

## CLAIM SUMMARY / DETERMINATION<sup>1</sup>

<b>Claim Number:</b>	UCGPN22029-URC001
<b>Claimant:</b>	Railroad Commission of Texas
<b>Type of Claimant:</b>	State
<b>Type of Claim:</b>	Removal Costs
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$440,217.22 <sup>2</sup>
<b>Action Taken:</b>	<b>Denial on Reconsideration</b>

### **EXECUTIVE SUMMARY:**

On May 28, 2022, at 1140 local time United States Coast Guard (USCG) Sector Houston-Galveston notified the National Response Center of a sheen near an offshore well in Trinity Bay, Texas following an overflight of the area.<sup>3</sup>

Later that afternoon 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.<sup>4</sup>

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.<sup>5</sup> The oil discharged from the Well because a failed wellhead casing valve had deteriorated due to lack of maintenance.<sup>6</sup>

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<sup>1</sup> 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.

<sup>2</sup> TRRC initially requested a sum certain of \$440,217.22 via its original claim submission received on April 12, 2023. On May 31, 2024, TRRC submitted its official Request for Reconsideration and contained within that request under Section III, Argument “D”, TRRC amended its sum certain on reconsideration to \$392,318.67 based on the application of an offset for the per capita financial assurance allocation for the well associated with this claim, page 12 of 13. However, in its claim for relief in the paragraph that immediately follows, TRRC reiterates the original request of \$440,217.22. Since this is a complete denial, the sum certain amount should be viewed as interchangeable throughout the text.

<sup>3</sup> See, National Response Center (NRC) Report # 1337231 dated May 28, 2022.

<sup>4</sup> See, TRRC submission, Final OPA claim, Incident Summary, P. 6/173, “Incident Summary” received April 12, 2023.

<sup>5</sup> See, USCG SITREP-POL ONE dated June 3, 2022.

<sup>6</sup> *Id.*

On April 12, 2023, TRRC presented a claim for uncompensated removal costs to the National Pollution Funds Center (NPFC) for \$440,217.22.<sup>7</sup> The NPFC thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and concluded that the claim was not compensable under the Oil Pollution Act (OPA) and therefore the claim was denied. On May 31, 2024, TRRC timely sought reconsideration and has amended its sum certain on reconsideration to \$392,318.67.<sup>8</sup>

Requests for reconsideration are considered *de novo*. The NPFC has thoroughly reviewed the original claim, the request for reconsideration, information it obtained independently, and the applicable law and regulations. Upon reconsideration, the NPFC concludes the information in the administrative record does not support TRRC's claim for entitlement to removal costs for the reasons as outlined in the original determination and below. Therefore, this claim on reconsideration is denied.

### **I. DETERMINATION PROCESS:**

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>9</sup> As a result, 5 U.S.C. § 555(e) requires the NPFC to provide a brief statement explaining its decision. This determination is issued to satisfy that requirement.

When adjudicating claims against the OSLTF, the NPFC acts as the finder of fact. In this role, the NPFC considers all relevant evidence, including evidence provided by claimants and evidence obtained independently by the NPFC, and weighs its probative value when determining the facts of the claim.<sup>10</sup> The NPFC may rely upon, is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>11</sup> 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. CLAIM HISTORY:**

On April 12, 2023, TRRC presented its original claim to the NPFC for removal costs for \$440,217.22. The NPFC thoroughly reviewed the original claim, all information provided by TRRC and obtained independently, the relevant statutes and regulations, and ultimately denied the claim. The NPFC's initial determination is hereby incorporated by reference.

### **III. REQUEST FOR RECONSIDERATION:**

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<sup>7</sup> See, TRRC submission, Final OPA claim received April 12, 2023.

<sup>8</sup> See, TRRC official request for reconsideration dated May 31, 2024 and request for 60-day extension of time to submit additional evidence.

<sup>9</sup> 33 CFR Part 136.

<sup>10</sup> 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)).

<sup>11</sup> 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).

The regulations implementing OPA require requests for reconsideration of an initial determination to be in writing and include the factual or legal grounds for the relief requested, along with any additional support for the claim.<sup>12</sup> The claimant has the burden of providing all evidence, information, and documentation deemed necessary by NPFC's Director to support the claim.<sup>13</sup> When analyzing a request for reconsideration, the NPFC performs a *de novo* review of the entire claim submission, including any new information provided by the Claimant in support of its request for reconsideration. The written decision by the NPFC is final.<sup>14</sup>

On May 31, 2024, the NPFC received TRRC's timely request for reconsideration in the amended amount of \$392,318.67 and its request for a 60-day extension of time to submit additional evidence. The NPFC granted the extension of time which ended on July 30, 2024.<sup>15</sup>

#### **IV. FACTUAL BACKGROUND:**

The NPFC's original determination explained the complex facts surrounding the history of the area where this oil spill occurred. As the original determination has been incorporated herein, those facts do not need to be restated here. Nevertheless, there are some facts that should be clarified and emphasized on reconsideration.

In its request for reconsideration, TRRC incorrectly stated that TGLO awarded a lease to Galveston Bay Operating LLC ("GBO") in 2017.<sup>16</sup> On December 17, 1948, TGLO and the Texas School Land Board issued an oil and gas lease called State Lease 33746 to Humble Oil and Refining Co., which covered Tract 22-23B and encompassed 640 acres in Galveston Bay, Chambers County Texas (hereinafter "Lease").<sup>17</sup> The Lease covered the area where the Well eventually became located.<sup>18</sup> On October 4, 1957, the Lease and many other leases were included in a pooling agreement between Humble Oil and Refining Co. and the State of Texas, acting through TGLO ("Pooling Agreement").<sup>19</sup> The Pooling Agreement was variously referred to as Unit 536, Trinity Bay State Unit No. 1, and TRRC Lease No. 03-08004.<sup>20</sup>

By 2016, the lessee's rights under the Lease and Pooling Agreement were held by Galveston Bay Energy, LLC ("GBE"). GBE also held a significant number of other oil and gas property rights and 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

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<sup>12</sup> 33 CFR 136.115(d).

<sup>13</sup> 33 CFR 136.105(a).

<sup>14</sup> *Id.*

<sup>15</sup> *See*, NPFC's executed Tolling Agreement on reconsideration dated June 3, 2024.

<sup>16</sup> Railroad Commission of Texas, Request for Reconsideration received May 31, 2024, page 2.

<sup>17</sup> The Lease, pg. 1.

<sup>18</sup> Map of Well Number 07130010 in Tract 22-23B.

<sup>19</sup> Pooling Agreement, pg. 1.

<sup>20</sup> *Id.* *See also*, *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7-1, pg. 79 and 88 (Bankr. S.D. Tx. 2021)(identifying Trinity Bay State Unit No. 1 as covering Tract 22-23B and identifying well API Number 71-30010 as on Trinity Bay State Unit No. 1); and *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7-10, pgs. 10-11 (Bankr. S.D. Tx. 2021)(identifying the Pooling Agreement as Trinity Bay State Unit No. 1 and TRRC Lease No. 03-08004).

associated equipment (herein after collectively referred to as “Oil and Gas Assets”).<sup>21</sup> The Oil and Gas Assets also included the Well and a bond held by TRRC providing \$6.652 million in cash as security for plugging the wells included in the Oil and Gas Assets (“Well Plugging Bond”).<sup>22</sup> On September 23, 2016, GBE transferred its interest in the Oil and Gas Assets to Progas Energy Services, Inc. (“Progas”).<sup>23</sup> Thereafter, Progas sold GBE’s interest in the Oil and Gas Assets to Galveston Bay Properties LLC (“GBP”).<sup>24</sup> In April 2020, Dark Ruby purchased the Oil and Gas Assets during GBP’s bankruptcy proceedings.<sup>25</sup>

According to Dark Ruby the Well Plugging Bond included both an operator’s fee of \$250,000 and a cash assurance of \$6.6 million.<sup>26</sup> The cash assurance held by TRRC was derived from a Letter of Credit issued by Green Bank on behalf of GBE.<sup>27</sup> The Letter of Credit provided financial assurances that the wells included in the Oil and Gas Assets would be plugged.<sup>28</sup> On July 25, 2016, TRRC cancelled the Letter of Credit in exchange for a cashier’s check from Green Bank for \$6.61 million.<sup>29</sup> After canceling the Letter of Credit, TRRC retained the funds from the cashier’s check to secure the obligation to properly plug and abandon all of the wells included in the Oil and Gas Assets.<sup>30</sup>

Even though Dark Ruby obtained GBE’s interest in the Well Plugging Bond in 2020, TRRC took the position that any obligation it had to distribute the proceeds from the bond was controlled by its April 12, 2017 settlement agreement with Progas, (b) (6), GBO, and GBP.<sup>31</sup> Under the agreement, GBO agreed to plug 13 wells previously owned by (b) (6) and pay a \$644,000 debt owed by (b) (6) and (b) (6).<sup>32</sup> In exchange, TRRC agreed to release the funds securing the Well Plugging Bond after the wells were plugged and the debt was paid.<sup>33</sup> Because none of the wells were ever plugged under the 2017 settlement agreement, TRRC concluded that it was not obligated to release any part of the \$6.6 million to Progas, GBP, or Dark Ruby.<sup>34</sup>

After Dark Ruby obtained ownership of the Oil and Gas Assets, its contractors attempted to become the designated operator responsible for the wells.<sup>35</sup> As part of these efforts, Dark Ruby requested a \$6.6 million credit on behalf of its contractors against the amount due to satisfy the financial responsibility requirements because TRCC still held the funds securing the Well Plugging Bond.<sup>36</sup> TRRC declined to provide Dark Ruby’s contractors with any credit and

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<sup>21</sup> *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 312-1, pgs. 31-102 (Bankr. S.D. Tx 2019).

<sup>22</sup> *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 312-1, pg. 46 (Bankr. S.D. Tx 2019)(Section 2.02 (k)).

<sup>23</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7-1 (Bankr. S.D. Tx. 2021).

<sup>24</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pg. 13 (Bankr. S.D. Tx. 2021)

<sup>25</sup> *In re: Galveston Bay Properties, LLC*, Case No. 19-36075, Doc. 351-1, pg. 3 (Bankr. S.D. Tx 2019).

<sup>26</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 1, pg 2-3 (Bankr. S.D. Tx. 2021).

<sup>27</sup> Railroad Commission of Texas, Request for Reconsideration received May 31, 2024, Exhibit A.

<sup>28</sup> Railroad Commission of Texas, Request for Reconsideration received May 31, 2024, Exhibit A, pgs. 9-10.

<sup>29</sup> Railroad Commission of Texas, Request for Reconsideration received May 31, 2024, Exhibit A, pgs. 1-2.

<sup>30</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 1, pgs. 2-3 (Bankr. S.D. Tx. 2021).

<sup>31</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pgs. 14 and 17-18 (Bankr. S.D. Tx. 2021).

<sup>32</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7-1, pgs. 1-5 (Bankr. S.D. Tx. 2021).

<sup>33</sup> *Id.*

<sup>34</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pg. 18 (Bankr. S.D. Tx. 2021).

<sup>35</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pgs. 20-21 (Bankr. S.D. Tx. 2021).

<sup>36</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 1, pgs. 2-4 (Bankr. S.D. Tx. 2021).

demanded that they post new security totaling \$7.8 million.<sup>37</sup> Relying on the failure to plug any wells as required by the 2017 settlement agreement, TRRC characterized Dark Ruby's interest in the Well Plugging Bond as "a contingent-future interest pending completion of the plugging requirements."<sup>38</sup>

Even though its contractors failed to establish the financial responsibility required by TRRC, Dark Ruby took possession of the Oil and Gas Assets and commenced producing oil from the wells.<sup>39</sup> During inspections on July 13, 2021, Dark Ruby's contractor acknowledged to TRCC that it was producing oil from the Oil and Gas Assets.<sup>40</sup> TRRC concluded this production was unauthorized based on, among other things, Dark Ruby's failure to pay any royalties due under the leases included in the Oil and Gas Assets.<sup>41</sup>

The dispute over whether Dark Ruby and its contractors were authorized to operate the Oil and Gas Assets resulted in Dark Ruby's failure to further maintain any of the Oil and Gas Assets, including the Well. After TRRC's inspection, TGLO cancelled all of the leases in the Oil and Gas Assets on July 20, 2021, including the Lease covering the Well's location.<sup>42</sup> In response, Dark Ruby sought a Temporary Restraining Order seeking to stop TRRC from interfering with Dark Ruby's operation of the Oil and Gas Assets and to allow its contractors a credit from the proceeds of the Well Plugging Bond.<sup>43</sup> Relying on the 2017 settlement agreement, TRRC opposed Dark Ruby's complaint under the theory that none of the proceeds from the Well Plugging Bond were required to be paid out because none of the wells had been plugged.<sup>44</sup> After the court denied Dark Ruby's request for a Temporary Restraining Order<sup>45</sup>, the parties agreed to dismiss the lawsuit on April 8, 2022.<sup>46</sup> After the lawsuit was dismissed, Dark Ruby stopped maintaining any of the Oil and Gas Assets.

Throughout the relevant time periods, TRRC monitored the condition of the Oil and Gas Assets. For example, during August 2020 TRRC inspected 175 oil wells, including the Well, the last approved operator of which, was identified as GBO.<sup>47</sup> During this same time period, TRRC referred 64 wells, including the Well, for enforcement due to non-compliant conditions and issue 10 additional notices of violation.<sup>48</sup> On August 6, 2020, TRRC characterized the Well as "non-compliant" under 16 Texas Administrative Code § 3.14(b)(2) because it had not been properly

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<sup>37</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pgs. 17-18 (Bankr. S.D. Tx. 2021).

<sup>38</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pg. 18 (Bankr. S.D. Tx. 2021).

<sup>39</sup> While in possession of the Oil and Gas Assets, Dark Ruby expended approximately \$2.5 million to repair and maintain them. *See, Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pg. 3 (Bankr. S.D. Tx. 2021).

<sup>40</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7-9, pgs. 2-9 (Bankr. S.D. Tx. 2021).

<sup>41</sup> TRRC's Certified GLO Lease History and Letter of Termination, received July 19, 2024, pg. 63. *See also, Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pgs. 22-23 (Bankr. S.D. Tx. 2021).

<sup>42</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7-10, pgs. 10-11 (Bankr. S.D. Tx. 2021).

<sup>43</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 1 (Bankr. S.D. Tx. 2021).

<sup>44</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 7, pgs. 13-14 (Bankr. S.D. Tx. 2021).

<sup>45</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 13, pgs. 1-2 (Bankr. S.D. Tx. 2021).

<sup>46</sup> *Dark Ruby LLC v. Engelhart*, Case No. 21-03866, Doc. 35, pgs. 1-3 (Bankr. S.D. Tx. 2021).

<sup>47</sup> *TRRC Inspections of Wells With GBO Identified as Last Operator*, rows 720-895, column A (downloaded from TRRC's web site on December 18, 2024).

<sup>48</sup> *Well Violations by GBO*, rows 84-158, columns A and P (downloaded from TRRC's web site on December 18, 2024).

plugged.<sup>49</sup> On April 27, 2022 TRRC inspected the Well again and determined that the Well was compliant at that point.<sup>50</sup> Thus, TRRC's inspections show that the Well was in an acceptable condition 19 days after Dark Ruby's adversary case was dismissed and about a month before this oil spill occurred.

## **V. ANALYSIS ON RECONSIDERATION:**

The regulations implementing OPA require requests for reconsideration of an initial determination to be in writing and include the factual or legal grounds for the relief requested, along with any additional support for the claim in accordance with our governing claims regulations at 33 CFR 136.115(d). The NPFC has thoroughly reviewed and considered TRRC's request for reconsideration.<sup>51</sup> Below is NPFC's analysis of the issues raised on reconsideration.

### ***A. TRRC Argues It Cannot Be a RP Because It Did Not Voluntarily Assume Ownership or Control of the Well***

#### ***TRRC's Contentions***

TRRC acknowledges that a RP may only receive OSLTF reimbursement for removal costs in limited circumstances. Under 33 U.S.C. § 2708, a RP can only receive OSLTF reimbursement upon demonstrating an entitlement to limited liability under 33 U.S.C. § 2704 or a defense to liability under 33 U.S.C. § 2703. Despite this limitation, TRRC argues that it is entitled to OSLTF reimbursement because Texas is not an RP under the OPA. TRRC relies on 33 U.S.C. § 2701(32) as support for its contention that Texas does not satisfy OPA's definition of a RP for an offshore facility because it did not voluntarily assume ownership or control of the well. TRRC theorizes that a State cannot be a RP when it involuntarily assumed ownership or control of an offshore facility due to abandonment or any other involuntary process.<sup>52</sup> TRRC asserts the State of Texas did not install the Well and associated equipment and does not have the authority under state law to drill for or produce oil and gas. TRRC argues the Well and equipment belong to the operator that installed it and remains their property, and the state of Texas involuntarily assumed ownership or control by its owner abandoning the equipment.

#### ***NPFC's Response***

Both Texas and TRRC are RPs for this oil spill. It is undisputed that the Well satisfied OPA's definition of a an offshore facility.<sup>53</sup> A RP for an offshore facility is defined as follows:

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**

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<sup>49</sup> *Well Violations by GBO*, rows, 118, 129, and 135, columns A, G, L and M (downloaded from TRRC's web site on December 18, 2024). *See also, TRRC Inspections of Wells with GBO Identified as Last Operators*, row 855, columns A, G, and L (downloaded from TRRC's website on December 18, 2024).

<sup>50</sup> *TRRC Inspections of Wells with GBO Identified as Last Operator*, row 661, columns A, G, and L (downloaded from TRRC's web site on December 18, 2024).

<sup>51</sup> *See, Railroad Commission of Texas Motion for Reconsideration* received May 31, 2024. *See also, Section III, Argument D with amended final sum of removal costs in the amount of \$392,318.67*, pages 11-12 of 13.

<sup>52</sup> *Railroad Commission of Texas, Request for Reconsideration* received May 31, 2024, pages 6-8.

<sup>53</sup> 33 U.S.C. § 2701(22).

**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.<sup>54</sup>

The NPFC's original determination explained why TRRC is liable as a RP for the oil discharges from the Well and the information provided in the Request for Reconsideration has not changed that conclusion. TRRC does not dispute that the Well satisfied the OPA's definition of an offshore facility. TRRC further acknowledges that a RP for an offshore facility includes any person who has a right of use and easement in the area where offshore facility was located. TRRC does not contend that it should be exempt from liability under the theory that possession of the area had been transferred to another via a lease, assignment or permit. Despite its recognition of how OPA imposes liability for an oil spill from an offshore facility, TRRC incorrectly argues that it is not a RP by theorizing that it did not voluntarily assume ownership or control of the Well.

TRRC's argument misconstrues how OPA defines who will be a RP liable for an offshore facility. Although TRRC does not cite to the definition of an "owner or operator" at 33 U.S.C. § 2701(26), its argument incorrectly conflates the definition of these terms with the definition of a RP for an offshore facility at 33 U.S.C. § 2701(32)(C). Admittedly, the OPA's definition of the terms "owner or operator" excludes States in certain circumstances.<sup>55</sup> However, the OPA does not impose liability for an offshore facility on an "owner or operator".<sup>56</sup> Instead, any person with a right of use and easement in the area where the offshore facility was located will be a RP liable under the OPA.<sup>57</sup> As explained in NPFC's original determination, Texas is a RP because its ownership interest in the submerged lands showed that it had a right of use and easement in the relevant area.

The OPA's definition of an "owner or operator" does not control Texas' ownership interest under state law in the submerged lands where the well was located. Rather, the definition only controls the meaning of the OPA's statutory text. For example, the definition of "owner or operator" at 33 U.S.C. § 2701(26) controls who would be liable for an oil spill from either a vessel or an onshore facility because the OPA's definition of a RP for those structures includes both an owner and operator. The OPA's definition of an owner does not invalidate an ownership interest in property created by state law. In this case, TRRC has presented no credible evidence suggesting that Texas did not own the submerged lands underneath the Well.<sup>58</sup> To the contrary, the evidence conclusively establishes that Texas owns the submerged lands. If Texas did not own

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<sup>54</sup> 33 U.S.C. § 2701(32)(C).

<sup>55</sup> 33 U.S.C. § 2701(26).

<sup>56</sup> 33 U.S.C. § 2701(32)(C).

<sup>57</sup> *Id.*

<sup>58</sup> Tex. Nat. Res. Code § 11.012(c). *See also, TH Investments, Inc. v. Kirby Inland Marine, L.P.*, 218 S.W.3d 173, 182 (Tex.Civ.App.--Houston 2007, pet. denied); and *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.").

those submerged lands, it would not have been able to lease out the area for oil and gas development. As the owner of the relevant submerged lands, Texas is a RP for this offshore facility oil spill because it held a right of use and easement in the area and the Well was not covered by an active lease when the oil spill occurred.

Moreover, because a state agency is part of the state, TRRC's entitlement to OSLTF reimbursement cannot exceed any right of recovery the state of Texas may have. TRRC is not a separate entity from Texas. Under Texas law, an agency having statewide jurisdiction is considered part of the state as opposed to an independent entity.<sup>59</sup> Because TRRC's jurisdiction includes all wells and pipelines throughout the state, TRRC is part of Texas. Further, TRRC has successfully defended against lawsuits by relying on state sovereign immunity.<sup>60</sup> By relying on state sovereign immunity, TRRC acknowledges that it is part of Texas. As a result, TRRC may only receive OSLTF reimbursement when Texas is authorized to receive those funds.<sup>61</sup> In this case, Texas' right to OSLTF reimbursement is precluded by 33 U.S.C. § 2708 because its ownership of the submerged lands underneath the Well satisfies the definition of a RP. Because Texas may not recover OSLTF reimbursement, TRRC is likewise precluded from recovery and this claim must be denied.

Even if TRRC's status was completely independent from Texas' ownership of the relevant submerged lands, TRRC would still be precluded from receiving OSLTF reimbursement. Based solely on its own interests in the area, TRRC satisfied OPA's definition of a RP for an offshore facility. In addition to a person with a right of use and easement, the OPA's definition of a RP for an offshore facility includes a permittee of the area. The OPA defines a "permittee" to mean "a person holding an authorization, license, or permit for geological exploration issued under ...applicable State law".<sup>62</sup> Because TRRC satisfies this definition of a permittee, it is also a RP under the OPA.

TRRC acts as the statutory agent on behalf of Texas to conserve its oil and gas resources.<sup>63</sup> As part of its responsibilities, TRRC grants permits for drilling and operating offshore wells on submerged lands owned by Texas, including the area where the Well was located.<sup>64</sup> Because it authorizes others to conduct geological exploration, TRRC holds authority to conduct geological exploration under Texas law, which is the requisite authority to satisfy OPA's definition of a permittee. If it were otherwise, TRRC would not be able to issue permits authorizing geological

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<sup>59</sup> *Monsanto Co. v. Cornerstones Mun. Utility Dist.*, 865 S.W.2d 937, 939-40 (Tex. 1993) ("The ordinary meaning of 'state', as it is used by the Texas courts, envisions an entity having statewide jurisdiction rather than an entity having local or limited jurisdiction."). See also, Tex. Nat. Res. Code § 81.01001(a) (identifying TRRC as a state agency subject to the Texas Government Code Chapter 325).

<sup>60</sup> *United States Oil Recovery Site Potentially Responsible Parties Group v. Railroad Commission of Texas*, 898 F.3d 497, 501-502 (5<sup>th</sup> Cir. 2018) (holding that state sovereign immunity precluded a lawsuit against TRRC seeking contribution for environmental clean up costs).

<sup>61</sup> Tex. Nat. Res. Code § 81.051.

<sup>62</sup> 33 U.S.C. § 2701(28).

<sup>63</sup> *Gulf Land Co. Atlantic Refining Co.*, 113 F.2d 902, 906 (5<sup>th</sup> Cir. 1940) ("[T]he commission is authorized as statutory agent of the state to conserve its resources of oil and gas in doing so to prorate oil fields and grant permits for drilling and operating wells therein.")

<sup>64</sup> Tex. Nat. Res. Code § 81.051. See also, 16 Tex. Admin. Code § 3.5; and 56 Tex. Jur. 3d Oil and Gas § 781 ("The Texas Railroad Commission is charged generally with the conservation of oil and gas in their production, storage and transportation, and is specifically required and authorized to make and enforce rules and orders for the drilling of wells.")



exploration because TRRC must hold that authority in order to transfer it to another. Even if TRRC never actually engaged in any geographical exploration, TRRC's authority to issue permits stills satisfies OPA's definition of a permittee. Because no active lease, assignment or permit authorized another person to use the submerged lands underneath the Well, TRRC satisfies OPA's definition of a RP for an offshore facility. As a RP, TRRC is not entitled to the OSLTF compensation sought by this claim.

***B. TRRC Argues That Texas Is Not a RP Because TGLO Lacks Authority to Produce Oil.***

***TRRC's Contentions***

TRRC argues that Texas is not a responsible party because TGLO lacks statutory authority to actually produce oil from the area. TRRC asserts that TGLO "does not have the authority to use the subsurface estate to conduct any commercial practices, including oil and gas production."<sup>65</sup> TRRC posits that the absence of express statutory authority permitting TGLO to produce oil precludes a determination that Texas holds a right of use and easement under the OPA.<sup>66</sup>

***NPFC's Response***

The preponderance of evidence establishes that Texas is a RP for this incident. TRRC acknowledges that Texas owned the submerged lands underneath the Well.<sup>67</sup> Because Texas owned a fee simple interest in the submerged lands, it had a right of use and easement in the relevant area. Also, TRRC was a permittee under the OPA because it held the authority for geological exploration in the area.<sup>68</sup> Because there is no evidence in the administrative record indicating that possession and right to use the area had been transferred to another by a lease, assignment, or permit, TRRC is a RP for this oil spill.<sup>69</sup> The mere fact that the Texas Legislature has not authorized TGLO to produce oil does not extricate TRRC from its status as an RP. Because Texas owns the submerged lands, the Texas Legislature could authorize TGLO or any other state agency to use the submerged lands in any manner. Notwithstanding TRRC's argument to the contrary, Texas' fee simple ownership interest in the submerged lands includes a right of use and easement under the OPA.

