

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP923026-URC001
Claimant:	San Jacinto River Authority
Type of Claimant:	Government (see sjra.net “Created by the Texas Legislature in 1937 (Article 8280-121, as amended), the San Jacinto River Authority (SJRA) is a government agency”
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$173,715.92
Action Taken:	Denial

EXECUTIVE SUMMARY:

On May 28, 2020, the Environmental Crimes Unit for Harris County Constable Precinct 1 (“HCC Precinct 1”) was notified of an oil spill that was discovered within the roadside ditches along the 900 and 1000 blocks of Church Street, in Crosby, Texas, with suspicion that the oil spill was emanating from a point source located at (b) (6) in Crosby, Texas.² The spill stretched approximately ¼ mile west, along Church Street and 655 feet south along a drainage ditch within a San Jacinto River Authority (“SJRA” or “Claimant”) drainage easement.³ The drainage easement intersected the Beaumont Road Ditch to the south, which feeds into the Crosby Lynchburg Road Ditch to its west. The Crosby Lynchburg Road Ditch feeds directly into the waters of the Jackson Bayou; a navigable waterway of the United States.⁴

In communication with the NRC on June 9, 2020, Harris County Pollution Control (“HCPC”) reported that they received a complaint about an oil spill at a private residence. The report states that the incident was discovered on May 28, 2020 at 10:00 local time and affected a roadside ditch.⁵ The NRC notified the United States Environmental Protection Agency Region 6 (“USEPA” or “FOSC”) and Texas Commission of Environmental Quality (“TCEQ”).⁶

¹ This determination is written for the sole purpose of adjudicating a claim against the Oil Spill Liability Trust Fund (OSLTF). This determination adjudicates whether the claimant is entitled to OSLTF reimbursement of claimed removal costs or damages under the Oil Pollution Act of 1990. This determination does not adjudicate any rights or defenses any Responsible Party or Guarantor may have or may otherwise be able to raise in any future litigation or administrative actions, to include a lawsuit or other action initiated by the United States to recover the costs associated with this incident. After a claim has been paid, the OSLTF becomes subrogated to all of the claimant’s rights under 33 U.S.C. § 2715. When seeking to recover from a Responsible Party or a Guarantor any amounts paid to reimburse a claim, the OSLTF relies on the claimant’s rights to establish liability. If a Responsible Party or Guarantor has any right to a defense to liability, those rights can be asserted against the OSLTF. Thus, this determination does not affect any rights held by a Responsible Party or a Guarantor.

² San Jacinto River Authority claim submission received June 28, 2023. *See*, Incident Investigative Report Case No. 2005-00438 pgs. 1 thru 17.

³ San Jacinto River Authority claim submission received June 28, 2023. *See*, Optional OSLTF Form pg. 1 of 4, question #2b.

⁴ *See*, USEPA GeoViewer 2.0 screenshot pg. 1 of 1, obtained by NPFC on July 7, 2023; and San Jacinto River Authority claim submission received June 28, 2023. *See*, Optional OSLTF Form pg. 1 of 4, question #2b.

⁵ National Response Center Report #1279198 dated June 9, 2020.

⁶ *Id.*

The United States Environmental Protection Agency Region 6 (“USEPA” or “FOSC”) was the Federal On-Scene Coordinator (FOSC) based on the location of this incident. The FOSC determined that the incident posed a substantial threat of discharge of oil and chemical substances into the San Jacinto River, a navigable waterway of the United States.⁷ SJRA presented its removal costs to Mr. (b) (6) as that is the entity the claimant believed was the responsible party.⁸ After ninety days, having not reached a settlement with the SJRA,⁹ SJRA presented its uncompensated removal costs claim to the National Pollution Funds Center (NPFC) in the amount of \$173,578.07.¹⁰ On July 25, 2023, SJRA adjusted their total costs claimed to the amount of \$173,715.92.¹¹

The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and after careful consideration has determined that all costs must be denied.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On May 28, 2020, the Environmental Crimes Unit for Harris County Constable Precinct 1 (“HCC Precinct 1”) was notified of an oil spill that was discovered within the roadside ditches along the 900 and 1000 blocks of Church Street, Crosby, Texas, with suspicion that the oil spill was emanating from a point source located at (b) (6) in Crosby, Texas.¹² The spill stretched approximately ¼ mile west, along Church Street and 655 feet south along a drainage ditch within a San Jacinto River Authority (“SJRA” or “Claimant”) drainage easement.¹³ The drainage easement intersected the Beaumont Road Ditch to the south, which feeds into the Crosby Lynchburg Road Ditch to its west. The Crosby Lynchburg Road Ditch feeds directly into the waters of the Jackson Bayou; a navigable waterway of the United States.¹⁴

On May 28, 2020, HCC Precinct 1 notified SJRA of the incident.¹⁵ On May 28, 2020, SJRA sent personnel to assist with remediation, containment and cleanup.¹⁶ SJRA hired the spill

⁷ To ensure that San Jacinto River Authority met its burden with respect to the cleanup activity, the NPFC coordinated with the USEPA as the Federal On-Scene Coordinator (FOSC) for this incident. After analyzing the incident and the actions taken by San Jacinto River Authority, the FOSC opined that the response actions undertaken by San Jacinto River Authority and its contractors were consistent with the National Contingency Plan. However, the FOSC also opined that, based on the evidence provided, the spill was not strictly an oil, but a mixed substance, or mixed waste spill. *See*, email from the USEPA to the NPFC dated August 4, 2023.

⁸ Email from SJRA to NPFC dated September 27, 2023 providing a copy of proof of presentment of costs to Mr. (b) (6) on July 24, 2023.

⁹ 33 CFR 136.103(c).

¹⁰ San Jacinto River Authority claim submission received June 28, 2023.

¹¹ Email from San Jacinto River Authority to NPFC dated July 25, 2023.

¹² San Jacinto River Authority claim submission received June 28, 2023. *See*, Incident Investigative Report Case No. 2005-00438 pgs. 1 thru 17.

¹³ San Jacinto River Authority claim submission received June 28, 2023. *See*, Optional OSLTF Form pg. 1 of 4, question #2b.

¹⁴ *See*, USEPA GeoViewer 2.0 screenshot pg. 1 of 1, obtained by NPFC on July 7, 2023; and San Jacinto River Authority claim submission received June 28, 2023. *See*, Optional OSLTF Form pg. 1 of 4, question #2b.

¹⁵ San Jacinto River Authority claim submission received June 28, 2023. *See*, Optional OSLTF Form pg. 3 of 4.

¹⁶ Email from SJRA to NPFC dated July 21, 2023. *See*, Tab 8: Timekeeping and Costs Summary Records, pages 1 through 2 of 2.

response contractors Masters Advanced Remediation Services Inc., (“Masters ARS”) and Geo Solutions, LLC (“Geo Sol”) to aide in mitigation of the spill.¹⁷ Actions taken included the placement of booms, buoys and pads to prevent further migration of the spill and to absorb oil and chemical substances from the ground and water, as well as vacuuming the substances and contaminated water from the ditches, and excavating contaminated soil for removal and disposal.¹⁸

On May 29, 2020, HCC Precinct 1 arrived on scene, and found Harris County Pollution Control (“HCPC”) at the spill location, working with Masters Environmental Services to mitigate the spill.¹⁹ A joint investigation of multiple spill locations was initiated by HCPC and HCC Precinct 1. Investigators concluded that barrels and/or containers of oil had been illegally buried over an unknown period of years at [REDACTED], leading to the eventual contamination of soil in the area and the eventual leakage into surrounding drainage features.²⁰ HCC Precinct 1 noted a thick black substance observed inside both the Beaumont Road Ditch and the Crosby Lynchburg Road Ditch.²¹

Responsible Party

In accordance with the Oil Pollution Act of 1990, the owner/operator of the source which caused the oil spill is the Responsible Party (RP) for the incident.²² Investigations made by response agencies concluded the spill path of discharge originated at (b) (6) in Crosby, Texas, a property owned by Mr. (b) (6).²³

Recovery Operations

On May 28, 2020, HCC Precinct 1 notified SJRA of the incident.²⁴ On May 28, 2020, SJRA hired the spill response contractors Masters Advanced Remediation Services Inc. (Masters ARS) and Geo Solutions, LLC (Geo Sol) to aide in mitigation of the spill,²⁵ and SJRA sent their own personnel on-scene, to assist with remediation, containment and cleanup.²⁶ Actions taken

¹⁷ San Jacinto River Authority claim submission received June 28, 2023. *See*, Masters ARS Invoice No. 4444, pages 20 through 21 of 136 for SJRA-Master ARS contract, and Email from SJRA to NPFC dated July 21, 2023. *See*, 20-1586 GeoSolutions, LLC, pages 2 through 30 of 33 for SJRA-Geo Sol contract.

¹⁸ San Jacinto River Authority claim submission received June 28, 2023. *See*, Optional OSLTF Form pg. 3 of 4.

¹⁹ San Jacinto River Authority claim submission received June 28, 2023. *See*, Incident Investigative Report Case No. 2005-00438 pg. 5 of 17.

²⁰ San Jacinto River Authority claim submission received June 28, 2023. *See*, Incident Investigative Report Case No. 2005-00438 pages 5 through 6 of 17.

²¹ San Jacinto River Authority claim submission received June 28, 2023. *See*, Incident Investigative Report Case No. 2005-00438 pg. 5 of 17.

²² 33 U.S.C. § 2701(32).

²³ San Jacinto River Authority claim submission received June 28, 2023. *See*, Incident Investigative Report Case No. 2005-00438 pgs. 1 thru 17. *See* also Case 2020-33614, filed by Harris County and TCEQ against (b) (6), on June 4, 2020 pgs. 1 thru 6. *See* also, Email from San Jacinto River Authority’s Legal Counsel to the NPFC, dated July 17, 2023.

²⁴ San Jacinto River Authority claim submission received June 28, 2023. *See*, Optional OSLTF Form pg. 3 of 4.

²⁵ San Jacinto River Authority claim submission received June 28, 2023. *See*, Masters ARS Invoice No. 4444, pages 20 through 21 of 136 for SJRA-Master ARS contract, and Email from SJRA to NPFC dated July 21, 2023. *See*, 20-1586 GeoSolutions, LLC, pages 2 through 30 of 33 for SJRA-Geo Sol contract.

²⁶ San Jacinto River Authority claim submission received June 28, 2023. *See*, Tab 8: Timekeeping and Costs Summary Records, pages 1 through 2 of 2.

included the placement of booms, buoys and pads to prevent further spread and to absorb the oil and chemical substances from the ground and water, as well as vacuuming the substances and contaminated water from the ditches, while excavating contaminated soil for removal and disposal.²⁷

Masters ARS obtained liquid and soil spill samples on May 29, 2020, at (b) (6), a location downstream of the spill suspected point of origin. On June 1, 2020, Masters ARS submitted the samples to Xenco Laboratories for chemical analysis.²⁸

Evidence suggests SJRA's contractors left the scene of the incident on August 5, 2020, and completed their cleanup operations on August 6, 2020.²⁹ An investigation report led by the Texas Commission on Environmental Quality (TCEQ) suggests cleanup operations associated with the spill incident continued into October 16, 2020.³⁰

II. CLAIMANT AND RP:

Absent limited circumstances, the Federal Regulations implementing the Oil Pollution Act of 1990 (OPA)³¹ require all claims for removal costs or damages must be presented to the RP before seeking compensation from the NPFC.³²

In this case, the claimant submitted all claims for removal costs to the purported responsible party on July 24, 2023.³³

III. CLAIMANT AND NPFC:

When a RP (or purported RP in this case) has not settled a claim after ninety days of receipt or denies a claim, a claimant may elect to present its claim to the NPFC.³⁴

