

CLAIM SUMMARY / DETERMINATION¹

Claim Number:	UCGP925002-URC001
Claimant:	CITY OF MARINETTE
Type of Claimant:	LOCAL GOVERNMENT
Type of Claim:	REMOVAL COSTS
Claim Manager:	(b) (6)
Amount Requested:	\$119,794.30
Action Taken:	Denial

EXECUTIVE SUMMARY:

On October 6, 2022, at approximately 2200 hours local time, the United States Coast Guard (“USCG”) National Response Center (“NRC”) received notification that the Resolute Forest Products warehouse, a recycled pulp mill, was on fire due to an unknown cause resulting in the release of an unknown amount of contaminants and firefighting water into the Menominee River, a navigable waterway of the United States.² The warehouse facility had four tenants that stored a variety of products including paper pulp, paper pulp waste, acids, caustics and potentially PFAS containing materials. Multiple fire departments from Michigan and Wisconsin battled the fire. Some fire suppression water released to the Menominee River.

On October 7th, at approximately 1730, a second NRC Report³ was called into the NRC from the Tyco Fire facility (Johnson Controls) stating that the fire had spread to their warehouse that contained a large quantity of chlorinated and non-chlorinated firefighting foam. Tyco Fire hired a company to build soil berms to stop the flow of foam and firefighting runoff water from entering the Menominee River. However, by 2100, the warehouse was one-third engulfed in flames and some of the foam/firefighting runoff was releasing to the Menominee River.⁴

The United States Environmental Protection Agency Region V (“USEPA” or “FOSC”) was the Federal On Scene Coordinator (FOSC) and arrived onsite to provide air monitoring and air sampling at the site and in the surrounding communities for common contaminants related to industrial fires.⁵ Warehouse tenants provided EPA with the Safety Data Sheets (SDS) for the material stored in the structure.⁶ A review of these SDS show that the warehouse housed

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 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 (NRC) Report # 1349274 dated October 6, 2022.

³ NRC Report # 1349303 dated October 7, 2022.

⁴ U.S. EPA Region V POLREP #1, dated June 16, 2023.

⁵ U.S. EPA Region V POLREP #1, section 2.1.2 Response Actions to Date, dated June 16, 2023.

⁶ Those SDS may be found at the U.S. EPA Menominee Warehouse Fire Response website at <https://response.epa.gov/menomineewarehousefire> (last visited March 13, 2025).

hazardous and nonhazardous materials as defined by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁷. The materials included fluorinated foams, acids, caustics, herbicides, specialty chemicals including mucochloric acid, sodium metabisulfite, norflurazon and sodium sulfite, and fire safety products including fluorinated and nonfluorinated foam concentrates, equipment and containers.⁸ USEPA coordinated with both Michigan Department of Environment, Great Lakes, and Energy (“EGLE” or “SOSC”) and Wisconsin Department of Natural Resources (“WI DNR” or “SOSC”) on surface water sampling and testing related to potential run-off from the incident to the Menominee River.⁹ The USEPA, state agencies and local water utilities coordinated to implement sampling to confirm that there were no impacts to drinking water supplies.¹⁰

There is no indication that any oil, as defined by the Oil Pollution Act of 1990¹¹, discharged at the site.¹² The FOSC identified four potentially responsible parties under CERCLA, Resolute Forest Products (owner/tenant), K&K Logistics (property owner), Tyco/Johnson Controls (tenant), and ChemDesign (tenant).¹³

The claimant is seeking reimbursement of costs in the amount of \$105,500.35 for water sampling; and \$14,293.95 for unreimbursed firefighter wages related to fighting the fire. The claimant stated that the claims were provided to all four potentially responsible parties.¹⁴

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. The NPFC finds that the incident involved the release of CERCLA-hazardous substances. The Oil Spill Liability Trust Fund (OSLTF) is not available to compensate for releases under CERCLA. Moreover, while the claimants proffer that OPA oil may have been present on-site during the fire, even if there was evidence to that position, the OSLTF is likewise unavailable for mixed or commingled spills involving CERCLA hazardous substances. As such, this claim must be denied.

I. DETERMINATION PROCESS:

The NPFC utilizes an informal process when adjudicating claims against the OSLTF.¹⁵ 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

⁷ 42 U.S.C. §9601 *et seq.* See, 40 CFR 302.4 for a comprehensive list of CERCLA hazardous substances.

⁸ <https://response.epa.gov/menomineewarehousefire> (last visited on March 13, 2025).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 33 U.S.C. 2701 *et seq.*

¹² See, U.S. EPA Region V POLREP #1. See also, email from USEPA FOSC to NPFC dated December 17, 2024, and email from the United States Coast Guard on-site responder (LT (b) (6)) to NPFC dated February 6, 2025.

¹³ U.S. EPA Region V POLREP #1, section 2.1.3 Enforcement Activities, Identity of Potentially Responsible Parties (PRPs), dated June 16, 2023.

¹⁴ Original Claim submission cover letter dated October 16, 2024, p. 1 of 3.

¹⁵ 33 CFR Part 136.

evidence obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim.¹⁶ The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.¹⁷ 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.

II. INDUSTRIAL FIRE AND CHEMICAL RELEASE, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:

Industrial Fire and Chemical Release

On October 6, 2022, at approximately 2200 hours local time, the United States Coast Guard (“USCG”) National Response Center (“NRC”) received notification that the Resolute Forest Products warehouse, a recycled pulp mill, was on fire due to an unknown cause resulting in the release of an unknown amount of contaminants and firefighting water into the Menominee River, a navigable waterway of the United States.¹⁸ The warehouse facility had four tenants that stored a variety of products including paper pulp, paper pulp waste, acids, caustics and potentially PFAS containing materials. Multiple fire departments from Michigan and Wisconsin battled the fire. Some fire suppression water released to the Menominee River.

On October 7th, at approximately 1730, a second NRC Report¹⁹ was called into the NRC from the Tyco Fire facility (Johnson Controls) stating that the fire had spread to their warehouse that contained a large quantity of chlorinated and non-chlorinated firefighting foam. Tyco Fire hired a company to build soil berms to stop the flow of foam and firefighting runoff water from entering the Menominee River. However, by 2100, the warehouse was one-third engulfed in flames and some of the foam/firefighting runoff was releasing to the Menominee River.²⁰

The United States Environmental Protection Agency Region V (“USEPA” or “FOSC”) was the Federal On Scene Coordinator (FOSC) and arrived onsite to provide air monitoring and air sampling at the site and in the surrounding communities for common contaminants related to industrial fires.²¹ Warehouse tenants provided EPA with the SDS for the material stored in the structure.²² A review of these SDS show that the warehouse housed hazardous and nonhazardous materials as defined by the Comprehensive Environmental Response, Compensation, and

¹⁶ 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)).

¹⁷ 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).

¹⁸ National Response Center (NRC) Report # 1349274 dated October 6, 2022.

¹⁹ NRC Report # 1349303 dated October 7, 2022.

²⁰ U.S. EPA Region V POLREP #1, dated June 16, 2023.

²¹ U.S. EPA Region V POLREP #1, section 2.1.2 Response Actions to Date, dated June 16, 2023.

²² Those SDS may be found at the U.S. EPA Menominee Warehouse Fire Response website at <https://response.epa.gov/menomineewarehousefire> (last visited March 13, 2025).

Liability Act (CERCLA)²³. The materials included fluorinated foams, acids, caustics, herbicides, specialty chemicals including mucochloric acid, sodium metabisulfite, norflurazon and sodium sulfite, and fire safety products including fluorinated and nonfluorinated foam concentrates, equipment and containers.²⁴ USEPA coordinated with both Michigan Department of Environment, Great Lakes, and Energy (“EGLE” or “SOSC”) and Wisconsin Department of Natural Resources (“WI DNR” or “SOSC”) on surface water sampling and testing related to potential run-off from the incident to the Menominee River.²⁵ The USEPA, state agencies and local water utilities coordinated to implement sampling to confirm that there were no impacts to drinking water supplies.²⁶ There is no indication that any oil, as defined by the Oil Pollution Act of 1990²⁷, discharged at the site.²⁸

Responsible Party

There were four potentially responsible parties identified by the USEPA FOISC and they were Resolute Forest Products (owner/tenant), K&K Logistics (property owner), Tyco/Johnson Controls (tenant), and ChemDesign (tenant).²⁹

Recovery Operations

Besides the fire-fighting activities performed by the firefighters, USEPA and MI EGLE began collecting co-located surface water samples with the potential Responsible Party (Tyco/Arcadis) contractor at 21 locations along the Menominee River and Lake Michigan, additional samples were also collected at locations in Lake Michigan where foam was observed, air monitoring and air sampling in the community continued while the fire was ongoing and the PRPs’ contractor continued to collect firefighting runoff water into FRAC tanks on site.³⁰

On October 7th, 2022, USEPA activated three Federal On Scene Coordinators and four USEPA Superfund Technical Assessment and Response Team (START) contractor personnel to the incident to provide air monitoring, air sampling, water sampling and water quality monitoring.³¹ The active response ended on October 24, 2022.³² All activities were focused on responding the fire, CERCLA-hazardous chemicals, and other non-hazardous substances, but there is no evidence of a response to an oil discharge.³³

²³ 42 U.S.C. § 9601 *et seq.* See, 40 CFR 302.4 for a comprehensive list of CERCLA hazardous substances.

²⁴ <https://response.epa.gov/menomineewarehousefire> (last visited on March 13, 2025).

²⁵ *Id.*

²⁶ *Id.*

²⁷ 33 U.S.C. § 2701 *et seq.*

²⁸ See, U.S. EPA Region V POLREP #1. See also, email from USEPA FOISC to NPFC dated December 17, 2024, and email from the United States Coast Guard on-site responder (LT (b) (6)) to NPFC dated February 6, 2025.

²⁹ U.S. EPA Region V POLREP #1, section 2.1.3 Enforcement Activities, Identity of Potentially Responsible Parties (PRPs), dated June 16, 2023.

³⁰ U.S. EPA Region V POLREP #1, section 1.1.2 Site Description, dated June 16, 2023.

³¹ U.S. EPA Region V POLREP #1, section 2.12 Response Actions to Date, dated June 16, 2023.

³² <https://response.epa.gov/menomineewarehousefire> (last visited on March 13, 2025).

³³ U.S. EPA Region V POLREP #1.

III. CLAIMANT AND RP:

Absent limited circumstances, the Federal Regulations implementing the Oil Pollution Act of 1990 (OPA)³⁴ require that all claims for removal costs or damages be presented to the RP before seeking compensation from the NPFC.³⁵ Although the NPFC ultimately determines that this incident is covered by CERCLA and not OPA, the NPFC still obtained confirmation that the claimant submitted its costs to the parties identified by the EPA as being potentially responsible for the incident.

On August 14, 2024, the claimant presented its costs and invoices to the four parties identified for the fire and chemical runoff (Resolute Forest Products (owner/tenant), K&K Logistics (property owner), Tyco/Johnson Controls (tenant), and ChemDesign (tenant)).³⁶ The claimant presented its claim to K K Integrated Logistics (KKIL).³⁷ The claim was also previously presented to KKIL via email December 14, 2022.³⁸ KKIL's insurer confirmed receipt of the claim, but stated that they were unable to consider the claimed costs on April 11, 2023.³⁹

IV. CLAIMANT AND NPFC:

When an RP denies a claim or has not settled a claim after ninety-days of receipt, a claimant may elect to present its claim to the NPFC.⁴⁰ On December 3, 2024, the NPFC received the claimant's submission seeking reimbursement of \$105,500.35 for water sampling and \$14,293.95 for firefighter wages.⁴¹ The Claimant is the City of Marinette seeking the costs of the Marinette Water and Wastewater Utility for the water testing and the costs for wages of Marinette Fire Department employees.⁴²

In its submission the claimant provided its claim cover letter, numerous invoices for the sampling (including other documentation associated with the sampling costs), and documentation related to fire department wages;⁴³ as well as a Wisconsin Emergency Management article about the fire.⁴⁴

Once the NPFC reviewed the claim submission, the NPFC determined that the claimant had not provided sufficient documentation to support the allegation that the incident was an OPA-incident allowing payment of any costs by the OSLTF. Therefore, the NPFC reached out to the

³⁴ 33 U.S.C. § 2701 *et seq.*

³⁵ 33 CFR 136.103.

³⁶ Letters from City of Marinette to PRPs dated August 14, 2024, attached to email from claimant to NPFC dated March 7, 2025.

³⁷ Letter from City of Marinette to K K Integrated Logistics dated September 3, 2024, attached to email from claimant to NPFC dated March 7, 2025.

³⁸ Marinette email to KKIL dated December 14, 2022, submitted with the OSLTF Claim as Enclosure 1 and 2 pg. 38 of 146.

³⁹ EMC Insurance letter to Marinette dated April 11, 2023, submitted with the OSLTF Claim as Enclosure 1 and 2 pg. 30 of 146. Note: EMC's letter identifies the insured as KKHL, Inc.

⁴⁰ 33 CFR 136.103.

⁴¹ Original Claim submission cover letter dated October 16, 2024.

⁴² *Id.*

⁴³ OSLTF Claim Enclosure 1 and 2 submitted with original claim submission.

⁴⁴ Wisconsin Emergency Management article dated December 13, 2022, submitted with original claim submission.

USEPA FOSC and Coast Guard officer who were on scene.⁴⁵ Neither official identified any evidence of a discharge of oil, and the USEPA FOSC was clear that the response was being conducted under CERCLA authorities.⁴⁶ Notwithstanding, the NPFC requested additional information from the claimant in an effort to determine whether any of the claimed costs were compensable under OPA.⁴⁷ The claimant provided numerous documents in response which included reports of hazardous chemical inventory, preliminary report of runoff pollutants, lab analysis reports, fire report summaries, aerial photographs, drinking water analyses documents, fire planning, structural analyses, equipment loss documents, schedules, personnel shift lists, activity logs, ICS forms, FEMA rates, NEMAC documents, communications plans, contact lists, briefing notes, check-in sheets, IAPs, situation reports, expense reports, and organization charts. The NPFC considered those documents in reaching its determination.

V. DISCUSSION:

General

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.⁴⁸ An RP's liability is strict, joint, and several.⁴⁹ 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."⁵⁰ 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."⁵¹ 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."⁵²

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).⁵³ The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such

⁴⁵ Email from NPFC to USEPA FOSC dated December 17, 2024, and email from NPFC to LT (b) (6) dated February 3, 2025.

⁴⁶ Email from USEPA FOSC to NPFC dated December 17, 2024, and email from LT (b) (6) to NPFC dated February 6, 2025.

⁴⁷ Email from NPFC to Claimant dated December 16, 2024.

⁴⁸ 33 U.S.C. § 2702(a).

⁴⁹ See, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

⁵⁰ *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).

⁵¹ 33 U.S.C. § 2701(31).

⁵² 33 U.S.C. § 2701(30).

⁵³ See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

claims.⁵⁴ The claimant bears the burden of providing all evidence, information, and documentation deemed relevant and necessary by the Director of the NPFCC, to support and properly process the claim.⁵⁵

Definitions

The resolution of this claim turns on several key definitions in OPA precluding OSLTF reimbursements for the cost of removing substances covered by CERCLA's definition of hazardous substances. First, 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.**"⁵⁶ Second, 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.**"⁵⁷ Third, 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 [CERCLA⁵⁸] and which is subject to the provisions of that Act."⁵⁹

CERCLA defines "hazardous substance" broadly.⁶⁰ However, the definition of "hazardous substance" under CERCLA specifically excludes "petroleum, including crude oil or any fraction thereof..."⁶¹ 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)."⁶²

⁵⁴ 33 CFR Part 136.

⁵⁵ 33 CFR 136.105.

⁵⁶ 33 U.S.C. § 2701(14).

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

⁵⁸ 42 U.S.C. § 9601 *et seq.*

⁵⁹ 33 U.S.C. § 2701 (23). Specifically referencing "subparagraphs (A) through (F) of section 101(14) of CERCLA" which is *codified at* 42 U.S.C. § 9601(14).

⁶⁰ 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]."

⁶¹ 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]."

⁶² 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

City of Marinette's Claim

The claimant seeks reimbursement of \$105,500.35 for water sampling and \$14,293.95 for firefighter wages. The claimant alleged that the fire involved oil and hydraulic fluids from equipment in the warehouse and discharged into the Menominee River.⁶³ The claimant provided a list of equipment that contained oil and the type of oil contained within each piece of equipment, which they stated was compiled by the City of Menominee. The claimant stated that “government regulatory authorities requested that the City of Marinette test for oil in the Menominee River after the fire”,⁶⁴ but did not provide information or evidence of the request or which government regulatory authorities made such request.

Incident was CERCLA and not OPA

The claimant alleged that equipment containing oil was on site and that oil discharged into the Menominee River. However, the evidence does not support that allegation. The NPFC did not find any documentation in the administrative record supporting the equipment list provided by the claimant. Further, the NPFC found no evidence in the record that oil discharged into the waterway. On the contrary, the claim submission shows the presence of hazardous and non-hazardous chemicals and substances during the fire and firefighting efforts.⁶⁵ Therefore, the NPFC reached out to the USEPA FOSC to obtain information regarding the nature of the substances involved in the fire.⁶⁶ In his reply, he stated that during an initial phone conversation, he was initially made aware of a bio-diesel tank that raised concern of discharging and threatening a water intake.⁶⁷ However, upon his arrival the bio-diesel tank had been consumed by the fire and the CERCLA hazardous substances were the focus of the response.⁶⁸

The record shows that the site contained chemicals that were CERCLA hazardous materials, and those are what posed the environmental threat⁶⁹ and were the focus of the response.⁷⁰ The CERCLA hazardous substances discharged to the navigable water. The NPFC finds that the incident was strictly a CERCLA incident, so the claim cannot be paid under OPA.

