product in the production of oil."<sup>13</sup> Additionally, in that case it is not clear if the produced brine was associated with a storage tank containing the produced brine and oil.

Importantly, even if production water might be an oil if it is associated with the production of oil, and the NPFC does not agree that it always is, it is clear that the contents in Tank No. 2 were not associated solely with the production of oil from Well No. 37 since at least August 2016.

Based on Mr. [REDACTED] Amended Affidavit, the tank contained approximately 40 barrels of an oily water emulsion, salt water and some solids, such as sands. In August 2016 in anticipation of heavy rains and flood waters the tank was filled with fresh water to prevent the tank from floating away.<sup>14</sup> He did not believe there was a layer of crude oil in the tank because the crude oil would have been removed and placed in a separate crude tank for subsequent sale. Further, Mr. [REDACTED], a Metairie site supervisor, stated that they had been filling the tank with tank bottoms and slop oil.<sup>15</sup>

Thus, it cannot be assumed that substances mixed with production water are always OPA oils. Nor can a substance be identified as oil based on a responder's experience in oil spill responses. Mr. [REDACTED] relied on the affidavits of two long time Oil Mop employees, who stated that they identified the discharge on their many years of experience.<sup>16</sup> He also notes that every regulatory agency at the facility investigating the discharge identified the substance as oil. E3 also relies on the Incident Action Plans that discuss the removal activities for oil. The Incident Action Plans were prepared by the federal and state regulatory agencies.

As stated above an OPA oil includes oil of any kind but excludes substances specifically listed or designated as hazardous substances under CERCLA. The CERCLA exclusion is important because OPA oils may contain constituents listed as hazardous under CERCLA but may be naturally occurring at trace or naturally occurring levels. In order to determine if a discharge is an OPA oil, it should be sampled and analyzed prior to conducting removal actions, specifically if a claimant may seek reimbursement of its uncompensated removal costs from the Fund.<sup>17</sup>

Pertinent to the OPA definition of oil is the exclusion of CERCLA hazardous substances. (The petroleum exclusion.) In order to determine whether the petroleum exclusion applies, the substance should be analyzed to determine whether its levels of hazardous substances are consistent with the levels of hazardous substances typically found in petroleum products. If the material includes hazardous substances not naturally occurring in oil or includes hazardous

---

<sup>13</sup> *Rice v. Harken*, 89 F. Supp. 820, fn 3.

<sup>14</sup> Oil Mop Exhibit O, Amended Affidavit, [REDACTED].

<sup>15</sup> Oil Mop Exhibit B-2.

<sup>16</sup> See Oil Mop Exhibits, D and E, Affidavits of [REDACTED] and [REDACTED].

<sup>17</sup> The Fund is available for payment of claims for uncompensated removal costs. 33 USC 2712(a)(4). Removal costs mean the cost of removal incurred after the discharge or substantial threat of a discharge of oil. 33 USC 2701(31).

substances at levels not naturally occurring in oil, the substance should not be a petroleum product and it should be covered by CERCLA.<sup>18</sup>

In order to determine if a substance is a CERCLA hazardous substance, and thus a petroleum exclusion substance, that substance must be analyzed. In the same vein in order to determine if a substance is an OPA oil and thus not a CERCLA hazardous substance, that substance must be sampled and analyzed to determine if any hazardous substances present are normally occurring in oil and the levels are consistent with the naturally-occurring hazardous substances in oil.

In this case the contents of Tank No. 2 were sampled and analyzed. Initially, Mr. [REDACTED] based on his analysis, determined that the sample, while it contained production water it also contained hazardous substances that are not naturally occurring in oil. On that basis the NPFC denied the claim.

***Whether the Claimant has established on reconsideration that the substance discharged from tank No. 2 is an OPA oil.***

In support of its request for reconsideration, Mr. [REDACTED] provided an affidavit by [REDACTED] B. [REDACTED] PhD. Dr. [REDACTED] specializes in environmental and analytical chemistry, which includes organic analyses using gas chromatography/mass spectrometry and data interpretation and the application of analytical techniques and chemical principles to oil spill responses. His specialization includes an in-depth knowledge and expertise of the compounds and constituents in petroleum and crude oils and their normal concentration levels in petroleum and crude oil.

He reviewed the analysis for Tank No. 2 and opined that TPH-GRO, TPH-DRO and TPH-ORO are a standardized grouping of hydrocarbon or petroleum compounds. He noted that in the samples reviewed these compounds comprised about 0.45 of the entire sample.

Dr. [REDACTED] states that there were trace elements of 1,1 Biphenyl, 2-Methylnaphthalene, Naphthalene and Pheanthrene, common constituents of petroleum or crude oil. Collectively, these compounds comprise about 0.00163 of the entire sample. These concentrations are trace amounts and do not exceed levels that naturally occur in petroleum, crude oil or crude oil sludge. There were also trace elements (0.007) of heavy metals – barium, chromium, copper, lead, mercury, nickel and zinc. He states that these trace elements do not exceed levels that naturally occur in petroleum or crude oil. Finally, the compound chloride was also a trace element that is usually associated with the production of crude oil and the chloride was produced with the crude oil and mixed with the crude oil during the production process.

Finally, he notes that the compound identified as bis(2-Ethylhexyl)phthalate is an exception. It is a laboratory contaminant may have been introduced by the sampling and handling process.

The NPFC forwarded Dr. [REDACTED]'s affidavit to Mr. [REDACTED] for his review and opinion. In a Memorandum dated January 2018, Mr. [REDACTED] concurred with Dr. [REDACTED]'s conclusion that the compounds or constituents identified in the various Technical Reports associated with the sampling were common constituents or compounds of petroleum or crude oil and were natural or indigenous to petroleum or crude oil. Further, the concentration levels of the identified

---

<sup>18</sup> See *Nixon-Egli Equipment Co., v. John A. Alexander Co.*, 949 F.Supp. 1435, fn 7 (C.D. Ca. 1996), (CERCLA's petroleum exclusion did not apply to drilling by-products involved in that case (cuttings and drilling mud) because they contained elevated lead levels.)

compounds or constituents in the various reports did not exceed levels that naturally occur in petroleum or crude oil. Thus, Mr. [REDACTED] considers the contents of the discharge to be an oil or oil-like substance under OPA 90 and the FWPCA.

The NPFC reviewed all the evidence in the record. It determines that Dr. [REDACTED] Affidavit and Mr. [REDACTED]'s January 2018 Memorandum are credible and convincing evidence that the discharge in Tank No. 2 is an OPA oil. Based on this determination the NPFC will adjudicate the E3 removal costs claim in accordance with OPA and the Claims Regulations.

### **Adjudication of the claimed removal costs**

The Fund is available to the President for the payment of claims in accordance with section 2713 for uncompensated removal costs determined to be consistent with the National Contingency Plan or uncompensated damages. 33 U.S.C. § 2712(a)(4). The Claims Regulations provide that a claimant must establish (a) that "the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;" (b) that the "removal costs were incurred as a result of these actions;" and (c) that "the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC." 33 C.F.R. 136.203(c).

Further, the amount of compensation allowable is the total of uncompensated reasonable removal costs of actions taken that are determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal activities for which costs are being claimed must have been coordinated with the FOSC. 33 C.F.R. 136.205.

It is the claimant's burden to show that the claimed costs were for actions to prevent mitigate the effects of the incident and that the costs were reasonable. Claimant must show that the costs were reasonable and uncompensated.

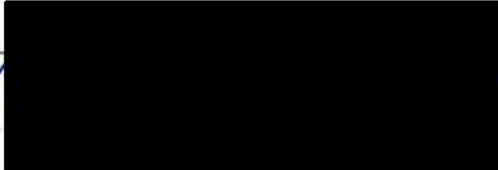
During the adjudication of this claim on reconsideration, the NPFC considered Claimant's initial submission as well as additional information submitted in support of the request for reconsideration. Claimant's additional information represented and supported the Claimant's argument that the Claimant responded to an OPA oil discharged as defined in the law. Based on Claimant's evidence the NPFC reviewed and adjudicated the costs it denied in its initial denial dated November 28, 2017.

### **CONCLUSION**

The NPFC will offer **\$71,169.07** in compensation for the OPA-reimbursable removal costs incurred by the Claimant and submitted to the NPFC under reconsideration for claim # E17607-0002.

**AMOUNT: \$71,169.07**

Claim Supervisor:



FOR

Date of Supervisor's review: 3/2/18

Supervisor Action: *Reconsideration Offer Approved*

Supervisor's Comments: