

CLAIM SUMMARY / DETERMINATION

Claim Number:	UCGPN22029-URC001
Claimant:	Railroad Commission of Texas
Type of Claimant:	State
Type of Claim:	Removal
Claim Manager:	(b) (6)
Amount Requested:	\$440,217.22
Action Taken:	Denial

EXECUTIVE SUMMARY:

On May 28, 2022, at 1730 local time, the Railroad Commission of Texas (“TRRC”, “Texas”, or “Claimant”) was notified by the Texas General Land Office (“TGLO” or “Texas”) of oil discharges from an offshore well identified as American Petroleum Institute Number 07130010 (“Well”) and located in Trinity Bay near Anahauc, Texas.¹ United States Coast Guard (USCG) Sector Houston-Galveston also received notification on May 28, 2022, following an overflight.²

Coast Guard Pollution Responders along with TGLO personnel arrived on scene and confirmed a continuous sheen approximately 2.5 miles long by 150 yards wide. The Federal On Scene Coordinator (“FOSC”) identified the Well as the source of discharge. At the time of the discharge, the Well was under the oversight and management of TRRC.³ The oil discharged from the Well because a failed wellhead casing valve had deteriorated due to lack of maintenance.⁴

On April 12, 2023, TRRC presented its removal costs claim to the National Pollution Funds Center (“NPFC”) seeking reimbursement of \$440,217.22 incurred to address the oil spill.⁵ The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations. After careful consideration, the claim must be denied because TRRC is a responsible party (“RP”) and the claim does not satisfy the requirements for that type of claim. TRRC’s claim must also be denied because its costs either have been or will be reimbursed with the proceeds from a \$6.6 million cash bond provided to TRRC to ensure the proper plugging of the Well in addition to numerous other wells in Trinity Bay (“\$6.6 Million Plugging Bond”). As TRRC will be compensated for the claimed removal costs, the OSLTF is not authorized to reimburse the claim.

I. INCIDENT AND RECOVERY OPERATIONS:

a. Incident

¹ See, TRRC submission, Final OPA claim, Incident Summary, P. 6/173, “Incident Summary” received April 12, 2023.

² See, National Response Center (NRC) Report # 1337231 dated May 28, 2022.

³ See, USCG SITREP-POL ONE dated June 3, 2022.

⁴ *Id.*

⁵ See, TRRC submission dated March 28, 2023 and received on April 12, 2023.

The incident began on May 28, 2022, at 1730 local time, when TRRC was notified by TGLO of an ongoing oil spill from the Well.⁶ United States Coast Guard (USCG) Sector Houston-Galveston also received notification on May 28, 2022, following an overflight.⁷

After USCG Sector Houston-Galveston responders along with personnel from TGLO arrived on scene, they observed that oil from the Well had created a continuous sheen measuring approximately 2.5 miles long by 150 yards wide. The FOSC estimated that the Well was discharging about 5 to 10 barrels of oil a day.⁸ At that point, the Well was under the oversight and management of TRRC.⁹ The oil discharged from the Well due to a failed wellhead casing valve that had deteriorated due to lack of maintenance.

b. Recovery Operations

TRRC hired Innovative Energy Services (“Innovative” or “OSRO”) for clean-up operations.¹⁰ Clean-up operations commenced on May 29, 2022, and the Well was successfully plugged and secured on June 9, 2022.¹¹

On June 10, 2022, 48-barrels of mud was pumped down the H-string. No pressure was observed on the three production casing strings therefore the Well was secured, and contractors were demobilized from the site.¹²

II. FACTUAL BACKGROUND OF INCIDENT:

a. Oil and Gas Assets in Trinity Bay

Understanding the context of this oil spill, requires an examination of the history surrounding the Well and some of the oil and gas operations in Trinity Bay. The Well was in the state waters of Trinity Bay on Submerged Original Texas Land Survey tract 22-23B.¹³ After being completed on May 20, 1969, the Well was recompleted once in 1977 and a second time in 1981.¹⁴ The Well was eventually shut-in during January 1998 and there are no records showing any oil production since that time.¹⁵

By April 2017, Galveston Bay Energy, LLC (“GBE”) owned a significant number of oil and gas production assets in both Galveston Bay and Trinity Bay of the Gulf of Mexico. Specifically, GBE owned 38 offshore leases, 182 wells, 105 pipeline rights of way, and all associated

⁶ See, TRRC submission, Final OPA claim, Incident Summary, P. 6/173, “Incident Summary” received April 12, 2023.

⁷ See, NRC Report # 1337231 dated May 28, 2022.

⁸ *Id.*

⁹ See, USCG SITREP-POL ONE dated June 3, 2022.

¹⁰ SITREP-POL THREE AND FINAL dated September 19, 2022.

¹¹ See, SITREP-POL THREE AND FINAL, section M2A, dated September 19, 2022.

¹² See, TRRC submission, Final OPA claim, Incident Summary, page 11 of 173, paragraph 8.

¹³ See, Map of All Wells in Tract 22-23B.

¹⁴ See, Lease Summary for API Number 07130010, Drilling Permits Tab and Inactive Well Aging Tab.

¹⁵ See, Lease Summary for API Number 07130010, Inactive Well Aging Tab. Also, it should be noted that shut-in wells include “wells which have encountered and are capable of producing crude oil or natural gas but which are not producing due to lack of available transportation facilities, available markets or other reasons.” See, e.g., lawinsider.com/dictionary/shut-in-wells (last visited April 2, 2024).

equipment (hereinafter collectively referred to as “Oil and Gas Assets”).¹⁶ The Well was one of the offshore wells included in the Oil and Gas Assets.¹⁷ The leases included in the Oil and Gas Assets covered offshore areas in state waters leased out by TGLO as the lessor.¹⁸ The Well was in an area covered by one of these State Leases.¹⁹

On September 30, 2016, GBE sold the Oil and Gas Assets to Progas Properties, Inc. (“Progas”) and (b) (6), who was the company’s President.²⁰ The sale also included GBE’s interest in the \$6.6 Million Plugging Bond covering all the wells.²¹ Thereafter, Progas sold the Oil and Gas Assets to the newly formed Galveston Bay Properties LLC (“GBP”).²² GBP subsequently designated Galveston Bay Operating Company LLC (“GBO”) as the operator of all the wells transferred by Progas, including the Well.²³

GBO commenced producing oil from GBP’s wells even though it failed to comply with the financial responsibility requirements imposed by TRRC to ensure proper plugging of wells when operations cease.²⁴ In response, TRRC ordered GBO to stop operating the wells and initiated enforcement proceedings.²⁵ TRRC also pursued litigation against Mr. (b) (6) and Progas to collect penalties, well plugging expenses, and cleanup costs.²⁶

In order to resolve their dispute, on April 12, 2017 TRRC entered into a settlement agreement with Progas, Mr. (b) (6), GBO, and GBP.²⁷ Under the agreement, GBO agreed to plug 13 wells previously owned by Progas and pay a \$644k debt owed by Progas and Mr. (b) (6).²⁸ Upon satisfying these conditions, the agreement allowed GBO to claim any remaining portion of the \$6.6 Million Plugging Bond.²⁹ However, GBO never satisfied its obligations under the settlement agreement.³⁰

b. Bankruptcies Filed by GBP and GBO

On August 9, 2017, GBP filed for Chapter 11 bankruptcy in the Western District of Texas San Antonio Division.³¹ While this bankruptcy action was pending, the management of both GBP and GBO changed.³² On February 6, 2018, GBP’s bankruptcy plan was confirmed, the

¹⁶ *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc 312-1, pgs. 31-102 (Bankr. S.D. Tx. 2019).

¹⁷ *Id.* at pg. 88 (The Well was identified as Well No. 108H, 108F, and 108D).

¹⁸ *Id.* at pgs. 79-80.

¹⁹ *Id.* at pg. 79 (Mineral File (“MF”) 033746, GBE File Number 100-0006-000, Trinity Bay State Unit 1 Lease dated December 17, 1948, Trinity Bay Field, Texas as the lessor and Humble Oil & Refining Co. as the original lessee, covering 640 acres being ST22-23B).

²⁰ *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc 312-1, pgs. 31-102 (Bankr. S.D. Tx. 2019).

²¹ *Id.* at pg. 46.

²² *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 312, pg. 2 (Bankr. S.D. Tx. 2019).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at pgs. 2-3.

²⁶ *Id.*

²⁷ *Id.* at pg.3. *See also, In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 312-1 (Bankr. S.D. Tx. 2019).

²⁸ *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 312-1, pgs. 1-6 (Bankr. S.D. Tx. 2019).

²⁹ *Id.*

³⁰ *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 312, pg. 3 (Bankr. S.D. Tx. 2019).

³¹ *In re: Galveston Bay Properties, LLC*, Case No. 17-51905, Doc. 1 (Bankr. W.D. Tx. 2017).

³² *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 312, pgs. 3-4 (Bankr. S.D. Tx. 2019).

settlement with TRRC was assumed, and (b) (6) and (b) (6) were made new members of GBP.³³ About two weeks later, Messrs. (b) (6) replaced the individuals who were previously in charge of both GBP and GBO.³⁴ On September 7, 2018, the bankruptcy case was closed.³⁵

About three months after GBP's 2017 bankruptcy was dismissed, Mr. (b) (6) formed a company called Dark Ruby in California.³⁶ On November 1, 2019, both GBP and GBO filed for bankruptcy in the Southern District of Texas Houston Division.³⁷ On April 6, 2020, the court approved a sale of all of GBP's assets to Dark Ruby free and clear of all liens and encumbrances.³⁸

c. Sale of Oil and Gas Assets to Dark Ruby

The order approving the sale of GBP's assets addressed Dark Ruby's obligations regarding the wells. When the sale was negotiated, TRRC demanded that Dark Ruby expressly assume obligations to plug all wells transferred as well as post adequate security to ensure that the plugging obligations would be satisfied.³⁹ After the court approved the sale, the Bankruptcy Trustee transferred ownership of GBP's Oil and Gas Assets to Dark Ruby.⁴⁰ The assignment also transferred GBP's interest in the \$6.6 Million Plugging Bond.⁴¹ Both the Trustee and Dark Ruby agreed that "third parties may conclusively rely on this Assignment to vest title to the Oil and Gas Assets in Assignee" (Dark Ruby).⁴²

For its part, Dark Ruby paid \$545,000 as a purchase price for GBP's assets and expended an additional \$2.5 million for repairs and maintenance.⁴³ Dark Ruby also took possession of the Oil and Gas Assets. Beginning in April 2020, Dark Ruby retained Bay Development Group LLC to operate the wells, but subsequently attempted to designate OKF Group LLC ("OKF") as the operator responsible for the wells.⁴⁴

d. Dispute Between TRRC and Dark Ruby

After the sale of Oil and Gas Assets, a dispute arose between TRRC and Dark Ruby regarding how much security should be posted by an approved operator. Even though the \$6.6

³³ *Id.* at pg. 4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at pg.5.

³⁷ *In re: Galveston Bay Properties, LLC*, Case No. 19-36075 Doc. 1 (Bankr. S.D. Tx. 2019). *See also, In re Galveston Bay Properties, LLC*, Case No. 17-51905, Doc. 207 (Bankr. W.D. Tx. 2017)(The original owners of GBP and GBO argued that this bankruptcy was filed as part of an effort to deprive them of their interests in the companies by the new members and management).

³⁸ *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 239 (Bankr. S.D. Tx. 2019). *See also, In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 312, pg. 5 (Bankr. S.D. Tx. 2019).

³⁹ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 1, pgs 6-7 (Bankr. S.D. Tx. 2021). *See also, In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 239, pgs. 4-5 (Bankr. S.D. Tx. 2019).

⁴⁰ *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 351-1 (Bankr. S.D. Tx. 2019).

⁴¹ *Id.* at pg. 3.

⁴² *Id.* at pg. 4.

⁴³ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 1, pg. 3 (Bankr. S.D. Tx. 2021).

⁴⁴ *Id.* at pgs. 8-9. *See also, Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pg. 20-21 (Bankr. S.D. Tx. 2021).

Million Plugging Bond had already been posted, TRRC revised its financial responsibility requirements and increased the required bond amount to \$7.8 million. Notwithstanding Dark Ruby's ownership of GBP's interest in the \$6.6 Million Plugging Bond, TRRC refused to provide Dark Ruby with any credit for that bond when determining whether the financial responsibility obligations had been satisfied. Instead, TRRC insisted that any newly designated operator must post a separate bond for the full \$7.8 million even though the \$6.6 Million Plugging Bond had already been posted.⁴⁵ Because Dark Ruby and TRRC failed to reach an agreement regarding the amount of security to be posted, TRRC refused to approve OKF as the designated operator.⁴⁶ As none of Dark Ruby's operators were approved by TRRC, GBO remained identified as the designated operator even though that company no longer operated the wells.⁴⁷

In spite of its failure to replace GBO with an approved operator, Dark Ruby produced oil from the wells included in the Oil and Gas Assets.⁴⁸ During a TRRC inspection on July 13, 2021, Dark Ruby's contractor acknowledged producing oil from wells attached to two different platforms.⁴⁹ TRRC estimated that production from the wells totaled about 140 barrels of oil a day.⁵⁰ Because GBO was still registered as the operator, TRRC concluded that wells were being illegally operated.⁵¹ TRRC also objected to the companies' failure to file any operational reports, pay any state taxes, or remit any of the royalties due under the leases.⁵² TRRC inspectors further observed that Dark Ruby's contractor improperly discharged production water into Trinity Bay.⁵³

Based upon TRRC's objections to Dark Ruby's operations, TGLO issued several letters on July 21, 2021 declaring that all the leases included in the Oil and Gas Assets were terminated due to a lack of production, shut-in royalty payments, and reworking operations.⁵⁴ TGLO's correspondence explained that the leases were terminated effective no later than March 1, 2020.⁵⁵ The terminated leases included the area where the Well was located.⁵⁶

On August 26, 2021, Dark Ruby filed an adversary case seeking Declaratory Relief, a Temporary Restraining Order ("TRO"), and Injunctions to stop TRRC from interfering with Dark Ruby's well operations and allow Dark Ruby's operator a credit for the \$6.6 Million Plugging Bond.⁵⁷ TRRC opposed the relief sought in the Complaint.⁵⁸ After the court denied Dark Ruby's motion for a TRO, the parties stipulated to a dismissal of the Complaint without prejudice on April 8, 2022.⁵⁹

⁴⁵ *Id.* See also, *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc 1-3, pgs 2-3 (Bankr. S.D. Tx. 2021).

⁴⁶ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pgs. 20-21 (Bankr. S.D. Tx. 2021).

⁴⁷ *Id.*

⁴⁸ *Id.* at pg. 12.

⁴⁹ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7-9, pgs. 2-9 (Bankr. S.D. Tx. 2021).

⁵⁰ *Id.*

⁵¹ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pgs. 21-23 (Bankr. S.D. Tx. 2021).

⁵² *Id.* at pg. 22.

⁵³ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7-9, pg. 7 (Bankr. S.D. Tx. 2021).

⁵⁴ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pg. 22 (Bankr. S.D. Tx. 2021).

⁵⁵ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7-10, pgs. 1-11 (Bankr. S.D. Tx. 2021).

⁵⁶ *Id.* at pgs. 10-11. See also, *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 351-1, pgs. 10 and 12 (Bankr. S.D. Tx. 2019)(noting that the leases in MF 033746 cover tract 22-23B); and Map of All Wells in Tract 22-23B (showing the Well in tract 22-23B).

⁵⁷ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Docs. 1, and 1-1 through 1-4 (Bankr. S.D. Tx. 2021).

⁵⁸ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Docs. 7 and 7-1 through 7-11 (Bankr. S.D. Tx. 2021).

⁵⁹ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc.35 (Bankr. S.D. Tx. 2021).

While Dark Ruby's adversary case was pending, the bankruptcy court dismissed the Chapter 7 cases filed by GBP and GBO on September 22, 2021 without discharging any debts owed by the companies.⁶⁰ The dismissal order retained jurisdiction over an emergency sale of oil and compensation to be paid to the trustee. On March 15, 2022, the court closed the bankruptcy cases by discharging the trustee and canceling the trustee's bond.⁶¹

e. Proceeds From the \$6.6 Million Plugging Bond

The proceeds from the \$6.6 Million Plugging Bond were never transferred to Dark Ruby, GBP, or GBO. Because the bankruptcy action was dismissed and GBO remains in a delinquent status, the bond's proceeds either have been or will eventually be deposited into the Oil & Gas Regulation Cleanup Fund ("OGRCF"), which is managed by TRCC.⁶² The bond's proceeds must be used "for actual well plugging and surface remediation."⁶³ Texas law also authorizes TRCC to use OGRCF funds to cleanup environmental problems created by oil and gas wastes when the RP fails to do so after notice and opportunity for a hearing, the RP is unknown, or the pollution threatens either surface or subsurface waters.⁶⁴

III. CLAIMANT AND NPFC:

On April 12, 2023, TRRC presented its removal cost claim to NPFC seeking reimbursement of \$440,217.22.⁶⁵ The claim included an Incident Summary, Location Map, Inspection Records, Photograph Documentation, Summary of Charges, Invoices, Railroad Commission Personnel Costs, and Innovative Well Services Price List.⁶⁶ On May 18, 2023, the NPFC requested additional information from the claimant.⁶⁷ In response, TRRC sent additional information to the NPFC on June 1, 2023.⁶⁸

IV. DETERMINATION PROCESS:

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan.⁶⁹ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.⁷⁰ 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.⁷¹ The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund ("OSLTF").⁷² As a result, 5 U.S.C. § 555(e) requires

⁶⁰ *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 353 (Bankr. S.D. Tx. 2019).

⁶¹ *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 399 (Bankr. S.D. Tx. 2019).

⁶² See, email from TRRC to NPFC providing additional information dated June 1, 2023.

⁶³ Tex. Nat. Res. Code §§ 91.108 and 91.109(a).

⁶⁴ Tex. Nat. Res. Code § 91.113.

⁶⁵ See, TRRC submission dated March 28, 2023, and received on April 12, 2023.

⁶⁶ See, TRRC submission, Final OPA claim, page 7 of 173.

⁶⁷ See, Additional Information Email from NPFC to Mr. (b) (6) dated May 18, 2023.

