CLAIM SUMMARY / DETERMINATION

Claim Number:	N19045-0001
Claimant:	MACS Maritime Carrier Shipping PTE, LTD
Type of Claimant:	Foreign Company
Type of Claim:	Loss of Profits and Earnings
Claim Manager:	(b) (6), (b) n
Amount Requested:	$51,373.77
Action Taken:	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 is the charterer of two vessels that were purportedly delayed by the closure of the Houston Ship Channel. It seeks lost profits of $51,373.77 comprised of charter hire, marine gas oil and port expenses.

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.[1] The EPA Region VI Federal On-Scene Coordinator mobilized to the site.[2]

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

[1] NRC Report #1240304 dated March 17, 2019.
[2] EPA Region VI POLREP #1; EPA Region VI ITC tank fire site profile, *available at* https://response.epa.gov/itctankfire (last visited June 4, 2020).

tanks were compromised, they leaked their contents creating a mixture of chemical and petroleum products within the containment area.[3] On March 22, 2019, the commingled substances breached the containment area eventually entering Tucker Bayou and the HSC.[4] 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.[5]

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.[6] ITC was not designated a responsible party under OPA.

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.[7] 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.[8] 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.[9]

II. CLAIMANT AND RP:

Absent limited circumstances, the Federal Regulations implementing the Oil Pollution Act of 1990 (OPA)[10] require all claims for removal costs or damages to be presented to the RP before seeking compensation from the NPFC.[11]

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[3] Email from CDR (b) (6) to NPFC dated January 22, 2020. CDR (b) (6), was in charge of the CG Incident Management Division at Sector Houston/Galveston during the spill.
[4] Email from CDR (b) (6), to NPFC dated January 22, 2020.
[5] 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.
[6] EPA Region VI POLREPs #1-#4.
[7] EPA Region VI POLREP #2.
[8] 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 (b) (6) to NPFC dated May 2, 2019
[9] EPA Region VI POLREP #2.
[10] 33 U.S.C. § 2701 *et seq.*
[11] 33 CFR 136.103.

The claimant is the operator/charterer of the M/V DIAMONDLAND and the M/V SILVERFJORD.[12] The claimant presented to ITC two separate claims for lost charter hire, marine gas oil and port expenses allegedly resulting from delays due to the spill.[13] The amounts claimed against the Oil Spill Liability Trust Fund (OSLTF) are $46,475.04 for the DIAMONDLAND and $4,898.73 for the SILVERFJORD. ITC denied the claims on three bases. First, the fact that the release involved a mixed substance including hazardous substances meant that the spill was covered by CERCLA. Second, ITC stated that since this was a release of hazardous substances under CERCLA, ITC is not a responsible party under OPA. Finally, ITC argues that purely economic losses are not recoverable in tort under these circumstances.[14]

III. CLAIMANT AND NPFC:

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.[15] After ITC denied the claims, the claimant combined the two claims into one totaling $51,373.77 and presented it to the NPFC. The NPFC received the claim on December 27, 2019.

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).[16] 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.[17] The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.[18] 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.

V. 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.[19] An

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[12] Email from Claimant to NPFC dated January 6, 2020.
[13] Letters from Claimant to ITC dated June 25, 2019.
[14] Letters from ITC (counsel) to claimant dated October 22 and October 24, 2019.
[15] 33 CFR Part 136.103.
[16] 33 CFR Part 136.
[17] *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)).
[18] *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).
[19] 33 U.S.C. § 2702(a).

RP's liability is strict, joint, and several.[20] 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."[21] OPA was intended to cure these deficiencies in the law.

OPA provides a mechanism for compensating parties who have incurred a loss of profits or earning capacity where the responsible party has failed to do so. Loss of profits and earning capacity are defined as,"[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant."[22]

The NPFC is authorized to pay claims for uncompensated damages that result from the discharge or substantial threat of the discharge of oil into navigable waters of the United States.[23] The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.[24] 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.[25]

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***."[26]

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 [CERCLA[27]].[28]

CERCLA defines "hazardous substance" broadly.[29] However, the definition of "hazardous substance" under CERCLA specifically excludes "petroleum, including crude oil or any fraction

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[20] *See,* H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.
[21] *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).
[22] 33 U.S.C. § 2702(b)(2)(E).
[23] *See generally,* 33 U.S.C. § 2712(a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.
[24] 33 CFR Part 136.
[25] 33 CFR Part 136.105.
[26] 33 U.S.C. § 2701(14)(emphasis added).
[27] 42 U.S.C. § 9601 *et seq*.
[28] 33 U.S.C. § 2701(14). Specifically referencing "subparagraphs (A) through (F) of section 101(14) of CERCLA" which is *codified at* 42 U.S.C. § 9601(14) .
[29] 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]."

thereof…".[30] 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)."[31]

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**.[32]

The legislative history of CERCLA likewise is instructive: "The reported bill [CERCLA] does not cover spills or other releases **strictly** of oil."[33] Contemporaneous congressional debate further elucidated how it intended CERCLA to apply to spills of oil mixed with hazardous substances.[34] 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 oil[35] 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.[36] While most of the jurisprudence in this area concerns cases where the EPA is asserting

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[30] *Id*.
[31] *Id*.
[32] H. R. Rep. No. 653, 101st Cong., 2d Sess.102 (1990).S. Rep. No. 101-94 (1989)(emphasis added).
[33] S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980)(emphasis added).
[34] *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).
[35] This has become known colloquially as EPA's "petroleum exclusion".
[36] 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

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.'"[37]

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.[38] 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.[39] 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.[40]

VI. 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 resulting damages claimed were the result of the discharge of oil.[41]

In this instance, the claimant alleged that Houston Ship Channel closures and traffic restrictions were due to the discharge of oil, and the effects caused its vessels to be delayed and resulted in it losing profits. 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.[42]

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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).

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

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

[39] *Id*.

[40] *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.

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

[42] The fire, the release, and the response forced the closure of a portion of the Houston Ship Channel to all traffic.

The NPFC finds the Houston Ship Channel closures and restrictions were not the result of a discharge or a substantial threat of discharge of oil. It follows, *a fortiori*, that the delay and resulting damages 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, MACS Maritime Carrier Shipping Pte Ltd's claim for uncompensated lost profits 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: (b) (6), (b)(b) (6), (b)(b) (6), (b)(b) (6), (b)(b) (6), (b)(b) (6), (b) (b) (6), (b)(b) (6), (b)(b) (6), (b)(b) (6), (b)(b) (6), (b)(b) (6), (b)

Date of Supervisor's review: 6/15/2020

Supervisor Action: ***Denial Approved***

Supervisor's Comments: