RECONSIDERATION CLAIM SUMMARY / DETERMINATION

Claim Number:	N19045-0003
Claimant:	Waterways Tankers Inc.
Type of Claimant:	Corporation
Type of Claim:	Removal Costs
Claim Manager:	(b), (b) (6)
Amount Requested:	$92,909.53
Action Taken:	**Denied on Reconsideration**

EXECUTIVE SUMMARY:

On March 17, 2019, a fire broke out at the Intercontinental Terminals Company (ITC) tank farm in Deer Park, Texas. On that date, due to the fire, vessel traffic on the Houston Ship Channel was prevented from entering the ITC facility or nearby VOPAK facility.[1] 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 on March 22, 2019, and the mixture discharged into the Houston Ship Channel (HSC), a navigable waterway of the United States. A portion of the HSC was initially closed because of the fire and toxic air quality; then remained closed for a period of time due to the commingled 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.[2]

On October 1, 2020, the NPFC issued a denial to the Claimant. The Claimant timely requested reconsideration of the claim by email and letter received by the NPFC and dated November 25, 2020.

The NPFC has thoroughly reviewed the original claim, the request for reconsideration, all information provided by the Claimant, information it obtained independently, and the applicable law and regulations. Upon reconsideration, the NPFC concludes that the facts established within the NPFC's initial determination as well as information provided by the Claimant within their request for reconsideration do not support payment of the claim. The NPFC once again denies the claim, as outlined in the original determination and below.

[1] Vessel Traffic Service Broadcast dated March 17, 2019.

[2] 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 opted to maintain consistency with the claimant's terminology for purposes of efficiency and readability.

I. CLAIM HISTORY:

The Claimant is the owner of the M/V NS CORONA.[3] The NS CORONA arrived at its berth at the Houston Fuel Oil Terminal east of the spill site on March 21, 2019.[4] 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.

On May 1, 2020, the Claimant presented a claim for removal costs to the NPFC for $92,909.53.[5] The NPFC thoroughly reviewed the original claim, all information provided by the Claimant or obtained independently, the relevant statutes and regulations, and ultimately determined that the claim was not compensable under OPA.[6] The NPFC's initial determination is hereby incorporated by reference.

On November 25, 2020, the NPFC received the Claimant's timely request for reconsideration.[7]

II. REQUEST FOR RECONSIDERATION:

The regulations implementing OPA require requests for reconsideration of an initial determination to be in writing and include the factual or legal grounds for the relief requested, along with any additional support for the claim in accordance with our governing claims regulations at 33 CFR 136.115(d). The claimant has the burden of providing all evidence, information, and documentation deemed necessary by NPFC to support the claim.[8] When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including any new information provided by the Claimant in support of its request for reconsideration. The written decision by the NPFC is final agency action.[9]

On November 25, 2020, the Claimant timely submitted a request for reconsideration and provided arguments purporting to support their claim.[10] The Claimant argues that the NPFC incorrectly concluded that the spill constituted a CERCLA incident. They argue that because the fire and first collapsed tank only involved a substantial threat of discharging oil, the spill remained an "oil" spill despite the fact that CERCLA-hazardous substances later mixed in before entering the navigable waterway. They argue that the plain language of OPA's definition of oil

[3] Claimant's Optional OSLTF Claim Form and Exhibit 1 attached to the form.
[4] Claimant's Optional OSLTF Claim Form.
[5] Claimant's initial submission dated April 21, 2020, and received by the NPFC on May 1, 2020.
[6] NPFC determination issued to the Claimant on October 1, 2020.
[7] Letter from Claimant to the NPFC dated November 25, 2020, requesting reconsideration of the NPFC's determination dated October 1, 2020.
[8] 33 CFR 136.105(a).
[9] 33 CFR 136.115(d).
[10] Letter from Claimant to the NPFC dated November 25, 2020, requesting reconsideration of the NPFC's determination dated October 1, 2020.

does not exclude commingled oil and hazardous substance spills.[11] Thus, they argue that once oil is involved, the spill falls under OPA's jurisdiction.[12]

III. ANALYSIS ON RECONSIDERATION:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).[13] 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.[14] 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.

The NPFC has thoroughly reviewed and considered the Claimants' request for reconsideration.

