CLAIM SUMMARY / DETERMINATION[1]

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 on Reconsideration**

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 thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and concluded that the claim was not compensable under the Oil Pollution Act (OPA) and therefore was denied. On March 31, 2023, ES&H timely sought reconsideration.

---

[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 Incident Action Plans (IAPs) page 3 of 64 dated August 27, 2020.

[4] USCG MISLE Case # 1233303 dated August 27, 2020.

[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.

Requests for reconsideration are considered *de novo*. The NPFC has thoroughly reviewed the original claim, the request for reconsideration, information it obtained independently, and the applicable law and regulations. Upon reconsideration, the NPFC concludes the information in the administrative record does not support ES&H's claim for entitlement to removal costs for the reasons as outlined in the original determination and below. Therefore, this claim on reconsideration is denied.

I. CLAIM HISTORY:

On January 26, 2023, ES&H presented its original claim to the NPFC for removal costs for $34,763.88. The NPFC thoroughly reviewed the original claim, all information provided by ES&H and obtained independently, the relevant statutes and regulations, and ultimately denied the claim because the claimant failed to prove the event was an "incident" as defined by OPA.[8] An incident must result in the discharge (or substantial threat of a discharge) of oil as defined by OPA.[9] The burden is on the claimant to prove that the substance released was oil, and the subsequent removal costs incurred were the result of the removal of that oil.[10] The claimant did not meet its burden and therefore the claim was denied. The NPFC's initial determination is hereby incorporated by reference.

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.[11] The claimant has the burden of providing all evidence, information, and documentation deemed necessary by NPFC's Director to support the claim.[12] 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.[13]

On March 31, 2023 the NPFC received E&H's timely request for reconsideration. In the request for reconsideration, the claimant reiterated its previous position and articulated its theory that since the mixture of produced water contained some petroleum constituents, then the claim should be payable by the Oil Spill Liability Trust Fund (OSLTF). The claimant produced no other documentation or evidence in support of its claim. For the reasons articulated in the initial determination and below, claimant's position is incongruous with the law and regulations governing payments from the OSLTF. As such, the claim must be denied upon reconsideration.

[8] 33 U.S.C. § 2701(14).
[9] 33 U.S.C. § 2701(23).
[10] *See*, 33 CFR 136.105.
[11] 33 CFR 136.115(d).
[12] 33 CFR 136.105(a).
[13] *Id*.

III. ANALYSIS ON 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 the governing claims regulations at 33 CFR 136.115(d).

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).[14] 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.[15] 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 Claimant's request for reconsideration.

OPA provides a mechanism for compensating parties who have incurred removal costs and certain damages where the responsible party has failed to do so. 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**."[16] 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***."[17]

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.]".[18]

The Claimant's request for consideration explained that it was mobilized to an uncontrolled well release under the direction of the RP utilizing the Facility Response Plan. The Claimant stated that initial observations revealed sheening with the discharge mixture of produced water containing crude oil constituents. The claimant did not provide a sample analysis to support its contention. The claimant proffers it should be entitled to compensation from the OSLTF because "there is confidence the produced water released did have crude oil constituents present"

---

[14] 33 CFR Part 136.
[15] *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)).
[16] 33 U.S.C. § 2701(14).
[17] 33 U.S.C. § 2701(14)(emphasis added).
[18] 33 U.S.C. § 2701(23).

"as this well produced crude oil in the past."[19] However, according to a representative from the RP, the well had been shut-in for unknown amount of time and reportedly was never used for crude oil production. [20] The last known production from the well was produced water and natural gas only.[21] Regardless, 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.[22]

As a factual matter and as discussed in detail below, the NPFC finds that the Claimant did not incur damages as a result of an incident as defined by OPA. More specifically, there is no evidence in the administrative record that the substance released met the statutory definition of oil. As evidenced in the facts and the claimant's own admissions, the event at issue here was a release of "produced water." By its very nature, produced water commonly includes concentrations of organic compounds, inorganic compounds and radionuclides, many of which are classified as CERCLA-listed hazardous substances.[23]

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**

[19] Claimant Request for Reconsideration dated March 31, 2023.
[20] FOSC Incident Summary, USCG MISLE Case # 1233303 dated August 27, 2020.
[21] *Id*.
[22] The NPFC acknowledges that when a substance is exempted from CERCLA by its "petroleum exclusion", it may fall within the OPA's definition of oil even if it contains constituents that are listed as CERCLA hazardous substances. The petroleum exclusion's legislative history shows that Congress intended to only exclude "releases strictly of oil". As a result, the petroleum exclusion has been consistently interpreted to exempt a mixture from CERCLA's coverage when the hazardous substances are indigenous to oil and the levels of hazardous substances are typically found in crude oil or refined product. However, if the mixture cannot satisfy this test, then the listed hazardous substances will result in the entire mixture being covered by CERCLA and exempted from the OPA. In the absence of sampling results, it is impossible to conclude what levels of hazardous substances were present in the material released in this case. The burden is on the claimant to prove that the material was "oil" as defined by OPA before it can be compensated.
[23] NPFC determination issued to Claimant dated March 9, 2023. *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).

there will be no overlap in the liability provisions of CERCLA and the Oil Pollution Act.[24]

"[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."[25] Similarly, due to their "common purposes and shared history," courts have often looked to CERCLA to understand the scope of the OPA.[26] In passing CERCLA, Congress stated: "[CERCLA] does not cover spills or other releases **strictly of oil**."[27] Contemporaneous congressional debate further elucidated how it intended CERCLA to apply to spills of oil mixed with hazardous substances.[28] 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. Courts have opined harmoniously on this very issue.[29]

Moreover, since the passage of CERCLA, the EPA 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[30] 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.[31] 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,

---

[24] H. R. Rep. No. 653, 101st Cong., 2d Sess.102 (1990). S. Rep. No. 101-94 (1989) (emphasis added). As Representative Stangeland explained, "The conferees have defined the term 'oil' to clarify that the term is mutually exclusive from hazardous substances subject to regulation under [CERCLA]. In fact, the conferees have focused on oil spills rather than hazardous substances or hazardous materials spills throughout development of the legislation." 136 Cong. Rec. H6933-02 (daily ed. August 3, 1990).

[25] *Collins v. Mnuchin*, 938 F.3d 553, 570 (5th Cir. 2019) (*quoting Lorillard v. Pons*, 434 U.S. 575, 581 (1978)).

[26] *Buffalo Marine Servs., Inc. v. United States*, 663 F.3d 750 (5th Cir. 2011). *See also*, *United States v. Nature's Way Marine*, *L.L.C.*, 904 F.3d 416, 420-21 (5th Cir. 2018); *In re Settoon Towing, L.L.C.*, 859 F.3d 340, 349-50 (5th Cir. 2017).

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

[28] *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); PCBs in waste oil, *id.* (Sen. Mitchell) and contaminated waste oil, *id.* at S14980 (Sen. Cohen).

[29] "The OPA provides a comprehensive regulatory and liability scheme governing all forms of petroleum pollution affecting the navigable waters of the United States, **to the extent they are not covered by [CERCLA]**.") *Avitts v. Amoco Prod. Co.*, 840 F. Supp. 1116, 1121 (S.D. Tex. 1994)(emphasis added); *accord*., *Sun Pipe Line Co. v. Conewago Contractors, Inc*., No. 4:CV-93-1995, 1994 WL 539326, (M.D. Pa. Aug. 22, 1994) ("The OPA was written to dovetail with preexisting federal legislation, specially, with [CERCLA] and the Clean Water Act."). *Id*. at *11.

[30] This has become known colloquially as EPA's "petroleum exclusion".

[31] 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).

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.'"[32]

Notably, for the record, courts have also previously addressed the concept of commingling. In one such case, the Tenth Circuit analyzed the commingling of petroleum products and hazardous materials in the soil and floating in the groundwater beneath an oil refinery.[33] 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.[34] 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.[35]

The NPFC is only authorized to pay claims for uncompensated removal costs and damages that result from the discharge or substantial threat of the discharge of oil into navigable waters of the United States.[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 adjudicate the claim.[38]

Given the facts of this case, most notably that produced water is known to commonly includes concentrations of organic compounds, inorganic compounds and radionuclides, many of which are classified as CERCLA-listed hazardous substances, the claimant has the burden to prove – by producing evidence - that the substance released met the definition of "oil" as it defined by OPA.[39] It simply has not done so. As such, this claim must be denied because Claimant failed to prove that its costs resulted from a *discharge of oil* as required by OPA.[40]

---

[32] *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1383-4 (E.D. Cal. 1991).
[33] *Tosco Corp. v. Koch Indus., Inc*., 216 F.3d 886 (10th Cir. 2000).
[34] *Id*.
[35] *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.
[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(23).
[40] *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

IV. CONCLUSION:

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 removal costs and 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 is discharged 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 and the claimed removal costs and damages *resulted from the discharge of OPA oil*.

The event at issue here was the release of produced water. As such, and without any evidence that the substance was OPA oil, the NPFC finds that claimant's alleged costs 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, ES&H's claim remains denied.

The NPFC has not adjudicated the specific underlying claimed costs because it has denied the claim on the jurisdictional grounds of not being compensable under OPA.[41]

Claim Supervisor: ***Russell C. Proctor***

Date of Supervisor's review: May 19, 2023

Supervisor Action: ***Denial Approved.***

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).

[41] 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.