

CLAIM DETERMINATION

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| Claim Number: | E20608-0001 |
| Claimant: | Sabine Oil & Gas Corporation |
| Type of Claimant: | RP |
| Type of Claim: | Defense to Liability, Act or Omission of a 3 rd Party |
| Claim Manager: | (b) (6) |
| Amount Requested: | \$243,824.53 |
| Action Taken: | Denied |

EXECUTIVE SUMMARY:

On February 27, 2020, approximately 214 barrels¹ of light crude oil were discharged and 200 barrels of produced water were released from the JL Hunter 4H tank battery (TB) into a tributary of the Sabine River, a navigable waterway of the United States.² The discharge of oil was reported to the U.S. Coast Guard (CG) National Response Center.³ Sabine Oil & Gas Corporation (“Sabine” or “Claimant”), owner and operator of the JL Hunter 4H TB, responded and hired United States Field Services, LLC, (USFS) to conduct the pollution removal activities.⁴ The U.S. Environmental Protection Agency (EPA) Federal On-Scene Coordinator (FOSC) also responded to provide oversight of the spill response and determined that Sabine was the party responsible for the spill.⁵ On April 8, 2020, the EPA FOSC determined that cleanup of the spill was complete.⁶ Sabine submitted a claim to the CG National Pollution Funds Center (NPFC) for entitlement to a defense to liability, based on an act or omission of a third party⁷ and seek reimbursement of removal costs incurred under the defense in the amount of \$243,824.53.⁸ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined Sabine has not met its burden in proving that that removed material was oil as defined in OPA.⁹ As such, the claim is not compensable by the Oil Spill Liability Trust Fund (OSLTF) and must be denied.

I. FACTUAL BACKGROUND:

A. The JL Hunter 4H TB and the discharge of light crude oil and release produced water

On February 27, 2020, approximately 214 barrels of light crude oil were discharged and 200 barrels of produced water were released from the JL Hunter 4H TB into a road side ditch that drained into an unnamed creek which served as a tributary to the Sabine River, a navigable

¹ One barrel of oil is equivalent to 42 gallons.

² U.S. EPA POLREP #1 dated February 28, 2020. *See also*, Sabine Oil & Gas Corporation claim submission dated June 2, 2020.

³ CG National Response Center Report # 1272279 dated February 27, 2020.

⁴ U.S. EPA POLREP #1 dated February 28, 2020.

⁵ U.S. EPA Emergency Response Summary Report dated May 2020. *See also*, Notice of Federal Interest issued to Sabine Oil & Gas Corporation dated February 28, 2020, on page 84 of the U.S. EPA Emergency Response Summary Report dated May 2020.

⁶ U.S. EPA POLREP #2 (F) dated April 9, 2020.

⁷ 33 U.S.C. § 2703(a)(3).

⁸ Sabine Oil & Gas Corporation, LLC claim submission dated June 2, 2020, and received by the NPFC on June 15, 2020.

⁹ 33 U.S.C. § 2701.

waterway of the United States.¹⁰ The JL Hunter 4H TB is owned and operated by Sabine and is located in Gilmer, Upshur County, TX. The JL Hunter 4H TB is supplied by a gas and condensate well. The light crude oil and condensate produced by the well is stored in a 400-barrel capacity steel tank while produced water is stored in an adjacent 400-barrel capacity steel tank. Both storage tanks are contained within a common containment berm with load-out lines that extend past the secondary containment berm to allow for ease of unloading oil and produced water. According to Sabine, sometime in the early morning of February 27, 2020, an unknown individual(s) climbed over Sabine's locked entrance gate to gain access to the JL Hunter 4H TB and opened the load-out valves located outside of the containment berm on both the 400 barrel oil tank and the 400 barrel produced water tank.¹¹ The NPFC has determined that the contents of the oil tank and produced water tank traveled together from the tank battery into the roadside ditch and ultimately into the unnamed creek which served as a tributary to the Sabine River.¹²

B. Recovery operations

Sabine hired USFS to conduct the pollution removal activities and responded with personnel, vacuum trucks, boats, containment boom and sorbent material. Cleanup involved booming the 4 acre surface water impoundment pond and the construction of two catch basins, one approximately half-way downstream and the second near the end of the unnamed stream. Once complete, the material was pushed into the catch basins via freshwater flushing or crews with portable air blowers. However, inaccessibility to the unnamed stream and debris (logjams) hampered efforts and extended the overall operation, as access to the stream was very difficult. Ultimately, USFS was able to recover approximately 2,860 barrels of oily mixed water and 108 cubic yards of solid waste for disposal. The EPA FOSC determined that cleanup of the spill was complete on April 8, 2020.¹³

C. 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.¹⁴

¹⁰ U.S. EPA POLREP #1 dated February 28, 2020. *See also*, Sabine Oil & Gas Corporation claim submission dated June 2, 2020.

¹¹ Sabine Oil & Gas Corporation, LLC claim submission dated June 2, 2020, and received by the NPFC on June 15, 2020. *See also*, claimant letter to the NPFC dated July 20, 2020.

¹² Email from the EPA FOSC to NPFC dated September 11, 2020.

¹³ U.S. EPA POLREP #2 (F) dated April 9, 2020.

¹⁴ Produced water is more fully as follows:

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.

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. Production water commonly includes significant concentrations of chloride, sodium, calcium, magnesium, and potassium. Production water may also include varying concentrations of the following:

- Organic compounds: benzene, naphthalene, toluene, phenanthrene, bromodichloromethane, and pentachlorophenol;
- Inorganics: lead, arsenic, barium, antimony, sulfur, and zinc;
- Radionuclides: uranium, radon, and radium¹⁵

In addition, and because of the potential for contaminants, production water must be managed and disposed of properly. The permissible options available for management and disposal of these fluids vary.¹⁶ The most common method of disposing of production water is through subsurface injections utilizing wells. All types of injection wells must be constructed and operated in a manner that protects underground sources of drinking water as required by the Safe Drinking Water Act ("SDWA").¹⁷ In an effort to achieve this aim, the EPA regulates injection wells through the Underground Injection Control ("UIC") program.¹⁸ This program classifies wells used to dispose of wastes generated during the oil and gas production process as Class II wells.¹⁹

Sabine did not provide a sample analysis of the spilled material in its claim. In an effort to determine the composition and type of contaminants in the production water stored in the JL Hunter 4H tank battery, the NPFC asked Sabine to provide a safety data sheet (SDS) for the produced water tank. Sabine provided an SDS for the tank that included data for both produced water (sweet) and natural gas condensate (sweet). The produced water (sweet) SDS alerts the reader to the potential for contamination that includes benzene (organic compound), hydrogen

¹⁵ 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).

¹⁶ (b), (b) (6), Jr., *Disposal of Produced Water*, 37 RMMLF-INST 21 (1991).

¹⁷ 33 U.S.C. §§300g-300j-26. See also, 40 CFR Part 144.

¹⁸ United States Government Accountability Office, *Unconventional Oil and Gas Development: Key Environmental and Public Health Requirements*, pp. 18-22 (September 2010), available online at: <http://www.gao.gov/products/GAO-12-874>.

¹⁹ 40 CFR 144.6. Sabine was asked how their well produced water and how they disposed of their produced water. Sabine confirmed that because of the chemical composition of the produced water, which is two to four times the salinity of seawater, it is injected into Class II disposal wells using permeable formations at depths far below freshwater aquifers.

sulfide (inorganic compound) and naturally occurring radioactive material (radionuclides).²⁰ This is consistent with the information NPFC had previously gathered. In addition, in the composition section of the SDS that lists the specific contents of the tank, the SDS includes hydrogen sulfide and benzene as materials found in the tank. This is further evidence that CERCLA-listed hazardous materials were present in the produced water tank and were likely released on February 27, 2020.