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.[15] The EPA Region VI Federal On-Scene Coordinator mobilized to the site.[16]

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.[17] On March 22, 2019, the commingled substances breached the containment area and entered Tucker Bayou and the HSC.[18] On March 23, lab results from the sampling in Tucker Bayou and in Buffalo Bayou found exceedances of

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[11] Page 3 of the letter from Claimant to the NPFC dated November 25, 2020, requesting reconsideration of the NPFC's determination dated October 1, 2020.
[12] Pages 3 and 4 of the letter from Claimant to the NPFC dated November 25, 2020, requesting reconsideration of the NPFC's determination dated October 1, 2020.
[13] 33 CFR Part 136.
[14] *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)).
[15] NRC Report #1240304 dated March 17, 2019.
[16] EPA Region VI POLREP #1; EPA Region VI ITC tank fire site profile, *available at* https://response.epa.gov/itctankfire (last visited February 22, 2021).
[17] Email from CDR (b), (b) to NPFC dated January 22, 2020. CDR (b), (b) was in charge of the CG Incident Management Division at Sector Houston/Galveston during the spill.
[18] Email from CDR (b), (b) to NPFC dated January 22, 2020.

the water quality levels for benzene and xylene.[19] Due to the commingling of oil and hazardous chemical products, it became a CERCLA response.[20]

The combination of the fire, the toxic air quality, and the response to the commingled release caused channel closures and waterway traffic restrictions.

Facility Owner and Operator

Intercontinental Terminals Company LLC (ITC) is the owner and operator of the terminal and tanks used to store oil and chemicals, including those that discharged. The EPA identified ITC as a "potentially responsible party" under CERCLA.[21] 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.[22] 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.[23] 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.[24] Over 200 vessels were decontaminated of the mixed oil and hazardous substance spill.[25]

IV. DISCUSSION

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."[26]

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[19] 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.
[20] Email from CDR (b), (b) to NPFC dated January 22, 2020.
[21] EPA Region VI POLREPs #1-#4.
[22] EPA Region VI POLREP #2.
[23] 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), to NPFC dated May 2, 2019.
[24] EPA Region VI POLREP #2.
[25] Email from CDR (b), (b) to NPFC dated January 22, 2020.
[26] 33 U.S.C. § 2701(31).

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.[27] The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.[28] 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 adjudicate the claim.[29]

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**."[30]

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***."[31]

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.]".[32]

CERCLA defines "hazardous substance" broadly.[33] However, the definition of "hazardous substance" under CERCLA specifically excludes "petroleum, including crude oil or any fraction thereof…"[34] 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)."[35]

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.

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[27] *See generally*, 33 U.S.C. § 2712(a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.
[28] 33 CFR Part 136.
[29] 33 CFR 136.105.
[30] 33 U.S.C. § 2701(14).
[31] 33 U.S.C. § 2701(14)(emphasis added).
[32] 33 U.S.C. § 2701(23).
[33] 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]."
[34] *Id*.
[35] *Id*.

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**.[36]

The legislative history of CERCLA likewise is instructive: "The reported bill [CERCLA] does not cover spills or other releases **strictly** of oil."[37] Contemporaneous congressional debate further elucidated how it intended CERCLA to apply to spills of oil mixed with hazardous substances.[38] 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[39] 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.[40] 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.'"[41]

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[36] H. R. Rep. No. 653, 101st Cong., 2d Sess.102 (1990). S. Rep. No. 101-94 (1989) (emphasis added).
[37] S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980) (emphasis added).
[38] *See, e.g.*, at 126 Cong.Rec. H11798 (Rep. Edgar) (oil slicks and industrial oil waste); 126 Cong.Rec. S14963 (daily ed. November 24, 1980) (Sen. Randolph) (contaminated oil slick), and other petroleum products containing hazardous substance additives intended to be addressed by the legislation including PCBs in transformer fluid, *id.* at S14963 (Sen. Randolph) and S14967 (Sen. Stafford); dioxin in motor fuel used as a dust suppressant, *id.* at S14974 (Sen. Mitchell); PCB's in waste oil, *id.* (Sen. Mitchell) and contaminated waste oil, *id.* at S14980 (Sen. Cohen).
[39] This has become known colloquially as EPA's "petroleum exclusion".
[40] 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).
[41] *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1383-4 (E.D. Cal. 1991).

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.[42] 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.[43] In holding that the petroleum exclusion did not apply to these facts, the court indicated that in order for CERCLA to be inapplicable, the moving party would have to have provided testing to show that unadulterated petroleum was the *only* contaminant in the ground water plume. Moreover, the court would have required an expert to opine that the hazardous waste *did not commingle* with petroleum products.[44]

In its reconsideration request, claimant specifically contends that "[b]ecause of the spill, the hull of the NS Corona became contaminated with oil" and that the "U.S. Coast Guard required the vessel's hull to be cleaned before it was permitted to sail from Houston."[45] The claimant's submission omits a critical point. The Coast Guard did require over 200 vessels to be decontaminated, but as the local Coast Guard official in charge of Incident Management explained, it did so because the vessels were "contaminated by the *mixture of petro-chemical products* that were released into the waterway."[46] Specifically, the Coast Guard official explained:

> [a]s the fire spread from one tank to the next from March 17th to March 22nd, the structural integrity of each tank was compromised and ultimately failed, *allowing the various petroleum and chemical products. . . to mix within the containment area*. *When the secondary containment breached, this mixture of petrochemicals, firefighting foam and water entered the waterway and subsequently contaminated the vessels*.[47]

Claimant seemingly proffers in its reconsideration request that since *some* amount of oil was discharged at the very beginning of this incident, any resultant damages, no matter how derivative of that initial discharge of oil, are compensable under OPA. The NPFC disagrees. Coupled with the undisputed facts that this oil commingled with hazardous materials far before it impacted the navigable waterway and the closure of the waterway was based on a combination of the fire, toxic air quality and the release of the commingled substances, it would be fundamentally inconsistent with the statutory language of OPA and CERCLA; the NPFC and EPA's longstanding interpretations of this language, and established caselaw to find otherwise.[48]

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[42] *Tosco Corp. v. Koch Indus., Inc*., 216 F.3d 886 (10th Cir. 2000).
[43] *Id*.
[44] *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.
[45] Letter from Claimant to the NPFC dated November 25, 2020.
[46] Email from CDR (b), (b) to NPFC dated January 22, 2020.
[47] *Id*.
[48] "…the Fourth and Fifth Circuits agree that OPA was not designed to cover economic losses that are derivative of an oil spill." *Venoco, Inc. v. Plains Pipeline, L.P.*, 2016 WL 10646303 (C.D. Ca. 2016). As of July 31, 2020, the Ninth Circuit agrees as well. *See, Venoco, Inc. v. Plains Pipeline, L.P.* 814 Fed.Appx. 318 (mem) (9th Cir. 2020).

As a factual matter, the NPFC finds that the claimant did not incur removal costs or suffer damages as a result of an oil discharge under OPA. Any expense suffered by the claimant was caused by the mixture of oil and hazardous substances in the HSC, not any oil discharged into the containment area. A mixture of both CERCLA hazardous substances and OPA oil falls within CERCLA's definition of hazardous substances and is thereby excluded from OPA's definition of oil. Thus, this claim must be denied because claimant's alleged costs and damages did not result from oil as defined by OPA.[49] While admittedly more narrow than OPA, CERCLA does provide for claims that arise from hazardous substance releases.[50] Any claim resulting from the release of hazardous substances must be compensated by the Superfund instead of the OSLTF.[51]

Claimant states in its reconsideration request that "a federal court has held that OPA applies to a commingled spill of oil and hazardous materials" relying on the Magistrate Judge's Findings and Recommendations in *United States v. Mare Island Sales, LLC*[52] to illustrate its point.[53] The NPFC carefully considered this case and concludes that it does not support paying an OSLTF claim for damages resulting from substances that fail to meet OPA's definition of an oil at 33 U.S.C. § 2701 (23).[54] As before, the claimant's submission omits a critical point. The *Mare Islands Sales* case did not involve a claim against the OSLTF. At best, *Mare Islands Sales* illustrates the point that many casualties involve both a discharge of oil under the OPA and a release of hazardous substances under CERCLA. In such cases, a RP may be liable under either OPA or CERCLA, but never liable under both for the same costs because these statutes impose mutually exclusive liability. If there is ever a question of which statute covers a substance in a particular case, the United States may opt to plead alternative causes of action under both OPA and CERCLA.[55] By pleading claims under both statutes, the United States protects against a

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[49] *See, e.g., In re Taira Lynn Marine Ltd. No. 5, LLC*, 444 F.3d 371, 383 (5th Cir. 2006)(holding that OPA only applies when the damages result from either an oil discharge or substantial threat of oil discharge). *See also, Gatlin Oil v. United States*, 169 F.3d 207 (4th Cir. 1999)(affirming NPFC's denial of an OSLTF claim because the claimant's damages resulted from a fire as opposed to oil); *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); and *Venoco, Inc. v. Plains Pipeline, L.P.*, 2016 WL 10646303 (C.D. Ca. 2016)(holding that plaintiff's lost profits claim was not compensable under the OPA because any loss resulted from plaintiff's pipeline being "shut-in", not the discharge of oil). *Affirmed*, *Venoco, Inc. v. Plains Pipeline, L.P.* 814 Fed.Appx. 318 (mem) (9th Cir. 2020).

[50] 42 U.S.C. § 9612.

[51] *Id.*

[52] 2008 U.S. Dist. LEXIS 85339 (E.D. Cal. 09/16/2008).

[53] Letter from Claimant to the NPFC dated November 25, 2020.

[54] Claimant also makes mention of two other significant spills in its reconsideration request and queries whether or not the use of chemical dispersants might cause a hypothetical claim to be adjudicated differently. The NPFC adjudicates each claim independently based on the administrative record in front of it at the time of adjudication, based on the applicable laws and regulations, and under the auspice that Congress drafted OPA's definition of oil to ensure there was **"**no overlap in the liability provisions [and by extension claims compensation] of CERCLA and the Oil Pollution Act." *See*, H. R. Rep. No. 653, 101st Cong., 2d Sess.102 (1990). S. Rep. No. 101-94 (1989). As indicated in the original determination and again here, if a claimant meets its burden of proof that oil, as defined by OPA, was discharged and the claimant incurred removal costs or covered damages resulting from the discharge of that OPA oil, then the OSLTF should be available to that claimant. To be clear, based on the facts of this incident and the administrative record in front of the NPFC, the NPFC finds that the OSLTF is not available to pay this claim.

[55] Fed. R. Civ. Proc. 8 (d).

finding at trial that a substance originally thought to be OPA oil was in fact a CERCLA hazardous substance. However, the mere fact that the United States sought recovery against a RP under both OPA and CERCLA in the *Mare Islands Sales* case does not authorize OSLTF compensation for damages resulting from hazardous substances covered by CERCLA.

When a FOSC initially responds to a pollution event such as this one, he or she may have two separate funding streams available. An FOSC may use OSLTF funding to clean up an oil spill.[56] Alternatively, a FOSC can use the Superfund to address a release of hazardous substances under CERCLA.[57] A FOSC decides which funding stream to use based on the best information available at the time during what is commonly a chaotic and rapidly evolving event, but the funding stream can change as better information becomes available. As evidenced in this case, the Coast Guard initially responded and opened an OSLTF funding stream under OPA. However, quickly thereafter and in conjunction with the EPA, the incident was determined to be a CERCLA incident. As such, the OSLTF funding stream was immediately closed, and a Superfund funding stream under CERCLA was opened. All of the federal response costs were ultimately reimbursed by the Superfund. Since this was a CERCLA release, the EPA assumed the role of the FOSC and led the response. This is evident in the several pollution reports filed by the EPA.[58] These reports describe the incident and the unified federal and state response in detail; including the explanation of the initial funding stream under OPA, the closing of that stream, and that all subsequent funding for the response was provided by the Superfund.[59]

Finally, the NPFC notes the concomitant "Trustees' Notice of Intent to Perform a Natural Resource Damage Assessment" which also describes the incident.[60] A careful review of that document evinces a position in symmetry with the discussion above, in that the Trustees understand and acknowledge that since this event was "a discharge or release of a mixture of oil and hazardous substances," they, too, are obligated to proceed under the regulations governing natural resources damages for CERCLA releases (vice OPA discharges).[61]

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[56] *See*, 33 U.S.C. §§ 1321 (c), 1321 (s), 2712 (a)(1), and 2752 (b). *See also*, 26 U.S.C. § 9509 (c)(1)(D).
[57] *See*, 42 U.S.C. §§ 9604 and 9611 (a)(1). *See also*, 26 U.S.C. § 9507 (c)(1).
[58] EPA Region VI POLREPs One through Four.
[59] *Id*. at Section 2.4-Finance Section (throughout).
[60] "Trustees' Notice of Intent to Perform a Natural Resource Damage Assessment - In re: ITC Deer Park Facility Tank Fire '2nd 80's Fire' dated August 5, 2019" *available at* https://www.cerc.usgs.gov/orda_docs/DocHandler.ashx?task=get&ID=5609 (last visited February 22, 2021).
[61] *Id*. at note 1. "For natural resource damages resulting from a discharge or release of a mixture of oil and hazardous substances, trustees must use 43 C.F.R. Part 11" citing "15 CFR 990.20(c)." 15 CFR 990.20(c) reads "Oil and hazardous substance mixtures. For natural resource damages resulting from a discharge or release of a mixture of oil and hazardous substances, trustees must use 43 CFR [P]art 11. 43 CFR Part 11 in part explains that when there is a mixed spill, these procedures "must be used by Federal or State natural resource trustees in order to obtain the rebuttable presumption contained in section 107(f)(2)(C) of CERCLA."

When publishing its Final Regulation, National Oceanic and Atmospheric Administration (NOAA) explained that an incident involving a mixture of oil and hazardous substances should be assessed under the CERCLA regulations controlling a Natural Resources Damage Assessment (NRDA), not the OPA NRDA regulations. *See*, *Natural Resource Damage Assessments*, 61 Fed. Reg. 440, 444 (January 5, 1996)(codified at 15 CFR Part 990), available online at: https://www.gpo.gov/fdsys/pkg/FR-1996-01-05/pdf/95-31577.pdf. Before issuing its Final Regulation, NOAA explained why a mixed spill should be covered by CERCLA with the following:

> If a component of a mixed spill is a hazardous substance under CERCLA, CERCLA and the CERCLA NRDA regulations apply. . . .

V. CONCLUSION:

While FOSCs have the ability to choose which funding authority (OSLTF or CERCLA) is best suited for funding the response to an event, the authority for the NPFC to compensate claimants for damages based on an event is exclusively found in OPA and is limited to compensating those damages that are *solely* the result of discharge or a substantial threat of discharge of oil. 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. 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.

In this instance, Claimant alleges that the ITC fire involved a discharge and substantial threat of a discharge of oil from tanks containing OPA products. The Claimant asserts that as a direct result of the ITC fire and Houston Ship Channel closures and traffic restrictions, it incurred OPA removal costs or damages. The NPFC disagrees. The tank farm fire caused multiple tanks to fail and spill their contents into the property's containment area. On the day of the breach, both oil and hazardous substances had spilled into and commingled within the facility's primary and secondary containment areas. Later, that commingled mix released into a navigable waterway of the United States.[62]

The NPFC finds the alleged removal costs and damages were not the result of discharge or a substantial threat of discharge of oil as defined by OPA and, as such, the OSLTF is not available to pay claims based on these facts. As such, upon reconsideration, based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Waterways Tankers claim remains denied.

> According to EPA guidance, "oil" covered by OPA includes: (1) Crude oil and fractions of crude oil including the hazardous substances, such as benzene, toluene, and xylene, which are indigenous to petroleum and its refined products; and (2) hazardous substances that are normally mixed with or added to crude oil or crude oil fractions during the refining process, including hazardous substances that have increased in level as a result of the refining process. (U.S. EPA Memorandum on the Petroleum Exclusion Under the Comprehensive Environmental Response, Compensation, and Liability Act, July 31, 1987; BNA, 1988) Hazardous substances added to petroleum that increase in concentration through any process other than refining, or added as a result of contamination of the petroleum during use (including waste oil), would not be excluded from CERCLA. For example, the presence of dioxin in oil used as a dust suppressant on highways would bring a discharge of such mixture under the jurisdiction of CERCLA, not OPA.
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> *Natural Resource Damage Assessments*, 60 Fed. Reg. 39804, 39810, 1995 WL 455595 (August 3, 1995), available online at: https://www.gpo.gov/fdsys/pkg/FR-1995-08-03/pdf/95-19128.pdf.

[62] The combination of the fire, toxic air and the response to the commingled release, forced the closure of a portion of the Houston Ship Channel to all traffic.

The NPFC has not specifically adjudicated the specific underlying claimed costs because it has denied the claim on the jurisdictional grounds of not being compensable under OPA.[63]

Claim Supervisor: (b), (b) (6) [redacted]

Date of Supervisor's review: February 23, 2021

Supervisor Action: ***Denial Approved***

Supervisor's Comments:

[63] Because NPFC has determined that the claimant is not entitled to compensation, NPFC did not adjudicate whether or not these claimed expenses met the other regulatory requirements outlined in 33 CFR Part 136. If this determination were to be remanded, the NPFC would address how much, if any, of the claimed removal costs and damages are actually compensable by the OSLTF.