CLAIM SUMMARY / DETERMINATION¹

Claim Number:UCGP923029-URC001Claimant:State of LouisianaType of Claimant:StateType of Claim:Removal CostsClaim Manager:(b) (6)Amount Requested:\$2,757.62Action Taken:Denial

EXECUTIVE SUMMARY:

On November 14, 2021, the National Response Center (NRC) notified United States Coast Guard (USCG) Marine Safety Unit (MSU) Houma via NRC report # 1321958 that a storage tank at S2 Energy's Timbalier Bay Storage Facility #1 platform facility released crude oil and a produced water mixture onto the deck of the platform and into Timbalier Bay, a navigable waterway of the United States.² The source of the discharge was the facility's 1,500-barrel (BBL)³ capacity surge storage tank that held produced water.⁴ USCG MSU Houma was the Federal On-Scene Coordinator (FOSC) for the incident.

In accordance with the Oil Pollution Act of 1990 (OPA), S2 Energy Operating LLC., has been identified as the responsible party ("S2 Energy" or "RP") for the Timbalier Bay Storage Facility #1.⁵ Forefront Emergency Management ("Forefront") was S2 Energy's Qualified Individual ("QI") for the Timbalier Bay Storage Facility #1.⁶

On November 14, 2021, State of Louisiana Department of Environmental Quality ("State of LA" or "Claimant") generated Incident Report # 205933 confirming there was a release of crude oil and produced water mixture from a leak in a tank from the facility.⁷

On May 26, 2023, State of LA presented its costs to S2 Energy.⁸ On June 18, 2023, a Managing Partner from Krewe Energy advised State of LA that S2 Energy filed Chapter 11

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 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 Number 1321958 dated November 14, 2021.

³ One barrel of oil equals approximately 42 gallons.

⁴ See, (b) (6) email to NPFC dated December 1, 2023, Timbalier Bay Facility General Information, and the Schematics of the facility. The 1500 BBLS Storage Tank is identified as 2 in the layout.

⁵ USCG Notice of Federal Interest (NOFI) dated November 15, 2021.

⁶ See, Forefront Emergency Management Incident Action Plan (IAP) Report dated November 16, 2021.

⁷ LDEQ Incident Report # 205933 dated November 14, 2021. P. 30 and 31/48 of claim submission.

⁸ See, State of Louisiana's Letter to Mr. (b) (6) and Invoice # LA2021_1114_0757 to S2 Energy dated May 26, 2023. P. 21-29/48 of claim submission.

bankruptcy on January 11, 2023.⁹ On August 17, 2023, the National Pollution Funds Center (NPFC) received State of Louisiana's claim submission for \$2,757.62. 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 must be denied.

I. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Incident

On November 14, 2021, at 0630 local time a company representative from Forefront notified the NRC that there was a discharge of crude oil and produced water mixture into Timbalier Bay, a navigable waterway of the United States.¹⁰ The discharge was from a corroded and leaking storage tank at S2 Energy Timbalier Bay Storage Facility #1 in Lafourche Parish, Louisiana.¹¹

Responsible Party

The spill in this case occurred at an offshore facility as defined by the Oil Pollution Act of 1990 (OPA).¹² The facility is an offshore crude petroleum and natural gas extraction facility that contains (1) 1,500-barrel surge storage tank¹³ and (1) 100-barrel slop storage tank. There are 22 wells associated with the facility with an average daily production of 171 barrels of crude oil, 1,842 barrels of produced water, and 184 mcf¹⁴ of natural gas.¹⁵ The surge tank that was involved in the incident is identified as number "2" in the schematics. The surge tank held produced water.¹⁶

In the case of an offshore facility, the lessee or permittee of the area in which the facility is located, or the holder of a right of use and easement granted under applicable State law for the area in which the facility is located.¹⁷ S2 Energy Operating, LLC ("S2 Energy" or "Responsible Party"); has been identified by the FOSC as the lessee/permittee of the S2 Energy Timbalier Bay Storage Facility #1 at the time when the spill incident occurred.¹⁸

The FOSC issued a Notice of Federal Interest (NOFI) to S2 Energy dated November 15, 2021.¹⁹ The NPFC issued an RP Notification Letter to S2 Energy's attorney, Mr. (b) (6) dated August 18, 2023.²⁰ An RP Notification letter notifies the responsible party that a claim was

⁹ See, (b) (6) email to (b) (6) dated June 18, 2023. P. 48/48 of claim submission.

¹⁰ NRC Report Number 1321958 dated November 14, 2021.

¹¹ USCG Pollution Responder Statement dated November 23, 2021, and S2 Energy Incident Briefing dated November 14, 2021.

¹² 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).

¹³ Identified as 2 in the Schematic.

¹⁴ mcf = One Thousand Cubic Feet. <u>www.enerdynamics.com</u>

¹⁵ See, General Information and Layout of Storage Facility No. 1 – Timbalier Bay Field.

¹⁶ See, Storage Facility No. 1 Equipment List. Also see, Storage Facility Layout.

¹⁷ 33 U.S.C. § 2701(32).

¹⁸ See, USCG NOFI dated November 15, 2021, signed by the RP.

¹⁹ Id..

²⁰ See, NPFC RP Notification Letter dated August 18, 2023. S2 Energy filed Chapter 11 Bankruptcy on January 16, 2023.

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.

On August 26, 2023, the NPFC received an email from Mr. (b) (6) advising that S2 Energy emails are being routed to him and he subsequently forwards them to the attorneys and U.S. Bankruptcy Trustee.²¹ Mr. (b) (6) also stated that the courts sold S2 Energy's assets on May 17, 2023, and S2 Energy personnel were terminated from the company.²²

Recovery Operations

On November 23, 2021, the Federal On Scene Coordinator's Representative (FOSCR), reviewed the NRC report and a telephone interview with an S2 Energy employee. The FOSCR confirmed that a discharge of an estimated 34.2 gallons of crude oil and produced water mixture discharged from the surge storage tank at the S2 Energy Operating, Timbalier Bay Storage Facility $\# 1.^{23}$ The cause of the discharge was reported to be corrosion in the tank.²⁴

The FOSCR determined no further response actions or resources were required once the crude oil and produced water mixture was recovered by the facility's Oil Spill Response Organizations (OSROs), OMI Environmental Services (OMI) and Clean Gulf Associates. The OSROs deployed sorbent boom, hard boom, and a skimmer vessel to recover the product.²⁵ A final overflight was conducted on November 16, 2021, and it was determined that no recoverable product remained.²⁶

II. CLAIMANT AND NPFC:

On July 31, 2023, the NPFC received State of Louisiana's claim submission for \$2,757.62 in uncompensated removal costs, however, the claim was received unsigned.²⁷ On August 17, 2023, the NPFC received the State's signed OSLTF Claim Form in the amount of \$2,757.62.²⁸ The claim included a signed OSLTF Claim Form, NRC Report # 1321958, Louisiana Hazmat incident report # 21-05869, Forefront / S2 Energy Incident Report LASP # 21-05869, State of Louisiana's Demand Letter to S2 Energy Operating LLC with Invoice # LA2021_1114_0757_1, pictures, and (b) (6)

III. DETERMINATION PROCESS:

²¹ See, (b) (6) email to NPFC dated August 26, 2023.

²² Id.

²³USCG Pollution Responder Statement dated November 23, 2021, and NRC Report Number 1321958 dated November 14, 2021.

²⁴ Id.

²⁵ USCG Pollution Responder Statement dated November 23, 2021, and LDEQ Incident Report 205933. P 2 of 2 dated November 14, 2021. P. 30 and 31/48 of claim submission.

²⁶ LDEQ Incident Report 205933 dated November 14, 2021. P. 30 and 31/48 of claim submission.

²⁷ See, unsigned OSLTF Form that accompanied the original claim submission.

²⁸ Signed OSLTF Claim Form dated August 17, 2023.

²⁹ See, State of Louisiana's signed claim submission received on August 17, 2023.

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).³⁰ 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.³¹ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.³² 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.³³ An RP's liability is strict, joint, and several.³⁴ 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."³⁵ 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."³⁶ 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."³⁷

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

³⁰ 33 CFR Part 136.

³¹ 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)).

 ³² 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).
³³ 33 U.S.C. § 2702(a).

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

³⁵ 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).

³⁶ 33 U.S.C. § 2701(31).

³⁷ 33 U.S.C. § 2701(30).

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

of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.³⁹ 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.⁴⁰

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**."⁴¹

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.*"⁴²

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]."⁴³

Produced Water

The NPFC finds that the 1500-barrel surge storage tank that corroded and discharged 34.2 gallons of product into Timbalier Bay contained produced water.⁴⁴ 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 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:

³⁹ 33 CFR Part 136.

⁴⁰ 33 CFR 136.105.

⁴¹ 33 U.S.C. § 2701(14).

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

⁴³ 33 U.S.C. § 2701(14).

⁴⁴ LDEQ Incident Report # 205933 dated November 14, 2021.

⁴⁵ Produced water is more fully explained 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.

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

CERCLA defines "hazardous substance" broadly.⁴⁷ However, the definition of "hazardous substance" under CERCLA specifically excludes "petroleum, including crude oil or any fraction thereof..."⁴⁸ 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)."⁴⁹ Notwithstanding the statutory definitions, a question sometimes exits 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

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 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]."

⁴⁹ *Id*

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

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 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 have provided testing to show that unadulterated petroleum was the *only*

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

⁵⁴ 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 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).

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.

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

V. CONCLUSION:

The NPFC determines as matter of fact, that the 1500-barrel surge storage tank that discharged product into Timbalier Bay held produced water.⁵⁹ As such, the NPFC finds the claimant's costs were not the result of a discharge of oil as defined by OPA and, therefore, the OSLTF is not available to pay claims based on the administrative record and applicable law and regulations. The NPFC has not specifically adjudicated the specific underlying claimed costs because it has denied the claim on the jurisdictional grounds of not being compensable under OPA.⁶⁰

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



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. Clear I ⁵⁹ *See*, (b) (6) EM to NPFC dated December 1, 2023, Timbalier Bay Facility General Info and Timbalier Bay Facility Layout.

⁶⁰ Because NPFC has determined that the claimant is not entitled to compensation, NPFC did not adjudicate whether these claimed expenses met the other regulatory requirements outlined in 33 CFR Part 136.