

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP923021-URC001
Claimant:	Environmental Safety and Health Consulting Services, Inc.
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$34,763.88
Action Taken:	Denial

EXECUTIVE SUMMARY:

On August 27, 2020, at approximately 11:30 am local time, the National Response Center (NRC) received notification of a release of an unknown amount of produced water from a wellhead into the Gulf of Mexico, a navigable waterway of the United States.² Environmental Safety and Health Consulting Services, Inc (“ES&H” or “Claimant”) was contacted by Forefront Emergency Management L.P. (“Forefront”) to respond to the incident.³ The United States Coast Guard (USCG) Sector New Orleans is the Federal On Scene Coordinator (FOSC) for the incident.⁴

Forefront, in its capacity as the Responsible Party’s (RP’s) Qualified Individual (QI), made written notifications on behalf of Lobo Operating, Inc. (RP) to Louisiana State Police, Louisiana Department of Environmental Quality, and the Plaquemines Parish Emergency Planning Committee.⁵ ES&H presented its costs to the RP on October 5, 2020 in the amount of \$51,267.21.⁶ ES&H presented its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) in the amount of \$34,763.88 on January 27, 2023.⁷

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 the Oil Pollution Act and must be denied.

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 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 National Response Center (NRC) Incident Report # 1285740 dated August 27, 2020.

³ Lobo Operating IAP’s (Incident Action Plans)page 3 of 64 dated August 27, 2020.

⁴ USCG MISLE Case # 1233303 dated August 27, 2020. The FOSC did not mobilize to the incident since the product reported was not an OPA oil but rather listed in the MISLE case as “other oil”.

⁵ See, Forefront notification letters dated September 3, 2020 which identify Lobo Operating, Inc. as the party responsible for the produced water blowout from on August 27, 2020 via Well # 223233 #1 at Breton Sound 32 in Plaquemines Parish, Louisiana.

⁶ ES&H Invoice # 1-57391 dated October 5, 2020.

⁷ ES&H claim submission dated January 26, 2023 and received by the NPFC on January 27, 2023. The claimant asserts that it received a partial payment in the amount of \$16,503.33 from the RP on August 23, 2021 but has not received any additional payments to date.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On August 27, 2020, at approximately 11:30 am local time, the National Response Center (NRC) was notified by Forefront Emergency Management of an unknown amount of produced water that was released from a wellhead into the Gulf of Mexico, a navigable waterway of the United States.⁸ Forefront made written notification to Louisiana state agencies and the Plaquemines Parish Planning Committee advising that Mr. (b) (6) of Lobo Operating (RP) reported that at approximately 1130 hours on August 27, 2020, when Lobo operators returned to well # 223233 located at Breton Sound following Hurricane Laura when they observed an uncontrolled flow of produced water from the well.⁹

ES&H was contacted by Forefront on behalf of the RP, Lobo Operating, LLC, to respond to the incident.¹⁰

Responsible Party

Lobo Operating, Inc. is listed as the Responsible Party (RP) of well 223233, #1 at Breton Sound 32 in Plaquemines Parish.¹¹ The FOSC has not identified Lobo Operating, Inc. as an OPA Responsible Party nor has the FOSC declared this incident an OPA event involving an OPA oil.¹²

Recovery Operations

On August 27, 2020, Forefront, on behalf of Lobo Operating, Inc., requested ES&H personnel respond to the produced water well blowout incident. Upon arrival, ES&H discovered that they could not remediate nor contain the produced water due to strong winds and sea conditions.¹³ On August 28, 2020, ES&H deployed 400' of containment boom to contain the light sheen that the produced water created. Additionally, some of the produced water was being carried far away from the well by the wind.¹⁴

On August 29, 2020, the RP hired a well-plugging contractor, Boots and Coots, to plug the well. Boots and Coots pumped kill fluid downhole in an attempt to kill the well and after pumping approximately 8 barrels of the kill fluid downhole, the well was successfully killed.¹⁵

⁸ National Response Center Incident Report # 1285740 dated August 27, 2020.

⁹ Lobo Operating IAP's (Incident Action Plans) page 3 of 64 dated August 27, 2020.

¹⁰ Lobo Operating IAP's (Incident Action Plans) page 3 of 64 dated August 27, 2020.

¹¹ See, Forefront notification letters dated September 3, 2020 which identify Lobo Operating, Inc. as the party responsible for the produced water blowout from on August 27, 2020 via Well # 223233 #1 at Breton Sound 32 in Plaquemines Parish, Louisiana.

¹² USCG MISLE Case # 1233303 dated August 27, 2020.

¹³ Lobo Operating IAP's.pdf page 13 of 64, 1530 hours report entry.

¹⁴ Lobo Operating IAP's.pdf page 13 of 64, 1130 hours report entry.

¹⁵ Lobo Operating IAP's.pdf page 42 of 64, 1330 hours report entry.

ES&H departed the location and picked up all containment boom on August 31, 2020 after a final site inspection¹⁶ and disposed of absorbent material on September 21, 2020.¹⁷

II. CLAIMANT AND RP:

Absent limited circumstances, the Federal Regulations implementing the Oil Pollution Act of 1990 (OPA)¹⁸ require all claims for removal costs or damages must be presented to the RP before seeking compensation from the NPFC.¹⁹

The claimant presented its costs to the RP via Invoice 1-57391 dated October 5, 2020.²⁰ The RP made a partial payment in the amount of \$50,000.00 that was intended to be applied to all outstanding ES&H invoices.²¹ ES&H applied \$16, 503.33 to the ES&H invoice that is subject of this claim submission²² and the remaining funds were applied to other outstanding invoices between ES&H and Lobo Operating, LLC.²³

The claimant initially presented its claim in the form of an invoice to Lobo Operating, Inc. on October 5, 2020.²⁴ Having not received full payment from the RP after ninety days, ES&H presented its uncompensated removal cost claim to the National Pollution Funds Center (NPFC) for \$34,763.88 on January 26, 2023.²⁵

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.²⁶ On January 27, 2023, the NPFC received a claim for uncompensated removal costs from Environmental Safety and Health Consulting Services, Inc., dated January 26, 2023. The claim included the Optional OSLTF Claim form, Invoice 1-57391, Daily Field Services Tickets, Straight Bill of Lading, Non-hazardous Waste Manifest # 11316, Cypress Cove Marina and Lodge Invoice P95012, P95019, P95066 and P95066; Lobo Operating IAP (Incident Briefing ICS 201 – 2A), Photos, Evidence of Written Notifications to Agencies, ES&H Emergency Response Rate Schedule 2020.

The NPFC requested additional information regarding coordination and involvement of the United States Coast Guard in the response and removal actions, the Claimant referenced the Written Notifications to Agencies pdf but did not provide evidence that an FOSC authorized

¹⁶ Lobo Operating IAP's.pdf page 42 of 64, 1500 hours report entry.

¹⁷ Claimant's Submission 2. - Invoice 1-57391, page 25 of 30, Straight Bill of Lading – Short Form, Manifest No. 11316.

¹⁸ 33 U.S.C. § 2701 *et seq.*

¹⁹ 33 CFR 136.103.

²⁰ *See*, ES&H Invoice 1-57391 dated October 5, 2020 as part of the ES&H original claim submission.

²¹ Email from ES&H to NPFC dated February 14, 2023 Re Additional Information Request.

²² *See*, ES&H Invoice 1-57391 dated October 5, 2020 as part of the ES&H original claim submission.

²³ Email from ES&H to NPFC dated February 14, 2023 Re Additional Information Request.

²⁴ *See*, ES&H Invoice 1-57391 dated October 5, 2020 as part of the ES&H original claim submission.

²⁵ ES&H claim submission dated January 26, 2023 and received by the NPFC on January 27, 2023.

²⁶ 33 CFR 136.103.

and/or monitored the response. The NPFC also asked additional questions to better understand the claim and circumstances involved.²⁷

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).²⁸ 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.²⁹ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.³⁰ 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.³¹ An RP's liability is strict, joint, and several.³² When enacting OPA, Congress "explicitly recognized that the existing federal and states laws provided inadequate cleanup and damage remedies, required large taxpayer subsidies for costly cleanup activities and presented substantial burdens to victim's recoveries such as legal defenses, corporate forms, and burdens of proof unfairly favoring those responsible for the spills."³³ OPA was intended to cure these deficiencies in the law.

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."³⁴ 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

²⁷ Email from the Claimant to NPFC dated February 14, 2023 Re: Additional Information Request.

²⁸ 33 CFR Part 136.

²⁹ 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)).

³⁰ 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).

³¹ 33 U.S.C. § 2702(a).

³² See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

³³ *Apex Oil Co., Inc. v United States*, 208 F. Supp. 2d 642, 651-52 (E.D. La. 2002) (citing S. Rep. No. 101-94 (1989), reprinted in 1990 U.S.C.C.A.N. 722).

³⁴ 33 U.S.C. § 2701(31).

damage to the public health or welfare, including, but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.”³⁵

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).³⁶ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.³⁷ 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.³⁸

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.**”³⁹

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.**”⁴⁰

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.]”⁴¹

CERCLA defines “hazardous substance” broadly.⁴² However, the definition of “hazardous substance” under CERCLA specifically excludes “petroleum, including crude oil or any fraction thereof...”.⁴³ 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).”⁴⁴

Produced water

³⁵ 33 U.S.C. § 2701(30).

³⁶ See generally, 33 U.S.C. § 2712(a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

³⁷ 33 CFR Part 136.

³⁸ 33 CFR 136.105.

³⁹ 33 U.S.C. § 2701(14).

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

⁴¹ 33 U.S.C. § 2701(14).

⁴² 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].”

⁴³ *Id.*

⁴⁴ *Id.*

When it is initially extracted from subsurface geological structures, unrefined crude oil typically includes portions of natural gas, silt, water, and sand, in addition to any chemical additives previously used during production to enhance extraction of the crude. In order to obtain a marketable product, some of these constituents must be removed from the crude oil. The separation process generates various types of wastes like produced water, cuttings, and drilling fluids. Produced water refers to the water separated from the crude oil.⁴⁵

In addition to small parts of crude oil, produced water may include other contaminants that can be difficult to remove. The concentrations and types of pollutants in production water may vary significantly depending upon factors like the well's location and any treatment of the water. Production water commonly includes significant concentrations of chloride, sodium, calcium, magnesium, and potassium. Production water may also include varying concentrations of the following:

- Organic compounds: benzene, naphthalene, toluene, phenanthrene, bromodichloromethane, and pentachlorophenol;
- Inorganics: lead, arsenic, barium, antimony, sulfur, and zinc;
- Radionuclides: uranium, radon, and radium⁴⁶

ES&H did not provide sample analysis of the spilled material in its claim and when requested, the Claimant alleges that the produced water discharged at the Brenton Sound #32 well contained oil products.⁴⁷ The NPFC requested additional information such as sample analysis laboratory results that would confirm the presence of an OPA oil in the discharged substance. The Claimant explained that on the Written Notifications to Agencies document⁴⁸ states that residual oil in the produced water created a light sheen and there were no analytical tests ran on the material that was being released from the well.⁴⁹

A commingled spill

⁴⁵ Produced water is more fully as follows:

A term used to describe water produced from a wellbore that is not a treatment fluid. The characteristics of produced water vary and use of the term often implies an inexact or unknown composition. It is generally accepted that water within the pores of shale reservoirs is not produced due to its low relative permeability and its mobility being lower than that of gas.

Schlumberger Oilfield Glossary, available online at: www.glossary.oilfield.slb.com/Terms/p/produced_water.aspx.

⁴⁶ See, United States Environmental Protection Agency, Office of Compliance, *Profile of the Oil and Gas Extraction Industry*, p 39 (October 2000) available online at: <https://archive.epa.gov/sectors/web/pdf/oilgas.pdf>. See also, United States Department of the Interior, Bureau of Reclamation, *Oil and Gas Produced Water Management and Beneficial Use in the Western United States*, p. 41-60 (September 2011) available online at: <https://www.usbr.gov/research/dwpr/reportpdfs/report157.pdf>; United States Environmental Protection Agency, *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources*, p. ES-17 (June 2015) (External Review Draft)—EPA/600/R-15/047, available online at http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=523539. Additionally, many other constituents found within produced water are CERCLA hazardous materials. (A listing of CERCLA hazardous substances is found at 40 CFR 302.4).

⁴⁷ Email from the Claimant to NPFC dated February 14, 2023 Re: Additional Information Request.

⁴⁸ Written Notification to Agencies pdf, page 5 of 6.

⁴⁹ Email from the Claimant to NPFC dated February 14, 2023 Re: Additional Information Request.

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.**⁵⁰

The legislative history of CERCLA likewise is instructive: "The reported bill [CERCLA] does not cover spills or other releases **strictly** of oil."⁵¹ Contemporaneous congressional debate further elucidated how it intended CERCLA to apply to spills of oil mixed with hazardous substances.⁵² 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 oil⁵³ 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.⁵⁴ 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

⁵⁰ H. R. Rep. No. 653, 101st Cong., 2d Sess. 102 (1990). S. Rep. No. 101-94 (1989) (emphasis added).

⁵¹ S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980) (emphasis added).

⁵² 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).

⁵³ This has become known colloquially as EPA's "petroleum exclusion".

⁵⁴ 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).

petroleum exclusion was ‘to remove from CERCLA jurisdiction spills only of oil, not releases of hazardous substances mixed with oil.’”⁵⁵

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.⁵⁶ 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.⁵⁷ 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.⁵⁸

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 as defined by OPA. The claimant must also show that the claimed expenses resulted from the discharge of OPA oil.⁵⁹

In this instance, the product that was discharged is identified as “produced water” and the claimant has failed to provide sample analysis to support its assertion that the product was an OPA oil. Produced water commonly includes varying concentration of organic compounds, inorganic compounds and radionuclides, many of which are classified as CERCLA-listed hazardous substances.

The significant issue here, and what ultimately results in the claim being non-compensable, is the absence of a sample analysis to confute the confirmed presence and likely release of CERCLA-listed hazardous substances within the resulting commingled mixture. As a result, NPFC determines based on all the information that was provided by the claimant, that the claimant has failed to carry its burden of proving that the commingled mixture from the contents of Lobo Operating’s Brenton Sound #32 well, that are the subject of the claimed removal expenses, was comprised solely of oil as defined by OPA.⁶⁰

⁵⁵ *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1383-4 (E.D. Cal. 1991).

⁵⁶ *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886 (10th Cir. 2000).

⁵⁷ *Id.*

⁵⁸ *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.

⁵⁹ *See, e.g., Gatlin Oil v. United States*, 169 F.3d. 107 (4th 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).

⁶⁰ *See, e.g., Gatlin Oil v. United States*, 169 F.3d. 107 (4th Cir. 1999).

The NPFC finds the alleged removal costs and damages were not the result of a 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, based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Environmental Safety and Health Consulting's claim for uncompensated removal costs is denied.

The NPFC has not adjudicated ES&H's claimed removal costs because it has denied the claim as not compensable under the OPA.

(b) (6)

Claim Supervisor: ^{(b) (6)}

Date of Supervisor's review: *March 9, 2023*

Supervisor Action: *Denial Approved*

Supervisor's Comments: