

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP924016-URC001
Claimant:	E3 OMI, LLC
Type of Claimant:	OSRO
Type of Claim:	Removal Costs
Claim Manager:	(b) (6)
Amount Requested:	\$26,568.25
Action Taken:	Denial

EXECUTIVE SUMMARY:

On December 26, 2022, at approximately 10:00 am local time, the National Response Center (NRC) received notification of a release of crude oil from the Torrent Oil Polk 43 production platform when a pressure safety valve (PSV) popped off causing a discharge into the surrounding marsh and waterway in Orange County, TX.² E3 OMI, LLC (“E3 OMI” or “Claimant”) was contacted by Torrent Oil to respond to the incident.³ The United States Environmental Protection Agency (USEPA) Region VI is the Federal On Scene Coordinator (FOSC) for the incident.⁴

Texas General Land Office (“TGLO” or “SOSC”), State On Scene Coordinator (SOSC) (b) (6) responded to the Polk 43 production platform and discovered that a flow line that went from the separator tank to the well backed up due to an ice plug causing pressure on the pressure safety valve (PSV) on the separator tank, triggering an overflow of oil and produced water⁵ directly into the Bessie Heights Marsh, a navigable waterway of the United States.⁶ The incident was located at the Polk 43 Production Platform inside the Port Neches Field Offshore facility.⁷

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 of the claimant’s rights under 33 U.S.C. § 2715. When seeking to recover from a Responsible Party or a Guarantor any amounts paid to reimburse a claim, the OSLTF relies on the claimant’s rights to establish liability. If a Responsible Party or Guarantor has any right to a defense to liability, those rights can be asserted against the OSLTF. Thus, this determination does not affect any rights held by a Responsible Party or a Guarantor.

² National Response Center Report #1355957 dated December 26, 2022.

³ See, E3 OMI Original Claim Submission, OSLTF Claim Form, question 2, page 1 of 27.

⁴ See, Email from USEPA Region 6 to NPFC dated February 5, 2024.

⁵ See, Email from TGLO to NPFC dated February 20, 2024, confirming spill consisted of both crude oil and produced water.

⁶ See, Email with attachments from TGLO to NPFC dated December 11, 2023. See, Email attachment entitled Texas General Land Office Spill Case Number 2022-4331, pg. 9 of 33.

⁷ See, Email with attachments from TGLO to NPFC dated December 11, 2023. See, Email attachment entitled Texas General Land Office Spill Case Number 2022-4331, Spill Source section, pg. 6 of 33.

Torrent Oil, LLC (“Torrent Oil” or RP”), is the responsible party (RP),⁸ as defined by the Oil Pollution Act of 1990.⁹

E3 OMI presented invoice # SI-28383 in the amount of \$26,568.25 dated December 26, 2022, to the RP via an email dated January 20, 2023.¹⁰ Having not received payment from the RP, E3 OMI presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$26,568.25 on December 6, 2023.¹¹

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 December 26, 2022, at approximately 10:00 am local time, the National Response Center (NRC) received notification of a release of crude oil from the Torrent Oil Polk 43 production platform when a pressure safety valve (PSV) popped off causing a discharge into the surrounding marsh and waterway in Orange County, TX.¹² E3 OMI, LLC (“E3 OMI” or “Claimant”) was contacted by Torrent Oil to respond to the incident.¹³

Texas General Land Office (“TGLO” or “SOSC”), State On Scene Coordinator (b) (6), responded to the Polk 43 production platform and discovered that the separator tank overflowed due to a frozen flow line that contained an ice plug, triggering an overflow of oil and produced water¹⁴ directly into the Bessie Heights Marsh, a navigable waterway of the United States.¹⁵

Responsible Party

The spill in this case occurred at an offshore facility as defined by the Oil Pollution Act of 1990 (OPA).¹⁶ OPA defines the Responsible Party (RP) for a discharge from an offshore facility as “the lessee or permittee of the area in which the facility is located.”¹⁷ Torrent Oil is identified

⁸ Email from USEPA Region 6 to NPFC dated February 5, 2024.

⁹ 33 U.S.C. § 2701 (32).

¹⁰ See, Email from Claimant to NPFC dated January 18, 2024, whereby they provided a copy of their email to the RP dated January 20, 2023, providing proof of presentment.

¹¹ ES&H Original Claim Submission received December 6, 2023.

¹² National Response Center Report #1355957 dated December 26, 2022.

¹³ See, E3 OMI Original Claim Submission, OSLTF Claim Form, question 2, page 1 of 27.

¹⁴ See, Email from TGLO to NPFC dated February 20, 2024, confirming spill consisted of both crude oil and produced water.

¹⁵ See, Email with attachments from TGLO to NPFC dated December 11, 2023. See, Email attachment entitled Texas General Land Office Spill Case Number 2022-4331, pgs. 6 and 9 of 33.

¹⁶ 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).

¹⁷ 33 U.S.C. § 2701(26)(A)(iii).

by the FOSC and the SOSC as the RP.¹⁸ E3 OMI presented Invoice SI-28383 totaling \$26,568.25 to Torrent Oil, RP, that is subject of this claim and dated December 26, 2022, via email dated January 20, 2023.¹⁹

Recovery Operations

E3 OMI, LLC was hired by Torrent Oil on December 26, 2022, to respond to the incident.²⁰ E3 OMI performed all cleanup operations between December 26, 2022, and December 31, 2022.²¹ TGLO provided state oversight of all cleanup activities.²² TGLO assessed the site, coordinated response activities, took photos to document the site conditions, and obtained Witness Statements from the crew member, (b) (6), of Torrent Oil and a Witness Statement from the crew member, (b) (6), of Torrent Oil.²³

E3 OMI did not handle waste disposal on behalf of Torrent Oil for this cleanup operation.²⁴ TGLO concluded the total amount of product removed was 26.059 gallons.²⁵ On December 27, 2022 at approximately 10:30 am local time, TGLO Response Officer (b) (6) reported that (b) (6) of Torrent Oil stated that Soca Global will be installing a sensor alarm on the pressure safety valve (PSV).²⁶

II. CLAIMANT AND RP:

Absent limited circumstances, the federal regulations implementing the Oil Pollution Act of 1990 (OPA)²⁷ require all claims for removal costs must be presented to the responsible party before seeking compensation from the NPFC.²⁸

On January 20, 2023, E3 OMI satisfied its presentment requirements under OPA.²⁹ Invoice SI-28383 totaled \$26,568.25.³⁰ The invoices were inclusive of labor, equipment and vehicles,

¹⁸ See, Email with attachments from TGLO to NPFC dated December 11, 2023. See, Email attachment entitled Texas General Land Office Spill Case Number 2022-4331, pg. 9 of 33. See, Email from USEPA Region 6 to NPFC dated February 5, 2024.

¹⁹ E3 OMI Original Claim Submission received December 6, 2023. See, E3 OMI Invoice SI-28383 pages 3-25 of 27. See, Email from E3 OMI to NPFC dated January 18, 2024 forwarding the presentment email to Torrent Oil that is dated January 20, 2023.

²⁰ Email from E3 OMI to NPFC dated December 14, 2023. See, E3 OMI Short Form Service Contract pages 1-5 of 5.

²¹ E3 OMI Original Claim Submission received December 6, 2023. See, E3 OMI Invoice SI-28383 pages 3-25 of 27.

²² Email from TGLO to NPFC dated December 11, 2023. See, Texas General Land Office Spill Case Number 2022-4331, pages 5-7 of 33.

²³ See, Texas General Land Office Full Spill Case Number 2022-4331, Witness Statement of (b) (6) of Torrent Oil, pages 13-16 of 26. See also, Texas General Land Office Spill Case Number 2022-4331, Witness Statement of (b) (6) of Torrent Oil, pages 14-15 of 33.

²⁴ E3 OMI Original Claim Submission received December 6, 2023, pg. 2 of 27.

²⁵ Email from TGLO to NPFC dated December 11, 2023. See, Texas General Land Office Spill Case Number 2022-4331, pg. 23 of 33.

²⁶ Email from TGLO to NPFC dated December 11, 2023. See, Texas General Land Office Spill Case Number 2022-4331, pg. 22 of 33.

²⁷ 33 U.S.C. § 2701 *et seq.*

²⁸ 33 CFR 136.103.

²⁹ E3 OMI submitted its invoice to the RP via email. The invoice was emailed to the RP on January 20, 2023. These costs are the subject of the claim. See, E3 OMI Invoice # SI-28383 dated December 26, 2022.

³⁰ E3 OMI claim submission received December 6, 2023.

materials and supplies, subcontractors, markup, and fixed priced items totaling \$26,568.25.³¹ The RP has not paid the invoice.

III. CLAIMANT AND NPFC:

On December 6, 2023, E3 OMI presented its removal costs claim to the National Pollution Funds Center (NPFC) for \$26,568.25.³² The claim included E3 OMI's signed OSLTF form, a copy of Invoice #SI-28386, all supporting daily reports, field notes, aerial images of the facility and images of the location of the spill.³³

On December 14, 2023, the NPFC requested additional information from E3 OMI.³⁴ On December 14, 2023, E3 OMI provided a copy of the contract agreement between E3 OMI and Torrent Oil, a copy of the E3 OMI November 2022 Rate Schedule, a copy of the claim with all daily reports and field notes, and a detailed explanation of the 8.25% tax associated with the costs claimed.³⁵

On January 17, 2024, the NPFC requested more additional information from E3 OMI.³⁶ On January 18, 2024, E3 OMI forwarded an email to the NPFC which they originally sent to the RP, Torrent Oil, on January 20, 2023.³⁷ E3 OMI attached all costs incurred as a result of the oil spill to the RP in the email sent on January 20, 2023.³⁸

IV. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).³⁹ 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.⁴⁰ The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.⁴¹ If there is conflicting evidence in the record, the

³¹ E3 OMI claim submission received December 6, 2023, with Attachments. *See*, Email forwarded from E3 OMI to NPFC dated January 18, 2024. *See*, E3 OMI Invoice SI-28383, pages 1-7 of 7.

³² E3 OMI claim submission received December 6, 2023, with Attachments.

³³ *Id.*

³⁴ Email from NPFC to E3 OMI, dated December 14, 2023.

³⁵ Email from E3 OMI to NPFC, dated December 14, 2023.

³⁶ Email from NPFC to E3 OMI, dated January 17, 2024.

³⁷ Email forwarded from E3 OMI to NPFC dated January 18, 2024. *See*, Email from E3 OMI to Torrent Oil, dated January 20, 2023.

³⁸ Email forwarded from E3 OMI to NPFC dated January 18, 2024. *See*, E3 OMI Invoice SI-28383, pages 1-7 of 7.

³⁹ 33 CFR Part 136.

⁴⁰ *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)).

⁴¹ *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).

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.⁴² An RP's liability is strict, joint, and several.⁴³ 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."⁴⁴ 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."⁴⁵ 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."⁴⁶

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).⁴⁷ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁴⁸ 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.⁴⁹

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**.⁵⁰

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**.⁵¹

⁴² 33 U.S.C. § 2702(a).

⁴³ See, H.R. Rep. No 101-653, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 780.

⁴⁴ *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).

⁴⁵ 33 U.S.C. § 2701(31).

⁴⁶ 33 U.S.C. § 2701(30).

⁴⁷ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁴⁸ 33 CFR Part 136.

⁴⁹ 33 CFR 136.105.

⁵⁰ 33 U.S.C. § 2701(14).

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

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.]”⁵²

CERCLA defines “hazardous substance” broadly.⁵³ However, the definition of “hazardous substance” under CERCLA specifically excludes “petroleum, including crude oil or any fraction thereof...”⁵⁴ 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).”⁵⁵

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. 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.⁵⁶

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. Produced water commonly includes varying concentration of organic compounds, inorganic compounds, and radionuclides, many of which are classified as CERCLA-listed hazardous substances such as:

- Organic compounds: benzene, naphthalene, toluene, phenanthrene, bromodichloromethane, and

⁵² 33 U.S.C. § 2701(14).

⁵³ “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].”

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 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.

- pentachlorophenol;
- Inorganics: lead, arsenic, barium, antimony, sulfur, and zinc;
- Radionuclides: uranium, radon, and radium⁵⁷

CERCLA defines “hazardous substance” broadly.⁵⁸ However, the definition of “hazardous substance” under CERCLA specifically excludes “petroleum, including crude oil or any fraction thereof...” 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).”⁵⁹ Notwithstanding the statutory definitions, a question sometimes exists when the release involves a mixture of oil and hazardous substances that have commingled before substantially threatening to discharge, or discharging into a navigable waterway, such as the facts in this case.

The analysis of these types of releases must begin by analyzing the purpose of each of the statutes and how Congress and the agencies have intended them to apply.

OPA’s legislative history clearly highlights the intent of Congress that OPA liability and, by extension OPA claim compensation, only applies to discharges of “oil” and not “oil mixed with hazardous substances”.

The definition [of oil] has been modified... to clarify that it does not include any constituent or component of oil which may fall within the definition of "hazardous substances", as that term is defined for the purposes of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). **This ensures that there will be no overlap in the liability provisions of CERCLA and the Oil Pollution Act.**⁶⁰

The legislative history of CERCLA likewise is instructive: “The reported bill [CERCLA] does not cover spills or other releases **strictly** of oil.”⁶¹ Contemporaneous congressional debate

⁵⁷ 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).

⁵⁸ See, 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].

⁵⁹ *Id.*

⁶⁰ H. R. Rep. No. 653, 101st Cong., 2d Sess. 102 (1990). S. Rep. No. 101-94 (1989) (emphasis added).

⁶¹ S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980) (emphasis added).

further elucidated how it intended CERCLA to apply to spills of oil mixed with hazardous substances.⁶² 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 oil⁶³ 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.⁶⁴ 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.’”⁶⁵

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.⁶⁶ 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.⁶⁷ 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.⁶⁸

⁶² 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); PCB's in waste oil, *id.* (Sen. Mitchell) and contaminated waste oil, *id.* at S14980 (Sen. Cohen).

⁶³ This has become known colloquially as EPA’s “petroleum exclusion”.

⁶⁴ 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).

⁶⁵ *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1383-4 (E.D. Cal. 1991).

⁶⁶ *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886 (10th Cir. 2000).

⁶⁷ *Id.*

⁶⁸ *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.

In accordance with the Oil Pollution Act of 1990, 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, as required by 33 CFR 136.105.⁶⁹ The NPFC requested E3 OMI provide proof of any sampling data or chemical analyses whose samples were recovered from the separator or spill incident, to determine whether hazmat substances mixed with oil prior to the discharge into the Bessie Heights Marsh.⁷⁰ E3 OMI specified samples were not taken from the separator and provided no samples recovered from the spill incident.⁷¹ TGLO confirmed that the separator tank that discharged into Bessie Heights Marsh held a mixture of produced water and crude oil.⁷² Given TGLO's confirmation that produced water and oil were contained in the separator tank that discharged, and E3 OMI's inability to substantiate that the spilled substance was indeed *strictly* an OPA oil as required by law, the NPFC finds that the claimant has not met its burden of proof that the discharge into the Bessie Heights Marsh was strictly an OPA oil.

After careful analysis of all the supporting documentation submitted by E3 OMI, LLC and the entire administrative record, the NPFC determines as matter of fact, that the tank that discharged was a separator tank that contained both produced water and oil. 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.⁷³

VI. CONCLUSION:

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, E3 OMI, LLC's request for uncompensated removal costs is denied.

(b) (6)

Claim Supervisor:

(b) (6)

Date of Supervisor's review: *3/29/24*

Supervisor Action: *Denial approved*

⁶⁹ 33 CFR 136.105.

⁷⁰ Email from NPFC to E3 OMI dated February 7, 2024.

⁷¹ Email from E3 OMI to NPFC dated February 7, 2024.

⁷² See, Email from TGLO to NPFC dated February 20, 2024 confirming the separator tank contained a mixture of produced water and crude oil.

⁷³ 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.