D. Sample analysis

Sabine performed sample analysis of the solid waste generated during the response to verify the levels of benzene, toluene, ethylbenzene and xylenes (BTEX) and petroleum hydrocarbons present within the samples.²¹ According to the laboratory that tested the samples, the testing for BTEX and petroleum hydrocarbons is a test commonly required for the disposal of solid waste within a landfill. The laboratory also confirmed that it did not test for the presence of any CERCLA-listed hazardous substances within the sample analysis.²² Sabine was asked if they conducted a sample analysis of the product discharged from the JL Hunter 4H TB and responded that they did not collect samples of the liquid waste.²³ Lastly, the EPA FOSSC was asked if he had conducted a sample analysis of the product discharged from the JL Hunter 4H TB and stated that he had not performed any type of sample analysis.²⁴ In summary, the solid waste samples collected by Sabine to ensure adequacy for landfill disposal were the only samples analyzed for this incident and were only tested for BTEX and petroleum hydrocarbons.

E. Responsible Party and the claim

On June 15, 2020, Sabine submitted a claim for entitlement to a defense to liability, act or omission of a third party²⁵ claim to the NPFC requesting compensation of removal costs incurred under the defense in the amount of \$243,824.53. Within their claim submission, Sabine confirmed that they notified their insurance company but did not submit a claim as the cost for the cleanup was far below their deductible. In addition, Sabine confirmed that no other compensation had been received for any of the removal costs or damages resulting from the spill and they had not initiated any action in court, as the party responsible for the incident remained unknown.²⁶

II. DISCUSSION:

A. Adjudication of Claims Against the OSLTF

²⁰ Sabine letter to the NPFC dated November 18, 2020, which contained an SDS for produced water (sweet) and natural gas condensate (sweet). Benzene, hydrogen sulfide and radionuclides are all CERCLA hazardous substances. See, 40 CFR 302.4.

²¹ Ana-Lab sample analysis for project 920602 dated May 21, 2020, for samples RRC-A through RRC-E.

²² Phone conversation between Ana-Lab and the NPFC as documented in an email dated October 19, 2020.

²³ Sabine letter to the NPFC dated July 20, 2020, page 4.

²⁴ Email from the EPA FOSSC to the NPFC dated August 11, 2020.

²⁵ 33 U.S.C. § 2703(a)(3).

²⁶ Sabine Oil & Gas Corporation, LLC claim submission dated June 2, 2020, and received by the NPFC on June 15, 2020.

When adjudicating claims against the OSLTF, the NPFC utilizes an informal process controlled by 5 U.S.C. § 555.²⁷ 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.

The NPFC is authorized to pay claims for uncompensated damages or removal costs that result from the discharge or substantial threat of the discharge of oil into navigable waters of the United States.²⁸ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.²⁹

B. Claims Against the OSLTF by Responsible Parties

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.³⁰ Further, a responsible party's liability is strict, joint, and several.³¹ In the case of a vessel, the responsible party includes any person owning, operating or demise chartering the vessel.³² 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."³³ OPA was intended to cure these deficiencies in the law.

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

²⁷ 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"

²⁸ See generally, 33 U.S.C. § 2712(a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

²⁹ 33 CFR Part 136.

³⁰ 33 U.S.C. § 2702(a).

³¹ See, H.R. Conf. Rep. No. 101-653, 102, 1990 U.S.C.C.A.N. 779 (August 1, 1990).

³² 33 U.S.C. § 2701(32)(A).

³³ *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.).

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.³⁴ 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.³⁵

C. Key OPA Definitions

³⁴ 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).

³⁵ 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 the JL Hunter 4H TB, Sabine had unique access to the facts surrounding this incident because it had dominion and control over the discharging onshore facility. This unique access to the discharging facility makes Sabine well positioned to actually know or discover the facts surrounding the incident. By placing the burden of proof on a responsible party seeking compensation under 33 U.S.C. § 2708, the NPFC incentivizes full disclosure of all relevant facts by claimants who are well positioned to know or learn what happened during an OPA incident.

The resolution of this claim turns on several key definitions in OPA precluding OSLTF reimbursements for the cost of removing substances covered by CERCLA’s definition of hazardous substances. First, OPA defines a “claim” to mean “a request in writing for a sum certain, for compensation for damages or removal costs **resulting from an incident.**”³⁶ Second, 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.**”³⁷ Third, 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 [CERCLA³⁸] and which is subject to the provisions of that Act.”³⁹

Because OPA’s definition of oil excludes CERCLA hazardous substances, the identity of those substances must be clarified when analyzing whether a substance satisfies OPA’s definition of oil. For its part, CERCLA defines “hazardous substance” broadly.⁴⁰ However, the definition of “hazardous substance” under CERCLA specifically excludes “petroleum, including crude oil or any fraction thereof...”⁴¹ 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).”⁴²

D. Commingled Spills

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 be applied.