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].”

⁶³ Original Claim submission cover letter dated October 16, 2024..

⁶⁴ *Id.*

⁶⁵ Numerous invoices and chain of custody documents provided as enclosures to the original claim submission dated October 16, 2024.

⁶⁶ Email from NPFC to U.S. EPA Region V FOSC dated December 17, 2024.

⁶⁷ Email from U.S. EPA Region V FOSC to NPFC dated December 17, 2024.

⁶⁸ *Id.* Moreover, as discussed, even if oil had discharged from the tank, it would have commingled with the numerous CERCLA hazardous materials before substantially threatening to discharge into – or discharging into – a navigable waterway. As such, even under those facts, the claim must be denied.

⁶⁹ U.S. EPA Region V POLREP #1, 1.1.2.2 Description of Threat.

⁷⁰ Email from U.S. EPA Region V FOSC to NPFC dated December 17, 2024.

Even if oil had threatened to discharge or actually discharged to the waterway, there were numerous hazardous materials⁷¹ involved in the fire and runoff into the river, which would have mixed or commingled with any oil. A mixture of oil and hazardous substances is not “oil” within the meaning of the OPA.⁷²

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. 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 be applied.

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.**⁷³

The legislative history of CERCLA likewise is instructive: “The reported bill [CERCLA] does not cover spills or other releases **strictly** of oil.”⁷⁴ Contemporaneous congressional debate further elucidated how it intended CERCLA to apply to spills of oil mixed with hazardous substances.⁷⁵ 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 oil⁷⁶ 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

⁷¹ See, U.S. EPA Region V POLREP #1, section 1.1.2.2 Description of Threat, dated June 16, 2023. The materials included fluorinated foams, acids, caustics, herbicides, specialty chemicals including mucochloric acid, sodium metabisulfite, norflurazon and sodium sulfite, and fire safety products including fluorinated and nonfluorinated foam concentrates, equipment and containers.

⁷² See, e.g., *Munoz v. Intercontinental Terminals Co.*, 845 F.4th 343 (5th Cir. 2023).

⁷³ H. R. Rep. No. 653, 101st Cong., 2d Sess. 102 (1990). S. Rep. No. 101-94 (1989)(emphasis added).

⁷⁴ S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980)(emphasis added).

⁷⁵ See, e.g., at 126 Cong.Rec. H11798 (Rep. Edgar) (oil slicks and industrial oil waste); 126 Cong.Rec. S14963 (daily ed. November 24, 1980) (Sen. Randolph) (contaminated oil slick), and other petroleum products containing hazardous substance additives intended to be addressed by the legislation including PCB's in transformer fluid, *id.* at S14963 (Sen. Randolph) and S14967 (Sen. Stafford); dioxin in motor fuel used as a dust suppressant, *id.* at S14974 (Sen. Mitchell); PCB's in waste oil, *id.* (Sen. Mitchell) and contaminated waste oil, *id.* at S14980 (Sen. Cohen).

⁷⁶ This has become known colloquially as EPA’s “petroleum exclusion.”

defined.⁷⁷ 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.’”⁷⁸

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.⁷⁹ 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.⁸⁰ 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 had 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.⁸¹

Therefore, even if the claimant were accurate in alleging that oil was involved in the incident that oil would have been mixed with the CERCLA hazardous substances, still resulting in the incident being a CERCLA incident and not an OPA incident.

Given all the information and evidence, the NPFC finds that the incident was a CERCLA incident. Thus, the OSLTF is not available to compensate this claim and thus, it must be denied.

VI. CONCLUSION:

As discussed above, the burden is on the claimant to prove that the discharged substance was oil, and, if the discharged substance was oil, that the claimed removal costs or damages resulted from the discharge of oil. After careful analysis of all the supporting documentation provided by the claimant and the entire administrative record, the NPFC determines and finds as a matter of fact that the industrial fire event was a CERCLA-hazardous substance incident. Therefore, the

⁷⁷ 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).

⁷⁸ *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1383-4 (E.D. Cal. 1991).

⁷⁹ *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886 (10th Cir. 2000).

⁸⁰ *Id.*

⁸¹ *See, Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886 at 894 (10th Cir. 2000). *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.

claimant's costs were not oil spill removal costs as they are defined under OPA and cannot be paid by the OSLTF.

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

Claim Supervisor:

(b) (6)

(b) (6)

Date of Supervisor's review: March 17, 2025

Supervisor Action: *Denial Approved*

Supervisor's Comments: