

## CLAIM SUMMARY / DETERMINATION

<b>Claim Number:</b>	N19045-0003
<b>Claimant:</b>	Waterways Tankers Inc.
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	██████████
<b>Amount Requested:</b>	\$92,909.53
<b>Action Taken:</b>	Denial

### **EXECUTIVE SUMMARY:**

In March 2019, a fire broke out at the Intercontinental Terminals Company tank farm in Deer Park, Texas. Several tanks containing chemicals and oil burned and, as a result, released their contents. The chemicals and oil then commingled inside the containment area surrounding the tanks. After the substances commingled in the containment area, the containment area breached and the mixture eventually discharged into the Houston Ship Channel (HSC), a navigable waterway of the United States. A portion of the HSC was closed because of the release.

Both the EPA and U.S. Coast Guard responded and it was determined the spill was a release of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

The claimant, Waterways Tankers Inc., is the owner of the M/V NS CORONA, which was berthed at the Houston Fuel Oil Terminal. The claimant alleges its vessel was contaminated by oil; and that the vessel was delayed by the spill and the cleaning required by the U.S. Coast Guard. The claimant seeks removal costs of \$92,909.53 comprised of cleaning costs and extra port expenses.<sup>1</sup>

The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration, has determined that the claim is not compensable under OPA and must be denied.

### **I. RELEASE OF HAZARDOUS SUBSTANCES, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:**

#### ***Release of Hazardous Substances***

On Sunday March 17, 2019, a chemical fire ignited at the Intercontinental Terminals Company (ITC) tank farm in Deer Park, Texas. ITC reported the fire to the National Response Center the same day.<sup>2</sup> The EPA Region VI Federal On-Scene Coordinator mobilized to the site.<sup>3</sup>

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<sup>1</sup> Although the claimant characterized the entirety of its costs as “removal costs”, some of the claimed expenses would be considered “damages” under the regulations found at 33 CFR 136. Because this claim is being denied for jurisdictional reasons (i.e. the expenses were not the result of an OPA incident), we will opt to maintain consistency with the claimant’s terminology for purposes of efficiency and readability.

<sup>2</sup> NRC Report #1240304 dated March 17, 2019.

<sup>3</sup> EPA Region VI POLREP #1; EPA Region VI ITC tank fire site profile, *available at* <https://response.epa.gov/itctankfire> (last visited September 23, 2020).

The impacted tank farm included 15 petro-chemical storage tanks that contained a variety of different petroleum and chemical products such as: Yubase 6, Gasoline Blend Stock, Yubase 4 Plus, Xylene, Pyrolysis Gasoline, Naphtha, Base Oils, and Toluene. The fire began in the centrally located Naphtha tank and spread to 13 of 15 tanks within the containment area. As the tanks were compromised, they leaked their contents creating a mixture of chemical and petroleum products within the containment area.<sup>4</sup> On March 22, 2019, the commingled substances breached the containment area eventually entering Tucker Bayou and the HSC.<sup>5</sup> On March 23, lab results from the sampling in Tucker Bayou and in Buffalo Bayou found exceedances of the water quality levels for benzene and xylene.<sup>6</sup>

The fire, the release, and the response caused channel closures and waterway traffic restrictions.

### ***Responsible Party***

Intercontinental Terminals Company LLC (ITC) is the owner and operator of the terminal and tanks used to store oil and chemicals, including those that were discharged. The EPA identified ITC as a “potentially responsible party” under CERCLA.<sup>7</sup> ITC’s facilities were not designated as the source of the discharge under OPA. Also, the U.S. Coast Guard has not identified ITC as an OPA responsible party.

### ***Recovery Operations***

EPA Region VI and U.S. Coast Guard Sector Houston-Galveston responded. During the initial stages of the response, federal and state authorities quickly determined that the release involved CERCLA hazardous substances and responded under CERCLA authority.<sup>8</sup> EPA Region VI provided the Federal On-Scene Coordinator (FOSC) who oversaw the response and removal operations. EPA exercised pollution-response authority under CERCLA based on sampling data indicating a release or threat of release of CERCLA-listed hazardous substances, including toluene, benzene, xylene, naphthalene, ethylbenzene and styrene.<sup>9</sup> On March 23, EPA delivered an Administrative Order to ITC, requiring ITC to conduct actions to abate or mitigate an imminent and substantial threat to the public health or welfare by the discharge or substantial threat of a discharge of hazardous substances from the Deer Park facility into or upon the navigable waters or adjoining shorelines.<sup>10</sup>

## **II. CLAIMANT, RP, and NPFC:**

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<sup>4</sup> Email from CDR ██████ to NPFC dated January 22, 2020. CDR ██████ was in charge of the CG Incident Management Division at Sector Houston/Galveston during the spill.

<sup>5</sup> Email from CDR ██████ to NPFC dated January 22, 2020.

<sup>6</sup> In addition, naphthalene, ethylbenzene, methyl tert-butyl ether (MTBE), and toluene exceeded the TCEQ levels in the Tucker Bayou sample; EPA Region VI POLREP #2.

<sup>7</sup> EPA Region VI POLREPs #1-#4.

<sup>8</sup> EPA Region VI POLREP #2.

<sup>9</sup> EPA Region VI letter to ITC attorneys dated September 27, 2019; U.S. Coast Guard Second 80’s Tank Farm Fire Product Listing Powerpoint presentation attached to email from MSTC ██████ to NPFC dated May 2, 2019.

<sup>10</sup> EPA Region VI POLREP #2.

Absent limited circumstances, the Federal Regulations implementing the Oil Pollution Act of 1990 (OPA)<sup>11</sup> require all claims for removal costs or damages to be presented to the RP before seeking compensation from the NPFC.<sup>12</sup>

The claimant is the owner of the M/V NS CORONA.<sup>13</sup> The NS CORONA arrived at its berth at the Houston Fuel Oil Terminal east of the spill site on March 21, 2019.<sup>14</sup> While there, the vessel's hull was contaminated.. The claimant seeks costs for extra pilotage, towage, mooring, agency fees and costs to clean its vessel's hull.

The claimant states that on December 12, 2019, it presented to ITC its claim for removal costs due to the incident.<sup>15</sup> The NPFC sent ITC a courtesy notice of the claim on May 4, 2020. ITC replied that it could find no record of receipt of the claim, but states that ITC denies the claim because the incident involved hazardous substances and is not subject to OPA; and that ITC is not a responsible party under OPA.<sup>16</sup>

When an RP denies a claim or has not settled a claim after 90 days of receipt, a claimant may elect to present its claim to the NPFC.<sup>17</sup>

### **III. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>18</sup> 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.<sup>19</sup> 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.

### **IV. DISCUSSION:**

Under OPA, a 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.<sup>20</sup> An

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<sup>11</sup> 33 U.S.C. § 2701 *et seq.*

<sup>12</sup> 33 CFR 136.103.

<sup>13</sup> Claimant's Optional OSLTF Claim Form and Exhibit 1 attached to the form.

<sup>14</sup> Claimant's Optional OSLTF Claim Form.

<sup>15</sup> Claimant's Optional OSLTF Claim Form. *See also*, Cover Letter from claimant to ITC dated December 12, 2019.

<sup>16</sup> Letter from ITC (counsel) to NPFC dated May 11, 2020.

<sup>17</sup> 33 CFR Part 136.103.

<sup>18</sup> 33 CFR Part 136.

<sup>19</sup> *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)).

<sup>20</sup> 33 U.S.C. § 2702(a).

RP's liability is strict, joint, and several.<sup>21</sup> 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."<sup>22</sup> OPA was intended to cure these deficiencies in the law.

OPA provides a mechanism for compensating parties who have incurred removal costs and certain damages 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 such an incident."<sup>23</sup>

The NPFC is authorized to pay claims for uncompensated removal costs and damages that result from the discharge or substantial threat of the discharge of oil into navigable waters of the United States.<sup>24</sup> The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>25</sup> The claimant bears the burden of providing all evidence, information, and documentation deemed relevant and necessary by the Director of the NPFC, to support and properly process the claim.<sup>26</sup>

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.**"<sup>27</sup>

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.**<sup>28</sup>

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.]"<sup>29</sup>

CERCLA defines "hazardous substance" broadly.<sup>30</sup> However, the definition of "hazardous substance" under CERCLA specifically excludes "petroleum, including crude oil or any fraction

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<sup>21</sup> See, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

<sup>22</sup> *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).

<sup>23</sup> 33 U.S.C. § 2701(31).

<sup>24</sup> See generally, 33 U.S.C. § 2712(a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

<sup>25</sup> 33 CFR Part 136.

<sup>26</sup> 33 CFR Part 136.105.

<sup>27</sup> 33 U.S.C. § 2701(14).

<sup>28</sup> 33 U.S.C. § 2701(14)(emphasis added).

<sup>29</sup> 33 U.S.C. § 2701(14).

<sup>30</sup> 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

thereof...”<sup>31</sup> 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).”<sup>32</sup>

### *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”.

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.**<sup>33</sup>

The legislative history of CERCLA likewise is instructive: “The reported bill [CERCLA] does not cover spills or other releases **strictly** of oil.”<sup>34</sup> Contemporaneous congressional debate further elucidated how it intended CERCLA to apply to spills of oil mixed with hazardous substances.<sup>35</sup> Both Representative [REDACTED] and Senator [REDACTED] 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

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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].”

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> H. R. Rep. No. 653, 101<sup>st</sup> Cong., 2d Sess.102 (1990).S. Rep. No. 101-94 (1989)(emphasis added).

<sup>34</sup> S. Rep. No. 96-848, 96<sup>th</sup> Cong., 2d Sess. 29-30 (1980)(emphasis added).

<sup>35</sup> *See, e.g.*, at 126 Cong.Rec. H11798 (Rep. [REDACTED] (oil slicks and industrial oil waste); 126 Cong.Rec. S14963 (daily ed. November 24, 1980) (Sen. [REDACTED]) (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. [REDACTED] and S14967 (Sen. [REDACTED]); dioxin in motor fuel used as a dust suppressant, *id.* at S14974 (Sen. [REDACTED]; PCB's in waste oil, *id.* (Sen. [REDACTED]) and contaminated waste oil, *id.* at S14980 (Sen. [REDACTED]).

policies explain that CERCLA excludes discharges of oil<sup>36</sup> 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.<sup>37</sup> 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.’”<sup>38</sup>

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.<sup>39</sup> 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 petroleum and hazardous wastes.<sup>40</sup> 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.<sup>41</sup>

## **V. 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 as defined by OPA. The claimant must also show that the claimed expenses resulted from the discharge of OPA oil.<sup>42</sup>

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<sup>36</sup> This has become known colloquially as EPA’s “petroleum exclusion”.

<sup>37</sup> 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).

<sup>38</sup> *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1383-4 (E.D. Cal. 1991).

<sup>39</sup> *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886 (10th Cir. 2000).

<sup>40</sup> *Id.*

<sup>41</sup> *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.

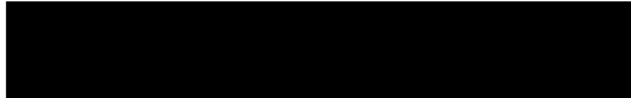
<sup>42</sup> *See, e.g., Gatlin Oil v. United States*, 169 F.3d. 107 (4<sup>th</sup> Cir. 1999)(affirming NPFC’s denial of an OSLTF claim because the claimant’s damages resulted from a fire as opposed to oil). *See also, In re Deepwater Horizon*, 168 F.Supp.3d 908, 914 (E.D. La. 2016)(dismissing OPA claims because the damages resulted from a moratorium on offshore drilling instead of an oil discharge).

In this instance, the claimant alleged that its vessel was contaminated and that it incurred removal costs due to the discharge of oil. The NPFC disagrees. The tank farm fire caused multiple tanks to fail and spill their contents into the property's containment area. Both oil and hazardous substances were released and quickly commingled within the primary and secondary containment areas. After the materials were commingled, they eventually released into a navigable waterway of the United States.<sup>43</sup>

The NPFC finds that the contamination and any effects of that contamination and response to it were not the result of a discharge or a substantial threat of discharge of oil. It follows, *a fortiori*, that the contamination of the claimant's vessel and resulting costs claimed herein were not the result of discharge or a substantial threat of discharge of oil and the OSLTF is not available to pay this claim. As such, based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Waterways Tankers Inc.'s claim for uncompensated removal costs is denied.

The NPFC has not specifically adjudicated the specific underlying claimed losses because it has denied the claim because it is not compensable under OPA.

Claim Supervisor:



Date of Supervisor's review: 10/1/2020

Supervisor Action: *Denial Approved*

Supervisor's Comments:

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<sup>43</sup> The fire, the release, and the response forced the closure of a portion of the Houston Ship Channel to all traffic.