

## CLAIM SUMMARY / DETERMINATION<sup>1</sup>

<b>Claim Number:</b>	UCGP924027-URC001
<b>Claimant:</b>	State of Louisiana
<b>Type of Claimant:</b>	State
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$6,458.06
<b>Action Taken:</b>	Denial

### **EXECUTIVE SUMMARY:**

On June 8, 2021, two incident reports were made to the National Response Center (NRC). At approximately 8:30 pm local time on June 8, 2021, the National Response Center (NRC) was notified of a spill that was causing strong fumes in the air at the Lake Dauterive Boat Launch in the Lake Fausse Pointe State Park.<sup>2</sup> Later that night, at approximately 11:46 pm local time, BCF Resources, LLC (“BCF” or “RP”) notified the NRC that a saltwater well overfilled causing a discharge of 2 to 3 barrels<sup>3</sup> of saltwater into Lake Fausse Pointe, Louisiana, a navigable waterway of the United States.<sup>4</sup>

The incident occurred at an offshore facility leased at the time of the spill to BCF Resources, LLC.<sup>5</sup> The United States Environmental Protection Agency (USEPA) Region VI is the Federal On-Scene Coordinator (FOSC) for the incident.<sup>6</sup> USEPA confirmed that the lessee of the facility, BCF Resources, LLC, is the responsible party (RP) for the spill.<sup>7</sup> The State of Louisiana (“State of LA”, “Claimant”, or “SOSC”), is the State On Scene Coordinator (SOSC) based on the location of the incident and was notified of the incident via NRC Report # 1307236<sup>8</sup> and Louisiana State Police Report # 21-02410.<sup>9</sup>

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<sup>1</sup> 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.

<sup>2</sup> National Response Center (NRC) Report # 1307234 dated June 8, 2021.

<sup>3</sup> One barrel of oil equals approximately 42 gallons.

<sup>4</sup> State of Louisiana Original Claim Submission received March 1, 2024. *See*, National Response Center report #1307243 dated June 8, 2021, pg. 3 of 45.

<sup>5</sup> Email from State of Louisiana to NPFC dated March 13, 2024. *See*, State of Louisiana Permit Amendment, pages 1-12, and *See*, Lease Facility Inspection Report pages 1-2.

<sup>6</sup> Email from USEPA Region 6 to NPFC dated March 25, 2024.

<sup>7</sup> Email from USEPA Region 6 to NPFC dated March 25, 2024.

<sup>8</sup> NRC Report # 1307236 dated June 8, 2021, was merged with NRC Report # 1307234 dated June 8, 2021. *See*, State of Louisiana Original Claim Submission received March 1, 2024. *See*, National Response Center report #1307236 dated June 8, 2021, pg. 7 of 45.

<sup>9</sup> State of Louisiana Original Claim Submission received March 1, 2024. *See*, Louisiana State Police (LSP) Report dated June 8, 2021, pgs. 11-13 of 45.

The Claimant reports that Legacy Environmental Services (“Legacy” or “OSRO”) was hired by BCF to mitigate the spill incident.<sup>10</sup> On June 17, 2021, the SOSC returned to the scene and determined all removal and cleanup actions were complete.<sup>11</sup>

The State of Louisiana submitted its removal costs claim to the National Pollution Funds Center (NPFC) for \$6,458.06 on March 1, 2024.<sup>12</sup> 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 June 8, 2021, two incident reports were made to the National Response Center (NRC). At approximately 8:30 pm local time on June 8, 2021, the National Response Center (NRC) was notified of a spill that was causing strong fumes at the Lake Dauterive Boat Launch in Lake Fausse Pointe State Park.<sup>13</sup> Later that night, at approximately 11:46 pm local time, BCF Resources, LLC (“BCF” or “RP”) notified the NRC that a saltwater well overfilled causing a discharge of 2 to 3 barrels<sup>14</sup> of saltwater into Lake Fausse Pointe, Louisiana, a navigable waterway of the United States.<sup>15</sup> The NPFC obtained a report of a Lease Facility Inspection performed by the State of Louisiana’s Department of Natural Resources Office of Conservation dated June 9, 2021, associated with the well that is the subject of this incident.<sup>16</sup> The inspection states that the malfunction of the saltwater disposal #053 well resulted in the overflow of the saltwater storage tank on an adjacent platform resulting in the discharge of *produced water* that overflowed containment around the tank and discharged into Lake Fausse Pointe.<sup>17</sup>

### ***Responsible Party***

The spill in this case occurred at an offshore facility as defined by the Oil Pollution Act of 1990 (OPA).<sup>18</sup> OPA defines the Responsible Party (RP) for a discharge from an offshore facility

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<sup>10</sup> State of Louisiana Original Claim Submission received March 1, 2024. *See*, LDEQ Incident report #203099, Comment section dated June 8, 2021, pg. 23 of 45

<sup>11</sup> State of Louisiana Original Claim Submission received March 1, 2024. *See*, LDEQ Incident report #203099, Comment section dated June 17, 2021, pg. 23 of 45.

<sup>12</sup> State of Louisiana Original Claim Submission received March 1, 2024.

<sup>13</sup> National Response Center (NRC) Report # 1307234 dated June 8, 2021.

<sup>14</sup> One barrel of oil equals approximately 42 gallons.

<sup>15</sup> State of Louisiana Original Claim Submission received March 1, 2024. *See*, National Response Center report #1307243 dated June 8, 2021, pg. 3 of 45.

<sup>16</sup> *See*, Lease Facility Inspection Report dated June 9, 2021, obtained from the State of Louisiana’s Strategic Online Natural Resources Information System (“SONRIS”) under SONRIS ID # 794911.

<sup>17</sup> *See*, Lease Facility Inspection Report dated June 9, 2021, obtained from the State of Louisiana’s Strategic Online Natural Resources Information System (“SONRIS”) under SONRIS ID # 794911, under section B. Well Site Comments (emphasis added).

<sup>18</sup> An “offshore facility” means any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel.” 33 U.S.C. § 2701(22).

as “the lessee or permittee of the area in which the facility is located.”<sup>19</sup> BCF Resources, LLC is identified by the FOSC and the State of Louisiana as the RP.<sup>20</sup>

### ***Recovery Operations***

The State of Louisiana (“State of LA”, “Claimant”, or “SOSC”), is the State On Scene Coordinator (SOSC) based on the location of the incident and was notified of the incident via NRC Report # 1307236<sup>21</sup> and Louisiana State Police Report # 21-02410.<sup>22</sup> The Claimant reports that Legacy Environmental Services (“Legacy” or “OSRO”) was hired by BCF to mitigate the spill incident.<sup>23</sup>

### **II. CLAIMANT AND NPFC:**

On March 1, 2024, State of Louisiana presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$6,458.06.<sup>24</sup> The claim included State of Louisiana’s signed OSLTF form, a copy of Invoice #LA2021\_0608\_2134\_1, NRC report #1307243, NRC report # 1307236, LSP Report # 21- 02410, a letter from the State of Louisiana to BCF requesting payment dated May 26, 2023, daily reports, spill reports, equipment records, labor records and timesheets, photographs, and an email from the RP to the State of Louisiana, stating their inability to pay the costs.<sup>25</sup>

On March 4 and 6, 2024, the NPFC requested additional information from the State of Louisiana.<sup>26</sup> On March 13, 2024, State of Louisiana provided answers to the NPFC provided a copy of a lease facility inspection report dated August 12, 2021, and a copy of a permit amendment.<sup>27</sup> The claimant was unable to provide a spill sample analysis as part of its claim submission. On March 14, 2024, the NPFC requested a copy of the schematics of the offshore facility<sup>28</sup> which the State was also unable to provide.<sup>29</sup>

### **III. DETERMINATION PROCESS:**

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<sup>19</sup> 33 U.S.C. § 2701(26)(A)(iii).

<sup>20</sup> See, Email with attachments from State of Louisiana to NPFC dated March 13, 2024. See, Email attachment entitled State of Louisiana Permit Amendment, pages 1-12, and Email attachment entitled Lease Facility Inspection Report pages 1-2. See, Email from USEPA Region 6 to NPFC dated March 25, 2024.

<sup>21</sup> NRC Report # 1307236 dated June 8, 2021, was merged with NRC Report # 1307234 dated June 8, 2021. See, State of Louisiana Original Claim Submission received March 1, 2024. See, National Response Center report #1307236 dated June 8, 2021, pg. 7 of 45.

<sup>22</sup> State of Louisiana Original Claim Submission received March 1, 2024. See, Louisiana State Police (LSP) Report dated June 8, 2021, pgs. 11-13 of 45.

<sup>23</sup> State of Louisiana Original Claim Submission received March 1, 2024. See, LDEQ Incident report #203099, Comment section dated June 8, 2021, pg. 23 of 45

<sup>24</sup> State of Louisiana claim submission signed February 29, 2024.

<sup>25</sup> State of Louisiana Original Claim Submission received March 1, 2024, with Attachments.

<sup>26</sup> Emails from NPFC to State of Louisiana dated March 4, 2024, and March 6, 2024.

<sup>27</sup> Email from State of Louisiana to NPFC dated March 13, 2024, with Attachments.

<sup>28</sup> Email from NPFC to State of Louisiana dated March 14, 2024.

<sup>29</sup> Email from State of Louisiana to NPFC dated March 14, 2024.

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>30</sup> 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.<sup>31</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>32</sup> 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.

#### **IV. 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.<sup>33</sup> An RP's liability is strict, joint, and several.<sup>34</sup> 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."<sup>35</sup> 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."<sup>36</sup> 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."<sup>37</sup>

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).<sup>38</sup> The NPFC has promulgated a comprehensive set of

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<sup>30</sup> 33 CFR Part 136.

<sup>31</sup> 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)).

<sup>32</sup> 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).

<sup>33</sup> 33 U.S.C. § 2702(a).

<sup>34</sup> See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

<sup>35</sup> *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).

<sup>36</sup> 33 U.S.C. § 2701(31).

<sup>37</sup> 33 U.S.C. § 2701(30).

<sup>38</sup> See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>39</sup> 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.<sup>40</sup>

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.**”<sup>41</sup>

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.***”<sup>42</sup>

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.]”<sup>43</sup>

CERCLA defines “hazardous substance” broadly.<sup>44</sup> However, the definition of “hazardous substance” under CERCLA specifically excludes “petroleum, including crude oil or any fraction thereof...”<sup>45</sup> 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).”<sup>46</sup>

### ***Produced water***

When produced water 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. To obtain a marketable product, some of these constituents must be removed from the crude oil. The

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<sup>39</sup> 33 CFR Part 136.

<sup>40</sup> 33 CFR 136.105.

<sup>41</sup> 33 U.S.C. § 2701(14).

<sup>42</sup> 33 U.S.C. § 2701(14)(emphasis added).

<sup>43</sup> 33 U.S.C. § 2701(14).

<sup>44</sup> “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].”

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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.<sup>47</sup>

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.<sup>48</sup>

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 radium<sup>49</sup>

### *A commingled spill*

Notwithstanding the statutory definitions, a question sometimes exists when the release involves a mixture of oil and hazardous substances that have commingled before substantially threatening to discharge, or discharging into a navigable waterway, such as the facts in this case.

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<sup>47</sup> Produced water is more fully defined 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.asp](http://www.glossary.oilfield.slb.com/Terms/p/produced_water.asp)

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*Schlumberger Oilfield Glossary*, available online at: [www.glossary.oilfield.slb.com/Terms/p/produced\\_water.aspx](http://www.glossary.oilfield.slb.com/Terms/p/produced_water.aspx).

<sup>49</sup> 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](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).

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.**<sup>50</sup>

The legislative history of CERCLA likewise is instructive: "The reported bill [CERCLA] does not cover spills or other releases **strictly** of oil."<sup>51</sup> Contemporaneous congressional debate further elucidated how it intended CERCLA to apply to spills of oil mixed with hazardous substances.<sup>52</sup> 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<sup>53</sup> 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.<sup>54</sup> 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.'"<sup>55</sup>

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

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

<sup>52</sup> 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).

<sup>53</sup> This has become known colloquially as EPA's "petroleum exclusion".

<sup>54</sup> 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).

<sup>55</sup> *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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

On March 13, 2024, State of Louisiana submitted a permit amendment in reply to the NPFC's request for additional information.<sup>59</sup> The permit amendment clearly defines SL 293 Lake Fausse Pointe well no. 53 as a saltwater disposal well (SWD).<sup>60</sup> Evidence obtained by the NPFC via the State of Louisiana SONRIS database supports SL 293 Lake Fausse Pointe well no. 53 saltwater storage tank aboard the adjacent facility platform as the source of the incident.<sup>61</sup> It is more likely than not, the saltwater disposal well that discharged in this incident contained produced water. Moreover, the State of Louisiana was unable to provide a sample analysis of the spilled material to support its claim.<sup>62</sup>

Upon review of the information submitted by the Claimant, and the entirety of administrative record, the NPFC has determined that the claimant has not met its burden to demonstrate the product released was exclusively an OPA oil. The evidence suggests the any oil involved was already commingled with produced water before it discharged. In addition, the FOSC reviewed the information submitted by the Claimant, and came to a similar opinion, concluding that "...the spill was mixture of saltwater and crude oil."<sup>63</sup>

## **V. CONCLUSION:**

Based on the entirety of the administrative record, the NPFC finds that the saltwater disposal well that discharged likely contained produced water, which is a CERCLA hazardous material and not compensable under OPA. In addition, after being presented the information provided by the claimant, the FOSC reached a similar conclusion.<sup>64</sup> On balance, the State of Louisiana was not able to provide any evidence to substantiate the spilled substance was *strictly* an OPA

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

<sup>57</sup> *Id.*

<sup>58</sup> *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.

<sup>59</sup> Email from State of Louisiana to NPFC dated March 13, 2024, with Attachments.

<sup>60</sup> Email from State of Louisiana to NPFC dated March 13, 2024. *See*, Permit Amendment, pg. 3 of 12.

<sup>61</sup> State of Louisiana Original Claim Submission received March 1, 2024, question 2, pg. 1 of 45.

<sup>62</sup> State of Louisiana Original Claim Submission received March 1, 2024.

<sup>63</sup> Email from USEPA Region 6 to NPFC dated March 25, 2024.

<sup>64</sup> Email from USEPA Region 6 to NPFC dated March 25, 2024.



compensable oil.<sup>65</sup> As such, the claimant has not met its burden of proof to substantiate its claim.

Based on a comprehensive review of the administrative record, the applicable law and regulations, and for the reasons outlined above, the State of Louisiana's request for uncompensated removal costs is denied.

(b) (6)

Claim Supervisor: (b) (6)

Date of Supervisor's review: 4/8/24

Supervisor Action: *Denial approved*

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<sup>65</sup> In accordance with OPA and its implementing regulations, 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. 33 CFR 136.105