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”.

³⁶ 33 U.S.C. § 2701(3).

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

³⁸ 42 U.S.C. § 9601 *et seq.*

³⁹ 33 U.S.C. § 2701 (23). Specifically referencing “subparagraphs (A) through (F) of section 101(14) of CERCLA” which is *codified at* 42 U.S.C. § 9601(14).

⁴⁰ 42 U.S.C. § 9601(14). “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].”

⁴¹ *Id.*

⁴² *Id.*

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.**⁴³

The legislative history of CERCLA likewise is instructive: "The reported bill [CERCLA] does not cover spills or other releases **strictly** of oil."⁴⁴ Contemporaneous congressional debate further elucidated how it intended CERCLA to apply to spills of oil mixed with hazardous substances.⁴⁵ 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 oil⁴⁶ 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.⁴⁷ 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.'"⁴⁸

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.⁴⁹ 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

⁴³ H. R. Rep. No. 653, 101st Cong., 2d Sess. 102 (1990). S. Rep. No. 101-94 (1989) (emphasis added).

⁴⁴ S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980) (emphasis added).

⁴⁵ 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 PCB's 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).

⁴⁶ This has become known colloquially as EPA's "petroleum exclusion".

⁴⁷ 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).

⁴⁸ *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1383-4 (E.D. Cal. 1991).

⁴⁹ *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886 (10th Cir. 2000).

petroleum and hazardous wastes.⁵⁰ 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 had 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.⁵¹

IV. CONCLUSION:

It is NPFC's determination that if a commingled mixture of oil and hazardous substances discharges into a navigable waterway, liability and by extension, claim compensation, for the spill does not fall under OPA. The OSLTF is not available to pay claims based on these facts. In the context of claims, the burden is on the claimant to prove that the discharged substance was oil, and, if the discharged substance was oil, that the claimed removal costs or damages resulted from the discharge of oil.⁵²

In this instance, approximately 214 barrels of light crude oil discharged and 200 barrels of produced water were released from the JL Hunter 4H TB and upon release, the contents of the oil tank and produced water tank comingled and traveled together from the tank battery, before releasing into the tributary of a navigable waterway.

Produced water commonly includes varying concentration of organic compounds, inorganic compounds and radionuclides, many of which are classified as CERCLA-listed hazardous substances. In addition, the SDS that specifies the contents of the produced water tank that released in this case, specifically lists CERCLA-listed hazardous substances.

The significant issue here, and what ultimately results in the claim being non-compensable, is the absence of a sample analysis to confute the confirmed presence and likely release of CERCLA-listed hazardous substances within the resulting commingled mixture. While Sabine performed sample analysis of the solid waste collected during the response to verify the levels of BTEX and petroleum hydrocarbons present within the samples for disposal, it failed to test for the presence of CERCLA-listed hazardous substances within the samples. In addition, Sabine failed to test any of the liquid waste collected during the response. As a result, NPFC determines based on all the information it was provided by the claimant, that the claimant has failed to carry its burden of proving that the commingled mixture from the contents of JL Hunter 4H Tank Battery, that are the subject of the claimed removal expenses, was comprised solely of oil as defined by OPA.⁵³ As such, the claim must be denied.

The NPFC has not evaluated Sabine's claim for entitlement to a defense to liability, based on an act or omission of a third party because it has denied the claim as not compensable under the OPA.

⁵⁰ *Id.*

⁵¹ *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.

⁵² See, e.g., *Gatlin Oil v. United States*, 169 F.3d. 107 (4th Cir. 1999).

⁵³ See, 33 U.S.C. 2701.

(b) (6)

Claim Supervisor: (b) (6)

Date of Supervisor's review: *December 11, 2020*

Supervisor Action: *Claim Denied*