On June 28, 2023, the NPFC received a claim for \$173,578.07 from SJRA.³⁵ SJRA provided the NPFC with a signed Optional OSLTF claim form, HCC Precinct 1's Incident Investigation Report, a series of PowerPoint Presentations created by SJRA's Risk Manager, a Contamination Site and Waterway Map, HCC Precinct 1's Press Release, Geo Sol's Boundary Survey, Geo Sol's Invoice with proof of payment, the Masters ARS Invoice with proof of payment, SJRA's contract agreement with Masters ARS, SJRA's "Labor Costs with Rates" document, an oil spill containment cost summary, a mileage report for SJRA's Risk Manager, and a Houston Chronicle Article associated with the spill incident.³⁶

²⁷ San Jacinto River Authority claim submission received June 28, 2023. *See*, Optional OSLTF Form pg. 3 of 4.

²⁸ Email from SJRA to NPFC dated July 21, 2023. *See*, Tab 11 C: Xenco Laboratories Report No. 663079, pages 1 through 31 of 47.

²⁹ Email from SJRA to NPFC dated July 21, 2023. *See*, Tab 11 A: Masters ARS Invoice No. 4444, pg. 22 of 26.

³⁰ Email from USEPA to the NPFC dated August 4, 2023. *See*, Investigation No. 1685867, pages 8 through 9 of 194.

³¹ 33 U.S.C. § 2701 *et seq.*

³² 33 CFR 136.103.

³³ Email from SJRA to NPFC dated September 27, 2023.

³⁴ 33 CFR 136.103.

³⁵ San Jacinto River Authority claim submission received June 28, 2023.

³⁶ San Jacinto River Authority claim submission received June 28, 2023.

On July 13, 2023, the NPFC requested additional information from SJRA, seeking verification of the total sum for expenses attributed to SJRA's labor costs as part, but not all of the request.³⁷ On July 25, 2023, SJRA replied to the NPFC's request, providing confirmation of the total labor costs attributed to SJRA personnel that were part of their claim.³⁸ Following SJRA's response, the NPFC requested verification of the SJRA's sum certain.³⁹ SJRA verified the new total for all removal costs claimed as \$173,715.92.⁴⁰

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).⁴¹ 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.⁴² The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.⁴³ 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:

An 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.⁴⁴ An RP's liability is strict, joint, and several.⁴⁵ 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."⁴⁶ OPA was intended to cure these deficiencies in the law.

³⁷ Email from NPFC to SJRA dated July 13, 2023.

³⁸ Email from SJRA to NPFC dated July 25, 2023.

³⁹ Email from NPFC to SJRA dated July 25, 2023.

⁴⁰ Email reply from SJRA to NPFC dated July 25, 2023, with confirmation of sum certain.

⁴¹ 33 CFR Part 136.

⁴² 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)).

⁴³ 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).

⁴⁴ 33 U.S.C. § 2702(a).

⁴⁵ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

⁴⁶ *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).

OPA provides a mechanism for compensating parties who have incurred removal costs 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 an incident.”⁴⁷ The term “remove” or “removal” means “containment and removal of oil [...] from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.”⁴⁸

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).⁴⁹ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁵⁰ 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.⁵¹

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.**⁵²

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.**⁵³

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.]”⁵⁴

CERCLA defines “hazardous substance” broadly.⁵⁵ However, the definition of “hazardous substance” under CERCLA specifically excludes “petroleum, including crude oil or any fraction

⁴⁷ 33 U.S.C. § 2701(31).

⁴⁸ 33 U.S.C. § 2701(30).

⁴⁹ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁵⁰ 33 CFR Part 136.

⁵¹ 33 CFR 136.105.

⁵² 33 U.S.C. § 2701(14).

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

⁵⁴ 33 U.S.C. § 2701(14).

⁵⁵ “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...”.⁵⁶ 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).”⁵⁷

Upon review of the evidence submitted by the Claimant, the FOSC opined the spill was a mixed substance spill.⁵⁸ To further substantiate this opinion, the FOSC cited Harris County Pollution Control Services Laboratory Analytical Report of liquid and soil samples obtained at (b) (6) on June 6, 2020.⁵⁹

The NPFC requested the FOSC verify which constituents found in the sample analysis report constitutes a mixed substance, and requested the FOSC identify the specific element(s) that establish the spill as a mixed spill substance.⁶⁰ The FOSC responded with a list of all constituents found in the HCPSC analytical report and identified Methyl Ethyl Ketone (“MEK”) as the non-oil constituent that he states established the product as a mixed spill substance.⁶¹ NPFC identified MEK as a constituent found in the analysis of liquid and soil samples obtained from (b) (6) on June 6, 2020.⁶² Methyl Ethyl Ketone is defined as a hazardous substance by CERCLA.⁶³

Additionally, the United States Coast Guard Hazardous Materials Division (CG-ENG-5) performed a review of the Xenco Laboratories sample analysis report submitted by SJRA with their claim.⁶⁴ CG-ENG-5 determined the analysis supports the presence of the non OPA compensable chemical barium, in the sample.⁶⁵ Barium is defined as a hazardous substance by CERCLA.⁶⁶ CG-ENG-5 also found evidence of BTEX (benzene, toluene, ethylbenzene and xylene) compounds, that may be naturally present in crude oil and can also be found in water(s) in the vicinity of natural gas and petroleum deposits.⁶⁷ However, based on the results provided, CG-ENG-5 determined it inconclusive to indicate whether the source of barium or the source of BTEX concentrations in the soil samples were due to the recent oil spill.⁶⁸

In accordance with the Oil Pollution Act of 1990, the claimant bears the burden of providing all evidence, information, and documentation deemed relevant and necessary by the NPFC, to support and properly process the claim, as required by 33 CFR 136.105.⁶⁹ After careful analysis

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Email from USEPA to the NPFC dated August 4, 2023.

⁵⁹ Email from USEPA to the NPFC dated August 4, 2023. *See*, HCPCS Results Report, pages 1 through 28.

⁶⁰ Email from NPFC to USEPA dated November 6, 2023.

⁶¹ Email from USEPA to NPFC dated November 6, 2023.

⁶² Email from USEPA to the NPFC, dated August 4, 2023. *See*, HCPCS Results Report, pages 10, 12, 16, 17, 19, 21, 22 and 24 of 28.

⁶³ *See*, Consolidated List of Chemicals Subject to the EPCRA, CERCLA, and Section 112(r) of the Clean Air Act, pg. 20 of 138.

⁶⁴ Email from SJRA to NPFC dated July 21, 2023. *See*, Tab 11C: Xenco Laboratories Report No. 663079, pages 1 through 31 of 47.

⁶⁵ Email from SJRA to NPFC dated July 21, 2023. *See*, Tab 11C: Xenco Laboratories Report No. 663079, pages 4, 8, 9, 18, 24, 27 and 28 of 31 of 47 for all reference(s) to Barium.

⁶⁶ *See*, Consolidated List of Chemicals Subject to the EPCRA, CERCLA, and Section 112(r) of the Clean Air Act, pg. 41 of 138.

⁶⁷ Email from SJRA to NPFC dated July 21, 2023. *See*, Tab 11 C: Xenco Laboratories Report No. 663079, pages 16, 17, 25, 26 and 28 of 31 of 47 for all reference(s) to BTEX.

⁶⁸ Email from CG-ENG-5 to the NPFC, dated August 10, 2023.

⁶⁹ 33 CFR 136.105.

of all the supporting documentation submitted by SJRA, the NPFC must deny the costs claimed since there is not enough evidence to substantiate the product released was exclusively an OPA oil.

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, San Jacinto River Authority's request for uncompensated removal costs is denied.

<p>Claim Supervisor: (b) (6)</p> <p>Date of Supervisor's review: <i>12/5/23</i></p> <p>Supervisor Action: <i>Denial Approved</i></p>