⁶⁸ See, email from TRRC to NPFC providing additional information dated June 1, 2023.

⁶⁹ See generally, 33 U.S.C. § 2712(a)(4); 33 U.S.C. § 2713; and 33 CFR Part 136.

⁷⁰ 33 CFR Part 136.

⁷¹ 33 CFR 136.105.

⁷² 33 CFR Part 136.

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.⁷³ The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.⁷⁴ 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.

If a claimant demonstrates an entitlement to reimbursement, only specific types of costs can be reimbursed by the OSLTF. 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.”⁷⁵ 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.”⁷⁶

V. DISCUSSION:

a. Restrictions on OSLTF Reimbursements to a RP

A 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.⁷⁷ A RP’s liability is strict, joint, and several.⁷⁸ 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.”⁷⁹ OPA was intended to cure these deficiencies in the law by increasing RPs’ liabilities for oil spills.

Notwithstanding the above, OPA permits OSLTF reimbursement of a RPs removal costs in very limited circumstances. Under 33 U.S.C. § 2708(a), a RP may receive OSLTF reimbursement upon demonstrating either an absolute defense to liability under 33 U.S.C. § 2703

⁷³ 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)).

⁷⁴ 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).

⁷⁵ 33 U.S.C. § 2701(31).

⁷⁶ 33 U.S.C. § 2701(30).

⁷⁷ 33 U.S.C. § 2702(a).

⁷⁸ See, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

⁷⁹ *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).

or a right to limit liability under 33 U.S.C. § 2704. Upon demonstrating a defense, a RP may receive reimbursement for all its removal costs and damages.⁸⁰ Alternatively, if a RP demonstrates a right to limited liability, then the OSLTF may reimburse any removal costs or damages incurred by a RP that exceed its limit of liability.⁸¹ If a RP fails to demonstrate either a defense or limited liability, then the OSLTF is not available to reimburse any removal costs or damages incurred by a RP.

The administrative record in this case fails to establish either a defense to liability or that TRCC's costs exceed the applicable limits of liability.⁸² As discussed below, Texas satisfies the definition of a RP for the Well. Because the record does not support OSLTF reimbursement of a RP claim, this claim must be denied.

b. RP Liability Under the OPA

The OPA defines RPs differently depending upon the source of the oil spill. The following controls who will be liable as a RP for an offshore facility:

In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (citation omitted), 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** or the Outer Continental Shelf Lands Act (citation omitted) for the area in which the facility is located **(if the holder is a different person than the lessee or permittee)**, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.⁸³

Because the above includes several defined terms, additional definitions should be considered when determining liability under the OPA. The following definitions are relevant:

“Facility” “means any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes;”⁸⁴

“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 public vessel;”⁸⁵

⁸⁰ 33 U.S.C. § 2708(b).

⁸¹ *Id.*

⁸² Under 33 U.S.C. § 2704(a) and 30 CFR 553.702, the current liability limit for an offshore facility includes all removal costs plus \$167.8069 million for damages.

⁸³ 33 U.S.C. § 2701(32)(emphasis added).

⁸⁴ 33 U.S.C. § 2701(9).

⁸⁵ 33 U.S.C. § 2701(22).

“lessee” “means a person holding a leasehold interest in an oil and gas lease on lands beneath navigable waters (as that term is defined in section 1301(a) of Title 43) or on submerged lands of the Outer Continental Shelf, granted or maintained under applicable State law or the Outer Continental Shelf Lands Act (citation omitted);”⁸⁶

“permittee” “means a person holding an authorization, license, or permit for geological exploration under section 11 of the Outer Continental Shelf Lands Act (citation omitted) or applicable State law.”⁸⁷

c. Texas Is a RP for the Well

The Well satisfies OPA’s definition of an offshore facility.⁸⁸ The OPA imposes liability for offshore facility incidents on a different classification of persons than the defendants who are liable for spills from other items. When defining who would be liable for an offshore facility spill, Congress intended to impose liability on whoever held the right to produce the oil from the area as opposed to the owner or operator of the discharging item. When reporting on Senate Bill S. 686 (a precursor to the OPA)⁸⁹, the 1989 Senate Environment and Public Works Committee explained Congress’ intent on this issue with the following:

A major deficiency of title III of the Outer Continental Shelf Lands Act is corrected by the reported bill. Under that title, the owner or operator of an OCS facility is held liable. **Often, that owner or operator is an independent drilling contractor and not the actual holder of the rights to produce oil.** This technical feature of the 1978 Act changed the way in which OCS leaseholders and drilling contractors had historically allocated liability, through contracts and indemnity agreements. **The reported bill restores balance among leaseholders and drilling contractors on the OCS, leaving the possibility of further adjustment in their internal allocation of liability through indemnity agreements. The bill accomplishes this by defining “owner or operator” for OCS facilities to mean the lessee or permittee of the area in which the facility is located (or the holder of the OCS rights).**⁹⁰

When determining who should be a RP for an offshore facility, it should initially be noted that OPA does not define the phrase “right of use and easement”. In the absence of a controlling definition, the language used by Congress when enacting a statute must be carefully considered, giving words their “ordinary meaning”.⁹¹ The context in which the words are used must also be considered, bearing in mind the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”⁹² Within OPA’s liability regime, the definition of a RP “should be read as broadly as

⁸⁶ 33 U.S.C. § 2701(22).

⁸⁷ 33 U.S.C. § 2701(28).

⁸⁸ 33 U.S.C. § 2701(22).

⁸⁹ Senate Bill 686 imposed liability on “the owner or operator” of a vessel, onshore facility, and an offshore facility as opposed to a “responsible party”. S. 686, 101st Cong., 1st Sess. (July 28, 1989).

⁹⁰ S. Rep. No. 94, 101st Cong., 1st Sess. 12, 1989 WL 225005, 1990 U.S.C.C.A.N. 722.

⁹¹ *Roberts v. Sea-Land Servs., Inc.*, 132 S.Ct. 1350, 1356 (2012).

⁹² *Id.* at 1357.

the plain language allows.”⁹³ As explained below, Texas’ ownership interest in submerged lands shows that it has a right of use in the area that satisfies the definition of a RP for an offshore facility.

Texas holds the right to produce oil from the area where the Well is located because it owns the submerged lands underneath state waters. Ownership of submerged lands underneath state waters was transferred to individual states by 43 U.S.C. § 1311(a), which states:

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;⁹⁴

Just like federal law, state law recognizes Texas’ ownership of the submerged lands at the Well’s location.⁹⁵ Texas Natural Resources Code § 11.012(c) provides “[t]he State of Texas owns the water and the beds and shores of the Gulf of Mexico and the arms of the Gulf of Mexico ..., including all land which is covered by the Gulf of Mexico and the arms of the Gulf of Mexico either at low tide or high tide.” Further, Texas case law recognizes two presumptions regarding submerged lands: “(1) they are owned by the State and (2) the State has not acted to divest itself of title to them.”⁹⁶ There is no evidence to rebut Texas’ presumed ownership of the submerged lands where the Well is located. To the contrary, TGLO’s leasing of the area unequivocally shows that Texas owns those submerged lands.

Based upon its fee simple ownership of submerged lands, Texas owns the right to produce oil from the area covering the Well’s location. Texas Natural Resources Code § 33.001(g) precludes alienation of state-owned submerged lands except for “leaseholds and lesser interests and by exchanges of coastal public land for littoral property” in accordance with Texas law. Additionally, Texas Natural Resources Code § 51.291(a) authorizes TGLO to grant easements over submerged lands and Texas Natural Resources Code § 52.011 authorizes the Texas School Land Board to issue oil and gas leases covering the Gulf of Mexico.⁹⁷

⁹³ *U.S. v. Bois D’Arc Operating Corp.*, 1999 WL 130635, 48 ERC 1540 (E.D. La. 1999), quoting *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1999).

⁹⁴ 43 U.S.C. § 1311(a).

⁹⁵ See, 45 Tex. Prac., Environmental Law, *State Ownership of Submerged Lands*, § 17:4 (Nov. 2022).

⁹⁶ *TH Investments, Inc. v. Kirby Inland Marine, L.P.*, 218 S.W.3d 173, 182 (Tex.Civ.App.--Houston 2007, pet. denied). See also, *Lorino v. Crawford Packing*, 142 Tex. 51, 175 S.W.2d 410, 413 (1943) (“The soil covered by the bays inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State, and constitutes public property that is held in trust for the use and benefit of all the people.”).

⁹⁷ 31A Tex. Jur. 3d Easements & Licenses in Real Property § 18 (2023) (“Except in specified situations, the Commissioner of the General Land Office may execute grants of easements for rights-of-way or access across, through, and under unsold public school land, that portion of the Gulf of Mexico within the jurisdiction of the state, the state-owned riverbeds and beds of navigable streams in the public domain, and all islands, saltwater lakes, bays, inlets, marches, and reefs owned by the state within tidewater limits of telephone, telegraph, electric transmission,

Texas has a right under state law to use the submerged lands where the Well was located. State law recognizes Texas' right to possess, use, and alienate its property.⁹⁸ As the fee simple owner of the submerged lands, Texas' rights in the area are far greater than the rights held by an easement holder.⁹⁹ Texas, as a fee simple owner, can grant a right of use and easement to others.¹⁰⁰ Thus, Texas' interests satisfy the requirement that a RP for an offshore facility must have a right of use and easement under state law. If Texas' fee simple ownership interest did not include a right of use and easement, then it would not be authorized to transfer those rights to another because a grantor cannot transfer rights that it does not possess.¹⁰¹

The definition of a RP for an offshore facility provides further support for classifying Texas as a RP. That definition excludes states from liability if the state has transferred the right to use the property to another via a lease or permit. By excluding states from liability under specific circumstances, OPA recognizes that a state should be a RP when the exclusions do not apply.¹⁰² If states were totally exempt from liability under the OPA, then there would be no reason to exclude them from the liability under limited circumstances.

Consistent with this determination, the U.S. Department of Interior ("DOI") has also concluded that an owner of submerged lands should be a RP for an oil spill from an offshore facility located on the land. DOI's Solicitor reasoned that OPA was intended to impose liability on all offshore facilities even if some were not covered by a lease or permit. Because ownership includes a right of use and easement in the area, an owner of submerged lands will be a RP for any offshore facilities on its submerged lands. DOI's Solicitor explained:

Nor is there any reason to believe Congress intended for the term "responsible party" for an offshore facility to apply to a narrower range of facilities than the term "offshore facility." To the contrary, the Act contemplates that there be a responsible party for every "offshore facility," not just for those on tracts leased for mineral development, permitted for geological exploration, or the subject of an easement or use permit- associated with oil and - gas.

and power lines, oil pipelines, gas pipelines, sulphur pipelines, and other electric lines and pipelines of any nature, and for irrigation canals, laterals, water pipelines, roads, and any other purpose the commissioner considers to be in the best interest of the state.").

⁹⁸ 59 Tex. Jur. 3d Property § 11 (Oct. 2023) *See also, Mobil Pipe Line Co. v. Smith*, 860 S.W.2d 157, 159 (Tex.Civ.App.—El Paso 1993)(“An owner of land has title and is entitled to possession of the premises. As the owner, that party may grant rights to other parties to use either the surface or subsurface.”).

⁹⁹ 34 Tex. Jur. 3d Estates § 3 (2023)(“Of the several estates recognized by law, the most comprehensive is the fee simple. Fee simple title, when applied to land, means absolute and indefeasible ownership of everything from the top of the ground to the center of the earth.”).

¹⁰⁰ 31A Tex. Jur. 3d Easements & Licenses in Real Property § 17 (2023)(“[A]n easement may be created only by the owner of the land over which it is sought to be exercised, and its creation requires some act by the owner.”). However, it should be noted that the merger doctrine prevents a landowner from granting itself an easement in property that it owns in fee simple. “One cannot have an easement in one's own land inasmuch as all the uses of an easement are fully comprehended in the general right of ownership. It is, therefore, elementary that the dominant and servient estate must be held by different owners. 31A Tex. Jur. 3d Easements & Licenses in Real Property § 2 (2023)(footnotes omitted).

¹⁰¹ Texas Property Code § 5.003. *See also*, 30 Tex. Jur. 3d Deeds § 160 (2023)(“[A] party cannot convey to another a greater interest in a property than it possesses.”).

¹⁰² 2A Sutherland Statutory Construction § 47:11 (Exceptions) (7th ed.2022) (“A true exception exists only to exempt something which would otherwise be covered by an act.”).

The term “holder of a right of use and easement” used in the definition of “responsible party” is broad enough to include landowners. Landowners generally have a “right of use and easement” on their land. If the definition were construed not to embrace landowners, Congress would not have needed to exempt governmental landowners/lessors from the definition, as it did. [footnote omitted]

Given the expansive definition of “offshore facility,” a narrow reading of “responsible party” that excludes landowners could leave some offshore facilities—such as those inland of the coast which are not on leased water bottoms—without any responsible party answerable for damages and cleanup. For example, an owner of a drilling platform on an island lake who also owns the bed of the lake would not be a permittee, lessee, nor a holder of a right of use under this narrow view, and thus would not come under the definition of “responsible party.” I can find no support for such a result in OPA or its history. The better reading is that landowners are included in the definition of “responsible party” for “offshore facility.”¹⁰³

NPFC concurs with DOI’s well-reasoned analysis and relies on it here as partial support for this determination.

d. A Canceled Lease or an Expired Permit Does Not Create an Exception to Liability

Even if it holds a right of use and easement over the Well’s location, Texas could avoid liability if it “transfers possession and right to use the property to another person by lease, assignment or permit.”¹⁰⁴ Notably, the statute uses the present tense of the verb “transfer” when creating this exception to liability. The verb tense used by Congress when enacting a statute typically controls its temporal reach.¹⁰⁵ When using the present tense to describe an action, a statute generally does not address past actions.¹⁰⁶ Because the statute uses “transfers” instead of “transferred”, the exception should only apply to current transfers, not past transfers. Furthermore, because the statute creates an exception to liability, Texas must bear the burden of proving that it applies.¹⁰⁷

¹⁰³ DOI Solicitor Opinion, M-36981, 12-13, 1994 WL 16460713 (November 29, 1994), available online at: <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-36981.pdf>. (Last visited April 2, 2024).

¹⁰⁴ 33 U.S.C. § 2701(32)(C).

¹⁰⁵ See e.g., *U.S. v. Wilson*, 503 U.S. 329, 333, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992) (“Congress’ use of a verb tense is significant in construing statutes.”); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) (“One of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense throughout § 505 of the Act.”); *Barrett v. U.S.*, 423 U.S. 212, 216, 96 S.Ct. 498, 46 L.Ed.2d 450 (1976) (noting that the present perfect tense referred to “an act that has been completed.”); and 1A Sutherland Statutory Construction § 21:10 (7th ed. 2023) (“[C]ourts often look to a legislature’s choice of verb tense to ascertain a statute’s temporal reach.”).

¹⁰⁶ 1 U.S.C. § 1 (“In determining the meaning of any Act of Congress, unless the context indicates otherwise...words used in the present tense include the future as well as the present.”).

¹⁰⁷ 2A Sutherland Statutory Construction § 47:11 (Exceptions) (7th ed.2022) (“And all courts do agree that those who claim the benefit to an exception have the burden of proving that they come within the limited class for whose benefit the exception was established.”).

Under 33 U.S.C. § 2702(a), OPA imposes liability for removal costs and damages resulting from an incident. For over 25 years, NPFC has determined that an incident commences upon discovery of the spill unless the facts show that a discharge occurred at an earlier time.¹⁰⁸ Relying on this well-established policy, NPFC generally identifies RPs based upon their relationship to the discharging item beginning when the incident starts and continuing until it stops.¹⁰⁹

Texas cannot carry its burden of showing that the transfer exception applies. When the oil spill from the Well started on May 28, 2022, the area was not covered by a valid lease or permit. By at least March 1, 2020, TGLO cancelled all oil and gas leases held by either Dark Ruby or GBP.¹¹⁰ Additionally, GBO's failure to post adequate financial responsibility meant that it did not have a valid permit during the relevant period.¹¹¹ When the incident started, Texas was the **"actual holder of the rights to produce oil"**¹¹² for the area where the Well was located. As a result, Texas falls squarely within the class of persons that Congress intended to be liable for an oil spill from an offshore facility.

Texas should not be permanently exonerated from liability for oil spills by the mere fact that the Well's area was once covered by a lease and a permit. The statute's plain language precludes extending the liability exception to include past transfers that were not in effect when the incident occurred. Any other interpretation would ignore Congress' deliberate use of the present tense of the verb "transfer" when creating the exception to liability. Allowing a permanent exception to liability based upon an expired lease or permit would also contradict Congress' intent that OPA should be liberally construed to impose liability on a broad class of RPs.¹¹³

e. OPA's Abandonment Provisions Do Not Support Paying the Claim

OPA's abandonment provisions do not exclude Texas from OPA's definition of a RP. Under 33 U.S.C. § 2701(32)(G), a RP for an abandoned offshore facility will include persons who

¹⁰⁸ See, National Pollution Funds Center Policy CM2, *Incident Date*, (3 October 1997) ("If there is migration through the soil, this is simply another occurrence in the series of occurrences constituting the incident. It is the date of the discharge of oil into navigable water (the last 'link in the chain') which will decide which law (FWPCA or OPA) will apply to the case. When facts concerning the discharge into navigable waters occurred are unknown, the "incident" is presumed to have occurred on the date when the discharge into navigable waters was first discovered or on the date the FOSC made a determination of substantial threat."). See also, National Pollution Funds Center Policy CL11, *When Does an OPA Incident Occur?* (12 March 1998) ("if the facts do not otherwise indicate when the discharge into or on the surface waters or adjoining shorelines first occurred (or a substantial threat thereof was officially recognized), the date of the discovery of the oil on the surface waters or adjoining shoreline (or threat thereto) is the effective date of the OPA incident.").

¹⁰⁹ See e.g., *Golnay Barge Co., Inc. v. M/T SHINOUSSA*, 1994 AMC 1050 (5th Cir. 1993) (holding that OPA did not apply because the oil discharges had stopped shortly before the law's enactment even though oil continued to spread on the water after OPA's effective date).

¹¹⁰ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7-10 pgs. 1-11 (Bankr. S.D. Tx. 2021). See also, *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 351-1, pgs. 10 and 12 (Bankr. S.D. Tx. 2019) (noting that the leases in Mineral File 033746 cover tract 22-23B. The Well is located in tract 22-23B).

¹¹¹ *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 312, pg. 2 (Bankr. S.D. Tx. 2019).

¹¹² S. Rep. No. 94, 101st Cong., 1st Sess. 12, 1989 WL 225005, 1990 U.S.C.C.A.N. 722.

¹¹³ *U.S. v. Brothers Enterprises, Inc.*, 113 F.Supp.3d 907, 913 (E.D. Tx. 2015) ("By defining 'responsible party' broadly, Congress ensured that more than one entity may be held accountable for the costs of pollution stemming from oil discharges."). See also, *U.S. v. Bois D'Arc Operating Corp.*, 1999 WL 130635 (E.D. La. March 10, 1999) ("The legislative history of OPA is consistent with and comports with a broad definition of responsible party.").

would have been liable immediately before the abandonment. The OPA does not provide any specific guidance on when an offshore facility will be considered “abandoned”. Whether property has been “abandoned” is an issue of property law and property law issues are typically resolved by the relevant state law.¹¹⁴ Under Texas law,

“Abandonment” means to give up absolutely, to forsake entirely, to renounce utterly, to relinquish all connection with or concern in, or to desert. [footnote omitted] It means the relinquishment of possession of a thing by its owner with the intention of terminating its ownership without vesting it in any one else, [footnote omitted] with the intention to forsake and desert it. [footnote omitted] Abandonment has also been defined as giving up something to which one is entitled to no one in particular. [footnote omitted]

Property is abandoned when the owner throws it away, or when it is voluntarily left or lost, without any intention or expectation to regain it. [footnote omitted] When applied to personal property, the term also includes an intent by the owner to leave the property free to be appropriated by any other person. [footnote omitted] The word “abandon” means a giving up, a total desertion, an absolute relinquishment of personal property.¹¹⁵

Generally, mere nonuse of property by its owner will not establish an abandonment “unless the failure to use is long-continued and unexplained.”¹¹⁶ Also, Texas law recognizes that an oil and gas lessee has an implied right to remove production equipment from the property within a reasonable time after the lease has expired.¹¹⁷ The facts of each individual case control whether the equipment has been removed within a reasonable amount of time. In *Morgan v. Fox*, the court found that the lessee had not abandoned its oilfield equipment even though those items had been left on the lessor’s property for about three and half years.¹¹⁸ Similarly, in *Pearson v. Black*, the court held that more than five years of nonuse did not establish the lessee’s abandonment of oilfield equipment.¹¹⁹

The sales transactions and legal proceedings involving the Oil and Gas Assets demonstrate that the Well could not have been abandoned before April 8, 2022. Ownership of the Well along with all the other Oil and Gas Assets was transferred from GBE to GBP and then from GBP to Dark Ruby. These transfers disprove any suggestion that the owners intended to abandon the Well. These owners intended to sell their interest in the Well, not abandon it. Also, after agreeing that third parties could rely on the Trustee’s assignment as a valid transfer of ownership, paying an agreed upon purchase price, and taking possession of the assets, Dark Ruby filed an adversary proceeding in GBP’s bankruptcy action in an effort to establish, among other things, its

¹¹⁴ See e.g., *Butner v. U.S.*, 440 U.S. 48, 55 (1979) (“Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy.” [citation omitted]); *U.S. v. Craft*, 535 U.S. 274, 278 (2002) (relying on state property law when interpreting the federal tax lien statute because the federal statute did not create any property rights);

¹¹⁵ 1 Tex. Jur. 3d Abandoned Property § 1 (Oct. 2023).

¹¹⁶ *Id.*

¹¹⁷ *Moore v. Jet Stream Investments, Ltd.*, 261 S.W.3d 412, 427 (Tex. Civ. App. —Texarkana 2008).

¹¹⁸ , 536 S.W.2d 644, 652 (Tx. Civ. App.—Corpus Christi 1976).

¹¹⁹ 120 S.W.2d 1075, 1080 (Tx. Civ. App.—Eastland 1938).

ownership of the Oil and Gas Assets.¹²⁰ These facts show that Dark Ruby had no intention of abandoning the Well before stipulating to the dismissal of the adversarial proceeding on April 8, 2022.¹²¹

The classification of the Well as a shut-in orphan does not necessarily mean that it was abandoned. Under Texas Natural Resources Code § 89.047(a)(3), an orphaned well includes “a well: (A) for which the commission has issued a permit; (B) for which production of oil or gas or another activity under the jurisdiction of the commission has not been reported to the commission for the preceding 12 months; and (C) whose operator’s commission-approved organization report has lapsed.” These criteria focus on a lack of activity by an operator approved by TRRC as opposed to an intent to relinquish an ownership interest in a well. Additionally, oil wells are commonly shut-in so they can be used for production later. The sales transactions and legal proceedings involving the Oil and Gas Assets show there was no intent to abandon the well even though it has been shut-in since January 1998 and TRRC classified it as an orphaned well. Without more, mere non-use of the well and TRRC’s orphan classification is insufficient to establish intent to abandon an ownership interest. That is particularly true here as TRRC had a reasonable amount of time after the lease was cancelled to remove its property from the area covered by the lease.

Even if there was evidence of abandonment sometime between April 8, 2022 and May 28, 2022 (there is no such evidence), Texas still satisfies the definition of a RP. Importantly, more than one person can be liable under the OPA for the same spill. The statute’s plain language imposes liability on “each responsible party...”¹²² By using the word “each”, Congress intended to impose liability on more than one defendant for an incident.¹²³ Similarly, there would be no reason for imposing joint and several liability if only one defendant could be liable as a RP.¹²⁴ If the Well was abandoned when the incident commenced, then OPA’s abandonment provisions may support imposing liability on another person. However, those statutes will not provide Texas with a defense to liability because its right of use and easement still satisfies the definition of a RP for an offshore facility and more than one person can be liable for an OPA incident.

In *United States v. Bois D’Arc Operating Corp.*, 48 ERC 1540, 1999 WL 130635 (E.D. La. 1999), the defendant was a lessee who argued that liability for a spill from an abandoned offshore facility should be exclusively controlled by OPA’s abandonment provisions. The lessee defendant reasoned that it should not be liable because another party satisfied the definition of a RP for an abandoned offshore facility. The *Bois D’Arc* court rejected this argument and held that multiple RPs can be liable for the same oil spill.¹²⁵ The court also held that the abandonment provision broadens OPA liability instead of restricting it. The mere fact that a defendant may be liable under the abandonment provision does not exonerate another defendant who would otherwise be liable as a current lessee. The court explained:

¹²⁰ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc.1 (Bankr. S.D. Tx. 2021).

¹²¹ *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc.35 (Bankr. S.D. Tx. 2021).

¹²² 33 U.S.C. § 2702(a).

¹²³ See also, *United States v. Brothers Enterprises, Inc.*, 113 F.Supp.3d 907 (2015)(noting that Congress intended to impose liability on multiple defendants by using the phrase “each responsible party” in 33 U.S.C. § 2702 (a) and reasoning that imposing joint and several liability would be unnecessary if only one RP could be liable).

¹²⁴ *Id.*

¹²⁵ *United States v. Bois D’Arc Operating Corp.*, 48 ERC 1540, 1999 WL 130635 (E.D. La. 1999).

I find that the section on abandonment ... expands rather than contracts the definition of a responsible party. In the case of abandonment, OPA provides for liabilities by both previous and current lessees/operators.¹²⁶

Any abandonment of the Well by Dark Ruby or GBP will not exempt Texas from its RP status. As illustrated in *Bois D'Arc*, OPA's abandonment provisions expand who can be liable as a RP for an offshore facility without providing a defense for other persons who would otherwise be liable. Proving the liability of a prior lessee or permittee under an abandonment theory does not prevent a current holder of a right of use and easement from also satisfying OPA's definition of a RP. In fact, the statute requires a holder of a right of use and easement to be a different person from a lessee or permittee. An offshore facility can be both abandoned and located in an area covered by a right of use and easement at the same time. Because imposition of OPA liability is not a zero-sum situation, identifying Dark Ruby or GBP as a RP under OPA's abandonment provision does not exclude Texas from also being a RP. As such, TRRC's RP status remains unaltered even if OPA's abandonment provisions impose liability on other RPs.¹²⁷

f. TRRC Received Compensation for Plugging the Well

The OSLTF is only available to reimburse claimants who have uncompensated removal costs and damages under the OPA.¹²⁸ In order for NPFC to authorize reimbursement of a claim, the claimant must show that it suffered an uncompensated loss. Texas cannot demonstrate that it has an uncompensated loss because the proceeds from the \$6.6 Million Plugging Bond more than adequately compensated for the cost of plugging the Well.

When responding to NPFC's request for additional information, TRRC explained that all the proceeds from the \$6.6 Million Plugging Bond would be deposited into the OGRCF instead of being used for reimbursement of the specific costs incurred to plug the Well.¹²⁹ The record shows that the OGRCF paid to plug the Well.¹³⁰ Also, the proceeds from the \$6.6 Million Plugging Bond either has been or will be deposited into the OGRCF and earmarked for TRRC to

¹²⁶ *Id.*

¹²⁷ The result could be different if the discharging item was a vessel, onshore facility or a pipeline as opposed to an offshore facility. For a vessel, onshore facility or a pipeline, the item's owner is a RP. Owned property is mutually exclusive from abandoned property. Property cannot be both owned and abandoned at the same time. As a result, proof that an item was abandoned will preclude liability based upon ownership of the discharging item. However, because OPA imposes liability for offshore facilities on the holder of a right of use and easement instead of an owner, proof that an offshore facility was abandoned will not preclude the liability of other defendants.

¹²⁸ 33 U.S.C. § 2712(a)(4).

¹²⁹ See, email from TRRC to NPFC providing additional information dated June 1, 2023.

¹³⁰ See, TRRC submission, Final OPA claim, page 46 of 173 (characterizing the costs as "Plugging With State Funding"). It should also be noted that TRRC uses OGRCF funds, Brownfield funds, or Infrastructure Investment and Jobs Act ("IIJA") funds to plug orphan wells. See e.g., RRC 2022 Oilfield Cleanup Program, Annual Report 2022, pg. 7 (January 18, 2023), available online at: <https://www.rrc.texas.gov/media/hirndst0/oilfield-cleanup-program-annual-report-fiscal-year-2022.pdf>. TRRC's data visualization tool shows Texas has not used any IIJA funds to address any well in Trinity Bay. See, TRRC's Web Page, Federally Funded (IIJA) Well Plugging, available online at: <https://www.rrc.texas.gov/resource-center/data-visualization/oil-gas-data-visualization/federally-funded-well-plugging-data-visualization/>. Similarly, the Well is not identified as one of TRRC's Brownfield sites. See, TRRC's Web Page, List of Voluntary Cleanup Program and Brownfield Sites, available online at: <https://www.rrc.texas.gov/resource-center/data-visualization/oil-gas-data-visualization/federally-funded-well-plugging-data-visualization/>. Thus, it is more likely than not that TRRC used OGRCF funds to plug the Well.

plug other wells.¹³¹ Because money is fungible,¹³² TRRC either has been or will be more than fully compensated for the claimed costs through its eventual receipt of the \$6.6 million in bond proceeds even if funds received from another source were used to plug the Well.

VI. CONCLUSION:

The NPFC determines that TRRC is a RP and the claim does not satisfy the requirements for a permissible RP claim. TRRC's claim should also be denied because its costs either have been or will be compensated by the proceeds from the "\$6.6 Million Plugging Bond". As TRRC has already been compensated for the claimed removal costs, the OSLTF is not authorized to reimburse the claim.

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

(b) (6)

Claim Supervisor: (b) (6)

Date of Supervisor's review: 4/3/24

Supervisor Action: *Denial Approved*

¹³¹ Tex. Nat. Res. Code §§ 91.108 and 91.109(a).

¹³² See e.g., *Gatesco Q.M. Ltd. v. City of Houston*, 503 S.W.3d 607, 616 (Tx. Civ. App.—Houston 2016).