***C. TRRC Claims an Entitlement to a Third-Party Defense.***

***TRRC's Contentions***

TRRC argues that it should not be liable for this oil spill because the prior operator's failure to maintain a valve satisfies the requirements for a third-party defense under 33 U.S.C. § 2703(a)(3).<sup>70</sup> TRRC argues it had no control, authority, or responsibility to maintain the Well; prior operators had the responsibility for maintaining their own equipment; and the failure to

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<sup>65</sup> Railroad Commission of Texas, Request for Reconsideration received May 31, 2024, page 9.

<sup>66</sup> Railroad Commission of Texas, Request for Reconsideration received May 31, 2024, page 8.

<sup>67</sup> *Id.*

<sup>68</sup> 33 U.S.C. § 2701(28).

<sup>69</sup> 33 U.S.C. § 2701(31)(C).

<sup>70</sup> Railroad Commission of Texas, Request for Reconsideration received May 31, 2024, page 10.

maintain the valve was the sole cause of the spill.<sup>71</sup> TRRC argues that it took reasonable steps to prevent third parties from causing an oil spill by requiring financial assurance to guaranty the plugging of the Well.<sup>72</sup> TRRC also argues that it took reasonable steps to mitigate the harm from any spill by promptly stopping the discharge.<sup>73</sup> TRRC contends it did not own or control the Well after the lease terminated.<sup>74</sup>

### ***NPFC's Response***

In order to establish a third-party defense under the OPA, TRRC must prove that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by “an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party”.<sup>75</sup> In addition, TRRC must also establish that it “exercised due care with respect to the oil concerned” and “took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions”.<sup>76</sup> As explained below, TRRC has not carried its burden of proving by a preponderance of credible evidence that it is entitled to a third-party defense.

#### ***(i) TRRC Failed to Prove that Any Prior Operator Solely Caused the Oil Spill.***

In order to establish a third-party defense, a RP must initially show that the oil spill was solely caused by another person. A RP will not satisfy its burden of proof with speculative and hypothetical accounts of how the oil spill occurred.<sup>77</sup> An oil spill will not be solely caused by a third party when the RP's acts or omissions proximately caused the incident.<sup>78</sup> The defense turns on sole causation, not fault. A RP will not be entitled to assert the sole cause of a third party as a defense when: (1) but for the RP's act or omission the discharge would not have occurred; and (2) the discharge was a foreseeable consequence of the act or omission. Just like other environmental casualties, an oil spill can have more than one proximate cause.<sup>79</sup> If a RP's act or omission is at least one of the proximate causes of a discharge, that RP will not be able to establish a third-party defense. When a RP proximately causes a spill, the third-party defense does not apply even if the RP's acts or omissions were not wrongful or negligent.

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> 33 U.S.C. § 2703(a)(3).

<sup>76</sup> *Id.*

<sup>77</sup> *U.S. v. Kilroy & Associates, Inc.*, 71 ERC 1219, 2009 WL 3633891 (W.D. Wa. 2009)(holding that a RP's “randomized, hypothetical accounts” were insufficient to exonerate a RP from liability based upon OPA's third-party defense). *See also, U.S. v. W.R. Grace & Co.-Conn.*, 280 F.Supp.2d 1135, 1147 (D. Mont. 2002)(holding that hypothetical and unsupported allegations will not support a third-party defense under CERCLA).

<sup>78</sup> *U.S. v. West of England Ship Owner's Mutual Protection & Indemnity Assoc.*, 872 F.2d 1192, 1198-1200 (5<sup>th</sup> Cir. 1989)(holding that the non-negligent decision to navigate outside a marked channel was a proximate cause of the oil spill and precluded a successful defense based on the sole causation of a third party).

<sup>79</sup> *See e.g., U.S. v. Stringfellow*, 661 F.Supp. 1053, 1061 (C.D. Ca. 1987)(holding that CERCLA's third-party defense only applies when a party totally unrelated to a RP solely causes the release of hazardous substances and denying the defense because there were multiple causes of the pollution).

In this case, TRRC alleges an entitlement to a third-party defense by summarily claiming that a prior operator failed to maintain a valve on the Well. Other than alleging a general failure of maintenance and a broken valve, TRRC does not attempt to specifically show what the prior operators did or failed to do that caused the Well to discharge oil. TRRC offers no explanation of any required maintenance or actual practices of the prior operators. TRRC's generalized and hypothetical allegations do not show that the discharge was solely caused by a prior operator. Thus, TRRC has failed to carry its burden of proving that this incident was solely caused by the acts or omissions of a third party.

TRRC's argument also fails to recognize that its enforcement of the contractual terms in the Lease and 2017 settlement agreement was a proximate cause of the discharge. Before the Lease was cancelled and TRRC refused to provide Dark Ruby's contractors with a credit for the Well Plugging Bond, Dark Ruby spent \$2.5 million to maintain the Oil and Gas Assets so they did not threaten the environment. It is reasonable to conclude that Dark Ruby would have likely continued to maintain the Oil and Gas Assets including the Well and thus reasonably foreseeable that cancelling the Lease and denying Dark Ruby's request for a credit under the 2017 settlement agreement would prompt Dark Ruby to cease maintaining the Oil and Gas assets, including the Well.<sup>80</sup> Similarly, it is also reasonably foreseeable that the Well would eventually discharge oil if left unattended in the ocean. Given the totality of facts in this case, NPFC determines as a matter of fact that TRRC's enforcement of the terms in the Lease and 2017 settlement agreement proximately caused this oil spill. As a result, TRRC is not entitled to a defense because it has not proven that this incident was solely caused by a third party.

***(ii) The Prior Operators' Acts and Omissions Occurred in Connection With Contractual Relationships Established By the Lease and 2017 Settlement Agreement.***

OPA's third-party defense also will not apply when the oil spill was caused by a third party whose actions occurred in connection with any contractual relationship with the RP.<sup>81</sup> The contractual element of the third-party defense is "intended to prevent otherwise responsible parties from avoiding liability by pointing to the conduct of foreseeable third parties."<sup>82</sup> As a result, an act or omission by a third party in connection with any contractual relationship, including an indirect one, will preclude the defense. Because an act or omission in connection with an indirect contractual relationship precludes the defense, simply alleging the RP lacks contractual privity with the third party does not satisfy the defense.<sup>83</sup> Also, for purposes of the defense, acts or omissions occur in connection with a contractual relationship "whenever the acts or omissions relate to the contractual relationship in the sense that the third party's acts and omissions would not have occurred but for that contractual relationship."<sup>84</sup>

In this case, TRRC contends that the failure of the prior operators to maintain a valve on the Well solely caused the spill. This unsupported allegation fails to establish a third-party defense

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<sup>80</sup> The NPFC does not opine on the propriety of the state's decision. Rather, the decision is of no moment to the causation element of the defense. Notwithstanding the rationale behind the state's decision, once the decision is made, that which reasonably follows is borne by the state.

<sup>81</sup> *Buffalo Marine Services, Inc. v. U.S.*, 663 F.3d 750, 757 (5<sup>th</sup> Cir. 2011).

<sup>82</sup> *International Marine Carriers v. Oil Spill Liability Trust Fund*, 903 F.Supp. 1097, 1106 (S.D. Tex. 1994).

<sup>83</sup> *Buffalo Marine Services, Inc. v. U.S.*, 663 F.3d 750, 754 (5<sup>th</sup> Cir. 2011).

<sup>84</sup> *U.S. v. American Commercial Lines, L.L.C.*, 875 F.3d 170, 175 (5<sup>th</sup> Cir. 2017).

under the OPA because, among other things, any such omission occurred in connection with a contractual relationship established by the Lease and/or the 2017 settlement agreement. The OPA's definition of a contractual relationship expressly includes leases.<sup>85</sup> Any obligation of a prior operator to maintain the Well would not have arisen but for the Lease. Additionally, but for the denial of any credit for the Well Plugging Bond under the 2017 settlement agreement, it is likely that Dark Ruby would not have ceased its operations and left the Well unattended leading to its deterioration<sup>86</sup>. Both the Lease and the 2017 settlement agreement show a contractual relationship between the prior operators and TRRC. Thus, even if the prior operators failed to properly maintain a valve on the Well, TRRC is still not entitled to a third-party defense under the OPA because any act or omission of the prior operators occurred in connection with the contractual relationships established by the Lease and 2017 settlement agreement.

***(iii) TRRC Has Not Shown It Exercised Due Care or Took Reasonable Precautions.***

In order to establish a third-party defense, a RP must show that it both “exercised due care with respect to the oil” and “took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions”.<sup>87</sup> In its Request for Reconsideration, TRRC argues that it satisfied these requirements “by requiring financial assurance as provided by state law” and “sending out plugging contractors within twenty-four hours of discovering the spill.”<sup>88</sup> TRRC further argues that it did not own or exercise any control over the Well after the Lease terminated.<sup>89</sup> As explained below, TRRC has not carried its burden of proof on these elements of the defense.

Contrary to TRRC's suggestion, compliance with a statute or regulation does not automatically establish that a person acted with due care.<sup>90</sup> Thus, the financial assurance posted by the prior operators does not *per se* establish that TRRC exercised due care or took reasonable precautions against foreseeable acts or omissions of a third party. While requiring a bond to secure the costs of plugging a well may address the consequences of a spill, such a bond does not reasonably establish either due care towards the oil before the spill or a reasonable precaution to prevent an oil spill. In order to establish the defense, TRRC would have had to demonstrate that it exercised due care to prevent an oil spill and took precautions aimed at preventing pollution. Simply requiring an operator to post financial assurance does not satisfy that burden.

The administrative record does not support TRRC's allegation that it exercised no control over the Well after the Lease was cancelled. After the Lease was cancelled on July 20, 2021 and before this oil spill occurred on May 29, 2022, TRRC inspected the Well on April 27, 2022. Contrary to its assertions in the Request for Reconsideration, TRRC exercised dominion and

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<sup>85</sup> 33 U.S.C. § 2703(d)(1).

<sup>86</sup> As before, the NPFCA is not opining on the rationale and propriety of the state's decision. Rather it is simply not relevant to whether or not there was a contractual relationship between the parties as evidenced by the Lease and 2017 settlement agreement.

<sup>87</sup> 33 U.S.C. § 2703(a)(3).

<sup>88</sup> Railroad Commission of Texas, Request for Reconsideration received May 31, 2024, page 10.

<sup>89</sup> *Id.*

<sup>90</sup> *Baby Oil, Inc. v. U.S.*, 938 F.Supp.2d 640, 646 (E.D. La. 2013)(“A statute or regulation can set the minimum requirements for due care, and a party's statutory violation may establish negligence per se. A party's full compliance with statutes and regulations, however, does not automatically establish that it was acting with due care.”).

control over the Well while inspecting it. Even though it inspected the Well, TRRC has not produced any evidence from the inspection specifically addressing the Well's condition prior to the spill or explained how it exercised due care to prevent an oil spill. Merely contending that it exercised due care by requiring a financial responsibility does not satisfy TRRC's burden of showing due care with respect to the oil or reasonable precautions against the third party's acts or omissions.

***D. Even though It Received \$6.6 Million from the Well Plugging Bond, TRRC Argues that Its Costs Are Uncompensated.*<sup>91</sup>**

***TRRC's Contentions***

TRRC asserts that the NPFC's denial determination inaccurately characterized their removal expenses as having been compensated by the Well Plugging Bond. TRRC further asserts that NPFC misunderstood the purpose of the Well Plugging Bond because it was intended to cover the expense of plugging 137 other wells in addition to the Well.<sup>92</sup> After dividing the total amount of the Well Plugging Bond by 138 wells, TRRC concludes that Well Plugging Bond only provided compensation totaling \$47,898.55 for the cost of plugging the Well and the remaining amount of financial assurance should be evenly attributed to the other 137 wells.<sup>93</sup> TRRC also argues that the Bond was "not intended for emergency situations, but to defray the ordinary expenses of oil and gas regulation."<sup>94</sup>

Based on the foregoing, TRRC argues that it should at least be entitled to recover \$392,318.87 as uncompensated removal costs. TRRC arrived at this figure by deducting \$47,898.55 from the total cost of plugging the Well under the theory that only a portion of the Well Plugging Bond was attributable to the Well.<sup>95</sup>

***NPFC's Response***

The OSLTF is only available to reimburse claimants who can demonstrate uncompensated removal costs and damages under OPA.<sup>96</sup> Removal costs include "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 such an incident."<sup>97</sup> In order to prove an entitlement to OSLTF reimbursement, a claimant must show that it suffered an actual loss of either removal costs or damages that has not otherwise been compensated. A claimant will not satisfy this burden by acknowledging receipt of compensation for the loss, but speculating that most of the received compensation ought to be attributed to future losses that have yet to occur.

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<sup>91</sup> Because this specific issue is raised on reconsideration, it is addressed here. However, the NPFC emphasizes that the RP of an offshore facility, such as this, is liable for the total of all removal costs plus \$167.8069 million. Once it reaches this limit, it may file a claim against the OSLTF. *See*, 33 U.S.C. § 2704(a)(3); 30 CFR 553.702 (adjusting the statutory limit to reflect the increase in the Consumer Price Index).

<sup>92</sup> Railroad Commission of Texas, Request for Reconsideration received May 31, 2024, pages 11-12.

<sup>93</sup> *Id.*

<sup>94</sup> Railroad Commission of Texas, Request for Reconsideration received May 31, 2024, page 11.

<sup>95</sup> Railroad Commission of Texas, Request for Reconsideration received May 31, 2024, pages 11-12.

<sup>96</sup> 33 U.S.C. § 2712(a)(4).

<sup>97</sup> 33 U.S.C. § 2701(31).

With this claim, TRRC seeks reimbursement for removal costs associated with plugging the Well. In support of its claim, TRRC provided the affidavit of Ms. (b) (6) who is the Director of the P-5 and Financial Assurance Department of the TRCC.<sup>98</sup> Ms. (b) (6) affidavit shows that the Bond covered the Well. Ms. (b) (6) further states that GBO, the last registered operator of the Well, is currently delinquent in its regulatory responsibilities. Without offering any support for her contention, Ms. (b) (6) opines that the \$6.6 million from the Well Plugging Bond will be insufficient to ensure that the other 137 wells will be properly plugged.<sup>99</sup>

TRRC's evidence is unpersuasive and does not establish that all of the \$6.6 million must be divided among all the other 137 wells. Importantly, TRRC makes no effort to show that any of the other 137 wells need to be plugged to stop an ongoing oil discharge or to prevent a substantial threat of an oil discharge in the future. Ms. (b) (6) affidavit incorrectly assumed that all of the 137 wells require plugging. Ms. (b) (6) opinion is assailable because it is not supported with any supporting documentation showing which of these 137 wells, if any, need to be plugged. Further, Ms. (b) (6) does not offer any estimate of the actual cost to plug the other wells. Without evidence showing that another well needed to be plugged and the actual cost of that repair, it would be unreasonable to apportion any part of the \$6.6 million to repairing another well.

The administrative record suggests that TRRC has not incurred any costs at all to plug the other 137 wells allegedly covered by the Well Plugging Bond. Thus, it is beyond reasonable dispute that the \$6.6 million from the Well Plugging Bond more than covered the removal costs resulting from this incident. Given this context, TRRC has not demonstrated that it has incurred uncompensated removal costs that are eligible for OSLTF reimbursement. Thus, regardless of TRRC's RP status or any applicability of a third-party defense, this claim must be denied.

## ***VI. CONCLUSION:***

The NPFC has thoroughly reviewed all documentation submitted with the claim, analyzed the applicable law and regulations, and as discussed in detail above, has concluded that the claimant has not demonstrated, by a preponderance of the evidence, that it is entitled to a uncompensated removal cost claim. As such, it is denied.

*Russell C. Proctor FOR*

Claim Supervisor: ***Russell C. Proctor***

Date of Supervisor's review: ***12/20/2024***

Supervisor Action: ***Denial Approved***

<sup>98</sup> See, affidavit of Ms. (b) (6) dated May 30, 2024 and identified as Exhibit B to the TRRC request for Reconsideration.

<sup>99</sup> *Id.*