

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGPN23011-URC001
Claimant:	E3 OMI, LLC
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$891,698.38 (Amended to \$95,238.16)
Action Taken:	Denial

EXECUTIVE SUMMARY:

On December 22, 2022, WCC Energy Group LLC., (“WCC Energy” or “RP”) reported the release of two barrels of oily water mixture onto the ground of their facility due to equipment failure via NRC Report # 1355635.² On the same day, the National Response Center (NRC) notified United States Coast Guard (USCG) Sector New Orleans (SEC NOLA) via NRC Report # 1355663 of an unknown oil sheen in the City’s drainage canal from an unknown source leading to Lake Washington, a navigable waterway of the United States.³

The United States Coast Guard (USCG) Sector New Orleans (“SEC NOLA” or “FOSC”) was the Federal On-Scene Coordinator (FOSC) for the incident.⁴ WCC Energy is the owner of the facility and the responsible party for the incident under the OPA.⁵ The RP hired E3 OMI (“OMI” or “Claimant”) to respond to the spill.⁶ ES&H was hired by the FOSC under Federal Project Number (FPN) UCGPN23011 to conduct an initial site assessment.⁷ The FOSC took five (5) samples confirming WCC Energy as the source and owner of the facility and to establish the path of discharge under the Federal Water Pollution Control Act (FWPCA).⁸

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 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 NRC Report # 1355635 dated December 22, 2022, 0800 local time.

³ NRC Report # 1355663 dated December 22, 2022, 1435 local incident time.

⁴ USCG SITREP-POL ONE dated December 22, 2022.

⁵ 33 U.S.C. § 2701(32).

⁶ See, E3 OMI Short Form Service Contract dated December 22, 2022.

⁷ USCG SITREP-POL ONE dated December 23, 2022. E3 OMI took over the response operations on December 24, 2022. ES&H remained on contract under the FPN for wildlife response and rehabilitation.

⁸ See, USCG Marine Safety Laboratory Case Number 23-016 dated January 18, 2023. Samples were taken on December 22, 2022, as indicated in USCG SITREP-POL One. Sample 1 was taken from the drainage canal northwest of the WCC Energy facility; Sample 2 was taken from the shoreline adjacent to the WCC

On January 13, 2023, the NRC received two notifications for a subsequent pollution incident at the same WCC Energy, West Potash Facility. The first notification was made via NRC Report # 1357554 by the RP, WCC Energy who reported a release of crude oil from an unknown source that may have been related to NRC Report # 1355635 taken on December 22, 2022.⁹ The second notification came via NRC Report # 1357553. That report was made by E3 OMI, the RP's response contractor, that was on scene still actively responding to the pollution incident from December 22, 2022.¹⁰

On January 20, 2023, E3 OMI presented its costs to WCC Energy in the amount of \$891,698.38 which included activities involving both the December 2022 and January 2023 releases.¹¹ On May 16, 2023, the National Pollution Funds Center (NPFC) received E3 OMI's claim submission for \$891,698.38.¹² On June 15, 2023, WCC Energy paid E3 OMI \$796,460.22 leaving a balance of \$95,238.16 in unpaid costs that remain the subject of this claim.¹³

After thoroughly reviewing the administrative record, the NPFC finds that removal costs incurred from both releases are non-compensable under the Oil Pollution Act (OPA). The first release was comprised of produced water and crude oil which had commingled well before it discharged into the navigable waterway and removal actions commenced. The second incident involved the release of pure crude oil, but the crude oil commingled with the residual mixture of produced water and crude oil that was still present from the first incident before removal actions were performed. Additionally, even if the release of crude oil had not commingled in the second event, the claimant did not meet its burden of proof that the second incident resulted in a substantial threat of discharge or actual discharge of oil into a navigable waterway as required by OPA.

As such, based on the administrative record and the applicable law and regulations and after careful consideration, the NPFC has determined that the claim is not compensable under OPA and must be denied.

On July 18, 2023, the NPFC conducted an interview with WCC Energy's Chief Executive Officer, Mr. (b) (6), to understand the cause of the first release and to obtain clarification of what products discharged. The WCC Energy West Potash facility is in Port Sulphur and consists of four above ground storage tanks.¹⁴ Specifically, the incident location contains two 400-barrel (bbl.) crude oil tanks, one 400-bbl. gun barrel tank (used as a settling tank for crude oil and produced water), and a 400-bbl.

Energy facility; Sample 3 was taken from the oil pit located on the WCC Energy property; Sample 4 - taken from the secondary containment, matches samples 1 and 2; and sample 5 was taken from the canal and designated as "Clean Water" for comparison purposes only. Based on the foregoing, scientific evidence establishes the path of discharge from the WCC Energy facility to the drainage canal to identify the Responsible Party of a FWPCA violation.

⁹ NRC Report # 1357554 dated January 13, 2023, at 0100 local time.

¹⁰ NRC Report # 1357553 dated January 13, 2023, at 0244 local time.

¹¹ Optional OSLTF Claim Form dated May 15, 2023.

¹² *Id.*

¹³ See, WCC Energy Group LLC check # 001300 to OMI dated June 15, 2023. On June 30, 2023, E3 OMI provided confirmation to the NPFC that they received WCC Energy's insurance payment.

¹⁴ See, WCC Energy Group, LLC Spill Prevention Control & Countermeasure Plan (SPCC), Section 3, page 23.

produced water tank. Mr. (b) (6) stated that the produced water tank and gun barrel tank from his facility were sabotaged by a disgruntled employee, causing the release of produced water and crude oil from the containment area. He further states that the two crude oil tanks were not vandalized.¹⁵

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 (OSLTF) and must be denied.

INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

Release 1 - On December 22, 2022, WCC Energy Group, LLC (“WCC Energy” or “Responsible Party (RP)”) made a report to the National Response Center (NRC), that two barrels¹⁶ of oily water mixture released onto the ground at their West Potash Facility, due to equipment failure.¹⁷ Later the same day, a second report was made to the NRC by a private citizen, asserting an unknown sheen in the city’s drainage canal from an unknown source leading to Lake Washington, a navigable waterway of the United States.¹⁸

The WCC Energy West Potash facility, located in Port Sulphur, LA, consists of four above ground storage tanks.¹⁹ Specifically, the incident location contains two 400-(bbl.) crude oil tanks, one 400-bbl. gun barrel tank (used as a settling tank for crude oil and produced water), and a 400-bbl. produced water tank. On July 18, 2023, the NPFC conducted an interview with WCC Energy’s Chief Executive Officer, Mr. (b) (6) (b) (6), to understand the cause of the first release and to obtain clarification of what products discharged. Mr. (b) (6) (WCC Energy’s Chief Executive Officer) stated that on December 22, 2022, a disgruntled employee entered his facility and locked out the safety system that was designed to prevent an overflow from the 400-bbl. gun barrel tank to the 400-bbl. produced water tank. The wells associated with this tank battery produce large amounts of produced water. Mr. (b) (6) explained that the PVC caps from the drainage tubes were removed from the containment area surrounding the 400-bbl. gun barrel tank and the 400-bbl. produced water tank and the earthen berm surrounding the facility which allowed crude oil and produced water mixture to leave the facility and enter the drainage canal.²⁰

¹⁵ See, Recap of interview with Mr. (b) (6) via email dated July 18, 2023.

¹⁶ One barrel of oil equals 42 gallons.

¹⁷ NRC Report # 1355635 dated December 22, 2022. 0800 Local Time.

¹⁸ NRC Report # 1355663 dated December 22, 2022. 1435 Local Incident Time. SEC NOLA was notified by the NRC of the spill.

¹⁹ See, WCC Energy Group, LLC Spill Prevention Control & Countermeasure Plan (SPCC), Section 3, page 23.

²⁰ See, Recap of interview with Mr. (b) (6) via email dated July 18, 2023. Mr. (b) (6) also stated that the two 400-bbl. crude oil tanks were not touched. He believes that the disgruntled employee was trying to make the release of crude oil and produced water look like an accident.

SEC NOLA was the FOSC for the incident.²¹ On December 22, 2022, the FOSC took five (5) samples confirming WCC Energy as the source and owner of the facility and to establish the path of discharge under the Federal Water Pollution Control Act (FWPCA).²²

Release 2 - On January 13, 2023, the NRC received two notifications for a subsequent pollution incident at the same WCC Energy, West Potash Facility. The first notification was made via NRC Report # 1357554 by the RP, WCC Energy who reported a release of crude oil from an unknown source that may have been related to NRC Report # 1355635 taken on December 22, 2022.²³ The second notification was made by E3 OMI, the RP's response contractor, that was on scene still actively responding to the pollution incident from December 22, 2022.²⁴ Although the record does not indicate the cause of the second release, both NRC reports intimate that inclement weather might have been a factor. The FOSC determined the release was contained within the earthen berm secondary containment area and there was no impact to the navigable waterway. .²⁵

Responsible Party

WCC Energy as the owner of the facility is the RP under OPA.²⁶ The FOSC issued a Notice of Federal Interest (NOFI) to WCC Energy dated December 22, 2022.²⁷ The NPFC issued an RP Notification Letter to WCC Energy dated May 24, 2023.²⁸ An RP Notification letter notifies the responsible party that a claim was presented to the NPFC seeking reimbursement of uncompensated removal costs incurred as a result of a discharge of oil to navigable waters of the United States.

Recovery Operations

SEC NOLA was the FOSC for the incident and accessed the Oil Spill Liability Trust Fund via Federal Project Number (FPN) UCGPN23011. Under the FPN, the FOSC hired ES&H to conduct a waterside assessment.²⁹ SEC NOLA took five (5) samples confirming WCC Energy as the source and owner of the facility and to establish the path

²¹ USCG SITREP-POL ONE dated December 22, 2022.

²² See, USCG Marine Safety Laboratory Case Number 23-016 dated January 18, 2023. Samples were taken on December 22, 2022, as indicated in USCG SITREP-POL One. Sample 1 was taken from the drainage canal northwest of the WCC Energy facility; Sample 2 was taken from the shoreline adjacent to the WCC Energy facility; Sample 3 was taken from the oil pit located on the WCC Energy property; Sample 4 - taken from the secondary containment, matches samples 1 and 2; and sample 5 was taken from the canal and designated as "Clean Water" for comparison purposes only. Based on the foregoing, scientific evidence establishes the path of discharge from the WCC Energy facility to the drainage canal to identify the Responsible Party of a FWPCA violation.

²³ NRC Report # 1357554 dated January 13, 2023, at 0100 local time.

²⁴ NRC Report # 1357553 dated January 13, 2023, at 0244 local time.

²⁵ SITREP POL FOUR dated January 20, 2023. "There was no impact to the tributary and canal."

²⁶ 33 U.S.C. § 2701(32).

²⁷ See, USCG NOFI dated December 22, 2022. WCC refused to sign the notification as noted at the bottom of the letter.

²⁸ See, NPFC RP Notification Letter dated May 24, 2023.

²⁹ USCG SITREP-POL ONE dated December 22, 2022.

of discharge under the Federal Water Pollution Control Act (FWPCA).³⁰ The RP hired E3 OMI to respond to the spill.³¹

On December 22, 2022, ES&H deployed one crew boat to begin a waterside assessment and deployed sorbent boom around the two miles of product in the canal.³² ES&H deployed boats and containment boom and began to recover oily water from the canal using a drum skimmer.³³

On December 24, 2022, E3 OMI assumed cleanup operations of the spill and ES&H remained on contract for the animal rehabilitation center they had set up.³⁴

On January 4, 2023, E3 OMI continued with active recovery of product from the facility's secondary containment utilizing vacuum trucks. Diversion booming was utilized in the canal to collect the product. Scraping of the drainage ditch and removal of oiled vegetation within the drainage ditch and the containment were conducted.³⁵

On January 6, 2023, E3 OMI changed absorbent boom, cut overhanging branches, collected oily product, and scraped the inside of the secondary containment as well as the tributary in the canal continued.³⁶

January 9, 2023, SECNOLA arrived on scene for the continued oversight of cleanup operations. Recommendations were made to WCC for a plan to address berm height and to clean up the saturated sediment in the secondary containment.³⁷

On January 13, 2023, SEC NOLA personnel arrived on scene to oversee the removal of the second release of product and monitor the continued response actions of the first spill. SEC NOLA personnel determined the 250-bbl. of crude oil from this second release was fully contained in the secondary containment earthen berm and posed no impacts to the navigable waterway. OMI pumped the oil contained within the earthen berm back to the tanks.³⁸ The FOSC continued oversight of cleanup operations until they closed the case on January 25, 2023.³⁹ E3 OMI performed all required response actions under the oversight of the FOSC.⁴⁰

³⁰ See, USCG Marine Safety Laboratory Case Number 23-016 dated January 18, 2023. Samples were taken on December 22, 2022, as indicated in USCG SITREP-POL One. Sample 1 was taken from the drainage canal northwest of the WCC Energy facility; Sample 2 was taken from the shoreline adjacent to the WCC Energy facility; Sample 3 was taken from the oil pit located on the WCC Energy property; Sample 4 - taken from the secondary containment, matches samples 1 and 2; and sample 5 was taken from the canal and designated as "Clean Water" for comparison purposes only. Based on the foregoing, scientific evidence establishes the path of discharge from the WCC Energy facility to the drainage canal to identify the Responsible Party of a FWPCA violation.

³¹ See, E3 OMI Short Form Service Contract dated December 22, 2022.

³² USCG SITREP-POL ONE dated December 23, 2022.

³³ USCG SITREP-POL TWO dated January 5, 2023.

³⁴ USCG SITREP-POL THREE dated January 13, 2023.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ SITREP POL FOUR dated January 20, 2023,

³⁹ USCG SITREP-POL FIVE AND Final dated February 16, 2023.

⁴⁰ *Id.*

II. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)⁴¹ require all claims for removal costs or damages must be presented to the responsible party before seeking compensation from the NPFC.⁴²

On January 20, 2023, E3 OMI submitted its claim to WCC Energy via its eleven invoices. The invoices were inclusive of labor, equipment and vehicles, materials and supplies, subcontractors, markup, and fixed priced items totaling \$891,698.38.⁴³

On June 15, 2023, WCC Energy paid E3 OMI \$796,460.22 leaving a balance of \$95,238.16 in unpaid removal costs.⁴⁴ On June 30, 2023, E3 OMI provided the NPFC confirmation of payment.⁴⁵

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.⁴⁶ On May 16, 2023, the NPFC received a claim for uncompensated removal costs from E3 OMI dated May 15, 2023, in the total amount of \$891,698.38.⁴⁷

In its claim to the NPFC, E3 OMI provided an executed OSLTF Claim Form; E3 OMI invoices # 10049 Final, # 10042 Final, # 10148 Final, # 10152 Final, # 10772, # 10773, #10778, # 10779, # 10780, # 10781, # 19782, disposal invoices, incident photos, E3 OMI Schedule of Rates dated November 1, 2022, a signed E3 OMI Short Form Service Contract and WCC West Potash Incident Update emails to SEC NOLA.⁴⁸

As noted above, E3 OMI received a payment from the RP on June 15, 2023, of \$796,460.22 leaving a balance of \$95,238.16 in unpaid removal costs.⁴⁹

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).⁵⁰ 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.

⁴¹ 33 U.S.C. § 2701 *et seq.*

⁴² 33 U.S.C. § 2713; 33 CFR 136.103.

⁴³ *See*, E3 OMI Invoices # 10049 Final, # 10042 Final, # 10148 Final, # 10152 Final, # 10772 Final, # 10773 Final, # 10778 Final, # 10779 Final, # 10780 Final, # 10781 Final, # 19782 Final.

⁴⁴ *See*, WCC Energy Group LLC check # 001300 to OMI dated June 15, 2023.

⁴⁵ Email to NPFC from E3 OMI dated June 30, 2023.

⁴⁶ 33 CFR 136.103.

⁴⁷ *See*, E3 OMI claim submission dated May 15, 2023, and received by the NPFC on May 16, 2023

⁴⁸ *Id.*

⁴⁹ *See*, WCC Energy Group LLC check # 001300 to OMI dated June 15, 2023.

⁵⁰ 33 CFR Part 136.

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.⁵¹ The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.⁵² 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.⁵³ An RP's liability is strict, joint, and several.⁵⁴ 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."⁵⁵ 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."⁵⁶ 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."⁵⁷

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).⁵⁸ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling,

⁵¹ 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)).

⁵² 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).

⁵³ 33 U.S.C. § 2702(a).

⁵⁴ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

⁵⁵ *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).

⁵⁶ 33 U.S.C. § 2701(31).

⁵⁷ 33 U.S.C. § 2701(30).

⁵⁸ See generally, 33 U.S.C. § 2712(a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

and adjudicating such claims.⁵⁹ 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.⁶⁰

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.”⁶¹

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.*⁶²

OPA defines “oil” as “oil of any kind or 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].”⁶³

CERCLA defines “hazardous substance” broadly.⁶⁴ However, the definition of “hazardous substance” under CERCLA specifically excludes “petroleum, including crude oil or any fraction thereof...”⁶⁵ Further, the definition goes on to exclude “natural gas, natural gas liquids, liquefied natural gas, or synthetic gas useable for fuel (or mixtures of natural gas and such synthetic gas).”⁶⁶

Produced Water

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. 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,

⁵⁹ 33 CFR Part 136.

⁶⁰ 33 CFR 136.105.

⁶¹ 33 U.S.C. § 2701(14).

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

⁶³ 33 U.S.C. § 2701(14).

⁶⁴ 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].”

⁶⁵ *Id.*

⁶⁶ *Id.*

cuttings, and drilling fluids. Produced water refers to the water separated from the crude oil.⁶⁷

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 radium⁶⁸

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.

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**

⁶⁷ 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.

⁶⁸ 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).

that there will be no overlap in the liability provisions of CERCLA and the Oil Pollution Act.⁶⁹

The legislative history of CERCLA likewise is instructive: “The reported bill [CERCLA] does not cover spills or other releases **strictly** of oil.”⁷⁰ Contemporaneous congressional debate further elucidated how it intended CERCLA to apply to spills of oil mixed with hazardous substances.⁷¹ Both Representative (b) (6) and Senator (b) (6) 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 oil⁷² 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.⁷³ 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.’”⁷⁴

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.⁷⁵ 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,

⁶⁹ H. R. Rep. No. 653, 101st Cong., 2d Sess. 102 (1990). S. Rep. No. 101-94 (1989) (emphasis added).

⁷⁰ S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980) (emphasis added).

⁷¹ See, e.g., at 126 Cong. Rec. H11798 (Rep. (b) (6) (oil slicks and industrial oil waste); 126 Cong. Rec. S14963 (daily ed. November 24, 1980) (Sen. (b) (6) (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. (b) (6) and S14967 (Sen. (b) (6); dioxin in motor fuel used as a dust suppressant, *id.* at S14974 (Sen. (b) (6); PCBs in waste oil, *id.* (Sen. (b) (6) and contaminated waste oil, *id.* at S14980 (Sen. (b) (6)).

⁷² This has become known colloquially as EPA’s “petroleum exclusion.”

⁷³ Several courts have analyzed whether 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 will 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).

⁷⁴ *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1383-4 (E.D. Cal. 1991).

⁷⁵ *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886 (10th Cir. 2000).

contained a mixture of petroleum and hazardous wastes.⁷⁶ 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.⁷⁷

VI. CONCLUSION:

The NPFC finds the product that discharged from the first release on December 22, 2022, was a commingled product of produced water and oil.⁷⁸ Produced water commonly includes a varying concentration of organic compounds, inorganic compounds, and radionuclides, many of which are classified as CERCLA-listed hazardous substances. The second release on January 13, 2023, was identified by the FOSC as crude oil, which did not escape the secondary containment. The crude oil commingled with the substances remaining from the first release.

It is the 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 as defined by OPA. The claimant must also show that the claimed expenses resulted from the discharge of the OPA oil.⁷⁹

As a result, NPFC determines based on all the information that was provided by the claimant and obtained independently by the NPFC, that the claimant has not met its burden of proving that the commingled mixture from the contents of WCC Energy Group, West Potash Facility that are subject of the claimed removal expenses, was comprised solely of oil as defined by OPA.⁸⁰

The NPFC finds the claimed removal costs 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, E3 OMI LLC's, claim for uncompensated removal costs is denied.

⁷⁶ *Id.*

⁷⁷ *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.

⁷⁸ Facility SPCC plan page 3-2 and 3-4. Also see, Recap of phone con with Mr. (b) (6) via email dated July 18, 2023.

⁷⁹ 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).

⁸⁰ See, e.g., *Gatlin Oil v. United States*, 169 F.3d 107 (4th Cir. 1999).

(b) (6)

Claim Supervisor: (b) (6)

Date of Supervisor's review: *10/26/2023*

Supervisor Action: *Denial Approved*