

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

<b>Claim Number:</b>	UCGPE24902-DRP001
<b>Claimant:</b>	Aztec Marine LLC dba Yacht Deck
<b>Type of Claimant:</b>	Business
<b>Type of Claim:</b>	Property Damage And Removal Costs
<b>Claim Manager:</b>	(b) (6)
<b>Amount Requested:</b>	\$728,502.85
<b>Action Taken:</b>	Denial

### **EXECUTIVE SUMMARY:**

On January 22, 2024, over four inches of rain fell in the San Diego watershed area.<sup>2</sup> Rain drained into Chollas Creek, a thirty-mile-long natural and concrete creek flood basin.<sup>3</sup> Chollas Creek is generally a dry creek upstream of the confluence of the north and south Chollas Creek channels.<sup>4</sup> The location of the claimant's business is upstream of the confluence.<sup>5</sup> The rain caused the water level to rise in some places of the creek to five feet above ground level flooding some businesses in the Logan Barrio of San Diego.<sup>6</sup>

The United States Environmental Protection Agency (EPA) Region IX provided the Federal On-Scene Coordinator (FOSC) for the incident and produced three Pollution Reports (POLREP) for the event.<sup>7</sup> The POLREPs covered five sites (A through E) that correspond to various locations impacted by the flooding. The claimant's business is located at 3373 National Avenue in San Diego.<sup>8</sup> This location corresponds to "Site B" in the EPA POLREPs.<sup>9</sup> The EPA stated in its POLREPs as to "Site B": "When the flood waters at site B recede[d], they deposited a large amount of mud inside all of the businesses on the property. The oil released from the auto shops on the property is commingled with this mud in the form of heavy sheen and black oil. The mud is both inside the buildings and outside the buildings. The automotive shop, where the majority

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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> POLREP 1, section 1.1.2 Site Description dated January 25, 2024.

<sup>3</sup> *Id.*

<sup>4</sup> California Regional Water Quality Control Board, San Diego Region Investigative Order No. R9-2015-0058 report, page 2.

<sup>5</sup> For the sole purposes of providing a detailed analysis and articulating the other deficiencies attendant with this claim that render it non-compensable, the NPFC will assume without deciding that the area where the claimant's actions took place qualifies as "navigable waters" as that term is defined by OPA. *See*, 33 U.S.C. § 2701(21).

<sup>6</sup> POLREP 1, section 1.1.2.1 Location dated January 25, 2024.

<sup>7</sup> POLREP 1 dated January 25, 2024; POLREP 2 dated January 26, 2024; POLREP 3 dated January 30, 2024 (collectively "POLREPS").

<sup>8</sup> Original Claim submission received March 6, 2024.

<sup>9</sup> POLREPs. The EPA later refers to Site B as "Division B" with no discernible difference.

of the oil is believed to have originated from, has a large quantity of free oil inside the shop. All of the storm drains on the property are clogged with sediment and oil. Additionally, over 100 cars were submerged in the flood, their contribution to the quantity of petroleum released is unknown.”<sup>10</sup> The Pollution Reports continues, “[p]etroleum products released as a result of the flooding has been mixed with the sediment deposited from the flood waters on the street along [other nearby areas]. The petroleum products are believed to be a mixture of waste oil, motor oils and hydraulic fluids (oils). It has also been deposited all over industrial park at Site B.”<sup>11</sup> After its initial POLREP, the EPA added the following information as it related to Site B “... there is tow yard next to the industrial park that a large quantity of cars that were submerged in the flood, that may have leaked petroleum products into the flood waters”<sup>12</sup>

A letter provided by the EPA FOSC stated the claimant provided assistance during the cleanup of the property where the claimant’s facility is located.<sup>13</sup>

On March 6, 2024, the NPFC received the claimant’s submission seeking reimbursement of property damages, lost profits and removal costs totaling \$728,502.85.<sup>14</sup> At that point, the claimant had not properly presented its claim to the responsible party that owned the facility that the FOSC had identified as discharging the oil that allegedly caused the claimant’s damages.<sup>15</sup> The claimant later presented the claim to the identified responsible party and NPFC began adjudicating the claim.

The NPFC has thoroughly reviewed all documentation submitted with the claim, information it has collected independently, and analyzed the applicable law and regulations. After careful consideration, the claim must be denied because the claimant did not provide sufficient documentation that the claimed damages and removal costs were incurred as a result of oil as defined by the Oil Pollution Act of 1990.<sup>16</sup> Notwithstanding, the claim also fails because the claimant did not provide the required values of the alleged damage, nor sufficient documentation to prove compensable removal actions as required by the regulations. As such, the claim must be denied.<sup>17</sup>

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

The NPFC utilizes an informal process when adjudicating claims against the Oil Spill Liability Trust Fund (OSLTF).<sup>18</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.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> POLREPs 2 and 3.

<sup>13</sup> U.S. EPA letter dated January 29, 2024, submitted with claim as Attachment C2.

<sup>14</sup> Original Claim submission received March 6, 2024. The EPA FOSC identified and designated the source of the oil pertaining to the claimant. Motor Car Services, a neighboring business in the same industrial area as the claimant, owned the oil drums that released oil into the flood waters and may have affected the claimant’s business. For this reason, the NPFC instructed the claimant to present his claim to the owner of that source.

<sup>15</sup> *See*, 33 U.S.C. § 2713(a); 33 CFR 136.103.

<sup>16</sup> 33 U.S.C. § 2701(23).

<sup>17</sup> *See*, 33 CFR 136.105; *see generally*, 33 CFR Part 136.

<sup>18</sup> 33 CFR Part 136.

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>19</sup> The NPFC may rely upon, but is not bound by the findings of fact, opinions, or conclusions reached by other entities.<sup>20</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. INCIDENT, RESPONSIBLE PARTY AND RECOVERY OPERATIONS:**

### ***Incident***

On January 22, 2024, over four inches of rain fell in the San Diego watershed area.<sup>21</sup> Rain drained into Chollas Creek, a thirty-mile-long natural and concrete creek flood basin.<sup>22</sup> Chollas Creek is generally a dry creek upstream of the confluence of the north and south Chollas Creek channels.<sup>23</sup> The location of the claimant's business is upstream of the confluence. The rain caused the water level to rise in some places of the creek to five feet above ground level flooding some businesses in the Logan Barrio of San Diego.<sup>24</sup>

The United States Environmental Protection Agency (EPA) Region IX provided the Federal On-Scene Coordinator (FOSC) for the incident and produced three Pollution Reports (POLREP) for the event.<sup>25</sup> The POLREPs covered five sites (A through E) that correspond to various locations impacted by the flooding. The claimant's business is located at 3373 National Avenue in San Diego.<sup>26</sup> This location corresponds to "Site B" in the EPA POLREPs.<sup>27</sup> The EPA stated in its POLREPs as to "Site B": "When the flood waters at site B recede[d], they deposited a large amount of mud inside all of the businesses on the property. The oil released from the auto shops on the property is commingled with this mud in the form of heavy sheen and black oil. The mud is both inside the buildings and outside the buildings. The automotive shop, where the majority of the oil is believed to have originated from has a large quantity of free oil inside the shop. All of the storm drains on the property are clogged with sediment and oil. Additionally, over 100 cars were submerged in the flood, their contribution to the quantity of petroleum released is unknown."<sup>28</sup> The Pollution Reports continues, "[p]etroleum products released as a result of the flooding has been mixed with the sediment deposited from the flood waters on the street along

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<sup>19</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>20</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).

<sup>21</sup> POLREP 1, section 1.1.2 Site Description dated January 25, 2024.

<sup>22</sup> POLREP 1, section 1.1.2 Site Description dated January 25, 2024.

<sup>23</sup> California Regional Water Quality Control Board, San Diego Region Investigative Order No. R9-2015-0058 report at p. 2 of 18.

<sup>24</sup> POLREP 1, section 1.1.2.1 Location dated January 25, 2024.

<sup>25</sup> POLREP 1 dated January 25, 2024; POLREP 2 dated January 26, 2024; POLREP 3 dated January 30, 2024 (collectively "POLREPS"). Much of the information is the same throughout each of the POLREPs.

<sup>26</sup> Original Claim submission received March 6, 2024.

<sup>27</sup> POLREPs. The EPA later refers to Site B as "Division B" with no discernible difference.

<sup>28</sup> *Id.*

[other nearby areas]. The petroleum products are believed to be a mixture of waste oil, motor oils and hydraulic fluids (oils). It has also been deposited all over industrial park at Site B.”<sup>29</sup> After its initial POLREP, the EPA added the following information as it related to Site B “... there is tow yard next to the industrial park that a large quantity of cars that were submerged in the flood, that may have leaked petroleum products into the flood waters”<sup>30</sup>

A letter provided by the EPA FOSC stated the claimant provided assistance during the cleanup of the property where the claimant’s facility is located.<sup>31</sup>

### ***Responsible Party***

The EPA identified Motor Car Services as the responsible party for the oil that released and gave rise to this claim.<sup>32</sup> Motor Car Services, a neighboring business in the same industrial area as the claimant, owned oil drums that released oil into the flood waters and may have affected the claimant’s property.

### ***Recovery Operations***

This section describes the recovery operations attendant to the entirety of the incident, not necessarily operations that occurred in the location of the activities and alleged damages that gave rise to this claim.

The California Department of Fish and Wildlife Office of Spill Prevention and Response (“CADFW OSPR” or “SOSC”) was the State On Scene Coordinator for the incident. The SOSC notified the FOSC about the incident on the evening of January 22, 2024.<sup>33</sup>

The San Diego County Environmental Health (SDCOEH) Hazardous Incident Response Team (HIRT) and CADFW OSPR responded to the flood and related spills. SDCOEH placed sorbent boom in the creek.<sup>34</sup> The FOSC arrived in the morning on January 23, 2024.<sup>35</sup>

The FOSC hired an Emergency and Rapid Removal Services (ERRS) contractor, Patriot Environmental Services.<sup>36</sup> Boom and sorbents were deployed to mitigate the damage. Contaminated debris was collected by contractors and private business owners and was placed in bins.<sup>37</sup> The response included removal of contaminated soil and sediment, drain cleaning, and pressure washing after soils and sediments were removed.<sup>38</sup>

As to Site B related to this incident, the Pollution Reports stated that EPA contractors “began to clean the oil and sediment out of the drains at Site B and scrape up some of the contaminated

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<sup>29</sup> *Id.*

<sup>30</sup> POLREPs 2 and 3.

<sup>31</sup> U.S. EPA letter dated January 29, 2024, submitted with claim as Attachment C2.

<sup>32</sup> Telephone conversation between EPA FOSC and NPFC dated April 17, 2024; and email from EPA FOSC to NPFC dated May 02, 2024.

<sup>33</sup> POLREP 1, section 2.1.2 Response Actions to Date dated January 25, 2024.

<sup>34</sup> POLREP 1, section 2.1.2 Response Actions to Date dated January 25, 2024.

<sup>35</sup> POLREP 1, section 1.1 Background Mobilization Date dated January 25, 2024.

<sup>36</sup> POLREP 1, section 2.1.2 Response Actions to Date dated January 25, 2024.

<sup>37</sup> POLREP 1, section 2.1.2 Response Actions to Date dated January 25, 2024.

<sup>38</sup> POLREPs.

soil.”<sup>39</sup> The contractors also “provided an oil debris bin for the businesses at Site B. The business owners were allowed to place oil contaminated debris in the bin under the supervision of [EPA contractors].”<sup>40</sup> Further it stated “[EPA contractors] conducted a preliminary scrap [sic] of the contaminated sediment of the soil in Site B. [The contractors] also prepped the outfall for site B for jetting and decon. . . by booming the outfall.” There is no mention of what removal activities may have been done by the claimant. The only statement by the FOSC as to the claimant was in the form of letter that stated, “EPA appreciates your assistance during the cleanup of the property where your facility is located.”<sup>41</sup>

### **III. CLAIMANT AND RP:**

When the claimant initially submitted its claim to the OSLTF via the NPFC, it had not submitted its claim to the identified RP.<sup>42</sup> Once the NPFC obtained information that the EPA identified the potential source of the oil that allegedly damaged the claimant’s property and the NPFC informed the claimant that it was required to present its claim to that RP.<sup>43</sup> The claimant presented its claim to the RP on October 17, 2024.<sup>44</sup>

### **IV. CLAIMANT AND NPFC:**

On March 6, 2024, the NPFC received a submission from the claimant seeking property damages of \$693,922.85, lost profits of \$5,700.00 and removal costs of \$28,880.00 allegedly incurred due to the Chollas Creek flash flood and oil spill. The submission consisted of the OSLTF Optional Claim Form, claimed-amount breakdown, a letter from the USEPA Region IX FOSC to the claimant, EPA POLREPs, teak purchase invoices from 2022 and 2023, photographs, an email from the Prodim Proliner manufacturer and a purchase invoice for a new Prodim Proliner electronic measuring machine.<sup>45</sup> The total claimed is \$728,502.85.

### **V. DISCUSSION:**

An RP is liable for all removal costs and damages resulting from either an oil discharge or a substantial threat of oil discharge into a navigable water of the United States.<sup>46</sup> An RP’s liability is strict, joint, and several.<sup>47</sup> 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

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> While the letter states that it could be used as “proof of coordination with the EPA FOSC” in the event the recipient files a third-party claim, there is no mention of what the claimant actually did to meet the definition of compensable “removal costs” as defined in OPA at 33 U.S.C. § 2701(31). Further, the NPFC understands that this letter was provided to several business owners in the adjacent industrial park.

<sup>42</sup> Initial Claim Submission received March 6, 2024..

<sup>43</sup> Email from the NPFC to the Claimant dated May 14, 2024.

<sup>44</sup> Email from the Claimant to the NPFC dated October 21, 2024.

<sup>45</sup> Original Claim submission received March 6, 2024.

<sup>46</sup> 33 U.S.C. § 2702(a).

<sup>47</sup> *See*, H.R. Rep. No 101-653, at 102 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 780.

favoring those responsible for the spills.”<sup>48</sup> 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.”<sup>49</sup> 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.”<sup>50</sup>

The NPFC is authorized to pay claims for uncompensated removal costs that are consistent with the National Contingency Plan (NCP).<sup>51</sup> OPA also provides a mechanism for compensating parties who have incurred damages where the responsible party has failed to do so. The NPFC has promulgated a comprehensive set of regulations governing the presentment, filing, processing, settling, and adjudicating such claims.<sup>52</sup> 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.<sup>53</sup>

Before reimbursement can be authorized for uncompensated removal costs, the claimant must demonstrate by a preponderance of the evidence:

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were directed by the FOSC or determined by the FOSC to be consistent with the National Contingency Plan;<sup>54</sup>
- (d) That the removal costs were uncompensated and reasonable.<sup>55</sup>

Before reimbursement can be authorized for lost profits or impairment of earning capacity, the claimant must demonstrate by a preponderance of the evidence:

- (a) That real or personal property or natural resources have been injured, destroyed, or lost.
- (b) That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of the property or natural resources, and the amount of that reduction.
- (c) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for

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<sup>48</sup> *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).

<sup>49</sup> 33 U.S.C. § 2701(31).

<sup>50</sup> 33 U.S.C. § 2701(30).

<sup>51</sup> See generally, 33 U.S.C. § 2712 (a) (4); 33 U.S.C. § 2713; and 33 CFR Part 136.

<sup>52</sup> 33 CFR Part 136.

<sup>53</sup> 33 CFR 136.105.

<sup>54</sup> 33 CFR 136.203.

<sup>55</sup> 33 CFR 136.203; 33 CFR 136.205.

profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.

- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant received as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.<sup>56</sup>

The amount of compensation allowable is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for—

- (a) All income resulting from the incident;
- (b) All income from alternative employment or business undertaken;
- (c) Potential income from alternative employment or business not undertaken, but reasonably available;
- (d) Any saved overhead or normal expenses not incurred as a result of the incident; and
- (e) State, local, and Federal taxes.<sup>57</sup>

Before reimbursement can be authorized for uncompensated real or personal property damages, the claimant must demonstrate by a preponderance of the evidence:

- (1) An ownership or leasehold interest in the property;
- (2) That the property was injured or destroyed;
- (3) The cost of repair or replacement; and
- (4) The value of the property both before and after injury occurred.<sup>58</sup>

The NPFC is authorized to pay a valid and properly evidenced property damage claim in accordance with the following:

- (a) The amount of compensation allowable for damaged property is the lesser of—
  - (1) Actual or estimated net cost of repairs necessary to restore the property to substantially the same condition which existed immediately before the damage;
  - (2) The difference between value of the property before and after the damage; or
  - (3) The replacement value.<sup>59</sup>

The claimant seeks reimbursement for alleged damages and removal costs. The claimed removal costs are for the work and materials to remove and replace flooring in the claimant's building, allegedly at the request of Patriot Environmental to facilitate cleaning of oil underneath.<sup>60</sup> The total claimed removal cost amount is \$28,880.00. The claimed lost profits and earning capacity amount includes \$5,700.00 for 60 hours of claim preparation time at \$95.00 per hour. The claimed property damages include allegedly oiled and ruined inventory of teak

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<sup>56</sup> 33 CFR 136.233.

<sup>57</sup> 33 CFR 136.235.

<sup>58</sup> 33 CFR 136.215.

<sup>59</sup> 33 CFR 136.217.

<sup>60</sup> Email from claimant to NPFC dated March 28, 2024; and, OSLTF Optional Claim form submitted with initial claim on March 6, 2024.

and synthetic teak boat decking and accessories, other supplies, shipping costs and an electronic measuring machine. The claimed property damage amount is the total replacement cost of the allegedly damaged items totaling \$693,922.85.

### *Overarching Analysis*

As mentioned above, the fundamental deficiency that pervades this claim is the absence of sufficient supporting evidence that the material that led to the costs and damages submitted in this claim was “oil” as defined by OPA. More specifically, OPA defines “oil” as “oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101 (14) of the Comprehensive Environmental Response, Compensation, and Liability Act<sup>61</sup> (42 USC § 9601) and which is subject to the provisions of that Act [42 USCA Section 9601 et seq.]”<sup>62</sup>

CERCLA defines “hazardous substance” broadly.<sup>63</sup> However, the definition of “hazardous substance” under CERCLA specifically excludes “petroleum, including crude oil or any fraction thereof...”<sup>64</sup> 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).”<sup>65</sup>

### *A commingled spill*

Notwithstanding the statutory definitions, a question sometimes exists when the release involves a mixture of oil and hazardous substances that have commingled before substantially threatening to discharge, or discharging into a navigable waterway, such as the facts in this case.

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

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

The definition [of oil] has been modified... to clarify that it does not include any constituent or component of oil which may fall within the definition of "hazardous substances", as that term is defined for the purposes of the Comprehensive

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<sup>61</sup> Abbreviated as “CERCLA”.

<sup>62</sup> 33 U.S.C. § 2701(14).

<sup>63</sup> “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].”

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*



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.**<sup>66</sup>

The legislative history of CERCLA likewise is instructive: “The reported bill [CERCLA] does not cover spills or other releases **strictly** of oil.”<sup>67</sup> Contemporaneous congressional debate further elucidated how it intended CERCLA to apply to spills of oil mixed with hazardous substances.<sup>68</sup> 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 oil<sup>69</sup> but CERCLA could impose liability on certain discharges of substances that contain oil in an adulterated form. Because of the adulteration of the oil, if released, it would be considered a “hazardous material” not “oil” as defined.<sup>70</sup> 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.’”<sup>71</sup>

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.<sup>72</sup> 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.<sup>73</sup> In holding that the petroleum exclusion did not apply to these facts, the court indicated that in order for CERCLA to be inapplicable, the moving party would have to have provided testing to show that unadulterated petroleum was the *only* contaminant in

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<sup>66</sup> H. R. Rep. No. 653, 101st Cong., 2d Sess. 102 (1990). S. Rep. No. 101-94 (1989) (emphasis added).

<sup>67</sup> S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980) (emphasis added).

<sup>68</sup> See, e.g., at 126 Cong. Rec. H11798 (Rep. Edgar) (oil slicks and industrial oil waste); 126 Cong. Rec. S14963 (daily ed. November 24, 1980) (Sen. Randolph) (contaminated oil slick), and other petroleum products containing hazardous substance additives intended to be addressed by the legislation including PCBs in transformer fluid, *id.* at S14963 (Sen. Randolph) and S14967 (Sen. Stafford); dioxin in motor fuel used as a dust suppressant, *id.* at S14974 (Sen. Mitchell); PCB's in waste oil, *id.* (Sen. Mitchell) and contaminated waste oil, *id.* at S14980 (Sen. Cohen).

<sup>69</sup> This has become known colloquially as EPA’s “petroleum exclusion”.

<sup>70</sup> 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).

<sup>71</sup> *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1383-4 (E.D. Cal. 1991).

<sup>72</sup> *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886 (10th Cir. 2000).

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

the ground water plume. Moreover, the court would have required an expert to opine that the hazardous waste *did not commingle* with petroleum products.<sup>74</sup> A mixture of oil and hazardous substances is not “oil” within the meaning of the OPA.<sup>75</sup> Claims for removal costs and damages for a commingled spill are not compensable under OPA.<sup>76</sup>

In this case, each of the EPA POLREPs related to Site B - where the claimant is located - indicate that “sediment” mixed with “waste oil, motor oils and hydraulic fluids (oils).”<sup>77</sup> The term “sediment” poses a concern. As explained below, the sample analysis provided by the EPA indicates that many CERCLA hazardous materials were detected in the soil sediment and debris collected during this event. The presence of “waste oil” poses an additional concern. A list of CERCLA hazardous substances is found at 40 CFR 302.4. 40 CFR 302.4 specifically lists a number of waste oils.<sup>78</sup> In addition, if any of the materials present are considered hazardous substances or toxic pollutants under the Clean Water Act then they are considered CERCLA hazardous substances.<sup>79</sup>

The claimant did not provide any samples attendant to its claim. On its own accord to ensure completeness of the administrative record, the NPFC sought samples from the EPA FOSC.<sup>80</sup> The EPA was only able to provide soil and trash/debris sample analysis. This analysis did not provide support for the claimant’s position. At a jurisdictional level, compensation under OPA requires the presence of OPA oil in the navigable waters (or as significant threat to the navigable waters) of the United States. These soil or trash/debris samples did not provide that data. Additionally, the samples provided only indicate they were taken as part of the Chollas Creek event, not specifically at Site B, or where the claimant purportedly incurred removal costs or damages. Moreover, the samples revealed the presence of various CERCLA hazardous substances to include tetrachloroethene, styrene, arsenic, lead, zinc, and chromium.<sup>81</sup> Because the claimant has not met its burden to prove that OPA oil led to his claimed removal costs and damages, the claim is denied. However, in the interest of completeness, the NPFC analyzed the specific claimed costs below – as if they met this jurisdictional requirement.

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<sup>74</sup> *Id.* at 894. *See also, Eastman v. Brunswick Coal & Lumber Co.*, No. CIV. 95-255-P-C, 1996 WL 911200, (D. Me. Apr. 19, 1996) (A truck loaded with diesel fuel (an OPA oil) overturned and caught fire releasing its contents, and in conjunction with the fire, hazardous materials mixed with the diesel fuel. This mixture entered the [plaintiffs] soil and groundwater, and ultimately, a navigable waterway of the United States. The court indicated that the petroleum exception would not apply and these facts, if alleged and proven, would constitute a CERCLA release.

<sup>75</sup> *See, e.g., Munoz v. Intercontinental Terminals Co.*, 845 F.4th 343 (5<sup>th</sup> Cir. 2023).

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

<sup>77</sup> POLREPs 1-3.

<sup>78</sup> *See*, 40 CFR 302.4. *See also*, United States Environmental Protection Agency, “Specific substances excluded under CERCLA petroleum exclusion” available at <https://www.epa.gov/epcra/specific-substances-excluded-under-cercla-petroleum-exclusion> (last visited July 10, 2025); *see also*, United States Environmental Protection Agency, Office of General Counsel, “Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)”, dated July 31, 1987 available at <https://www.epa.gov/sites/default/files/2013-09/documents/petro-exclu-mem.pdf> (last visited July 10, 2025).

<sup>79</sup> *See*, United States Environmental Protection Agency, “Clean Water Act (CWA) and CERCLA Hazardous Substance Lists” available at <https://www.epa.gov/epcra/clean-water-act-cwa-and-cercla-hazardous-substance-lists> (last visited July 10, 2025).

<sup>80</sup> *See, e.g.*, POLREP 1, Section 2.1.2 confirming the request.

<sup>81</sup> *See*, Chollas Creek Analytical Results documents W28493, W28493A, W28493A Rev P, W28495, and W28534.

### Removal Costs

The claimant seeks \$28,880.00 in alleged removal costs for the labor the claimant supplied to remove the existing plywood lofting floor, to fabricate a new plywood lofting floor, and to dispose of the allegedly contaminated items.<sup>82</sup> Claimant is seeking \$95.00 per hour for all labor. Claimant alleged that 112 hours were expended to remove the floor for a total of \$10,640.00; 112 hours were expended to fabricate the new floor for a total of \$10,640.00; and 80 hours were expended to dispose of contaminated items for a total \$7,600.00.<sup>83</sup> The regulations governing the adjudication of claims against the OSLTF state that the claimant bears the burden of providing to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.<sup>84</sup> In this claim, the administrative record lacks the relevant, detailed information the NPFC requires to determine whether the alleged response actions performed by the claimant for which it seeks reimbursement would be compensable.

For removal costs to be compensable, the actions upon which they are based must have been directed by an FOSC or determined by the FOSC to be consistent with the NCP. In this case, regarding FOSC coordination, the claimant provided a letter from the EPA FOSC in a likely attempt to show that its costs were valid. The letter purports to confirm that the claimant assisted in the cleanup of the property where its facility is located in San Diego and implies that the claimant's work was coordinated with the FOSC.<sup>85</sup> However, the letter does not detail work performed by the claimant or describe the necessity of work performed as part of an OPA-oil pollution response. Due to the lack of specificity by the FOSC in his letter, the NPFC finds that the FOSC letter is not sufficient to demonstrate that the claimant's work was directed by the FOSC, nor does it establish that the work was performed in accordance with the NCP or that it was a necessary response to a discharge or substantial threat of the discharge of oil.

Further, the NPFC finds that the claimed costs for removing and replacing the claimant's building's lofting floor are not compensable removal costs. The claimant has not shown that its actions in removing and replacing the lofting floor to assist the OSRO in accessing oil under the claimant's building were necessary and reasonable removal actions.

Additionally, when the NPFC requested documentation to support the alleged work done, the rates applied and waste manifests for the allegedly oiled plywood,<sup>86</sup> the claimant stated that they removed the flooring, and disposed of it in Patriot-supplied dumpsters as well as bringing some to the landfill.<sup>87</sup> The claimant also stated that the rate charged is the standard billing rate.<sup>88</sup> However, the claimant provided no documentation to support these responses. Even if the claimant's actions were proper response activities under OPA, without documentation of the labor, materials and supplies used and claimed the claimant has not supported the claim with evidence of the basis of the costs claimed.

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<sup>82</sup> Attachment A submitted with the initial claim dated March 6, 2024.

<sup>83</sup> *Id.*

<sup>84</sup> 33 CFR 136.105.

<sup>85</sup> Letter from the FOSC to the Claimant dated January 29, 2024.

<sup>86</sup> Email from NPFC to Aztec dated March 21, 2024.

<sup>87</sup> Email from Aztec to NPFC dated March 28, 2024.

<sup>88</sup> *Id.*

Since the claimant has not met its burden under the regulations, the claimed “removal costs” must be denied. Should the claimant decide to request reconsideration, it would need to remedy the evidentiary issues by addressing the requirements of OPA and its attendant regulations found at 33 CFR Part 136.

### Lost Profits and Impairment of Earning Capacity

The claimant seeks \$5,700.00 for lost profits and earning capacity. This claimed loss is related to 60 hours of employee time at \$95.00 per hour for preparation of the claim. These costs are not loss of profits or impairment of earnings capacity as defined by OPA. Claim preparation costs are not listed as a type of damage allowable under the Oil Pollution Act. On the contrary, they are specifically excluded from amounts that may be included in claims.<sup>89</sup> The NPFC denies the claim preparation costs.

### Property Damage

The claimant seeks \$693,922.85 for damages to its personal property in the form of its inventory, supplies and equipment. The claimant alleges that the oil in the flood waters destroyed its teak wood decking material, synthetic teak decking material, Clickbond fittings, lofting floor plywood, a motoryacht swimstep, Lonseal, 7500 6 HC S910 50-yard roll, a Prodim Proliner (an electric templating machine), shipping costs and disposal costs for contaminated items.

For the reasons discussed below, the NPFC cannot pay the damages claimed. The claim lacks evidence of oil damage. In an attempt to demonstrate damages from the oil, the claimant provided 87 photographs of the interior and exterior of its facility, including most of the claimed items.<sup>90</sup> The photos do not show oil or oil staining on the stacked materials and there is no visible oil in any photograph of the claimed property items. When the NPFC inquired about proof of damage by oil, stating that oil was not visible in the photographs,<sup>91</sup> the claimant replied that it is not surprising that we cannot see any oil because Patriot cleaned all the oil off the interior and exterior of its property.<sup>92</sup> Most of the wood itself does not look discolored and some only appears to be dusty. There is no evidence that oil penetrated the materials and destroyed them. Even if oil actually got on the materials, there is no evidence that it stained, penetrated or ruined the materials in any way, or even that oil would penetrate or damage the materials including the synthetic materials.

The only item with any indication of oil damage is the Prodim Proliner measuring machine. However, the claimant’s assertion that the Prodim Proliner measuring machine was only damaged by oil during the flood event is not persuasive. The claimant provided an email from the manufacturer who opened it up and reported oil damage inside, recommending replacement rather than repair. NPFC queries why this single piece of equipment was claimed to be damaged solely by the oil spill and not the flood when the rest of the claimant’s equipment was admittedly damaged by the flood and not claimed.<sup>93</sup> The photos show other machines and equipment in the

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<sup>89</sup> 33 CFR 136.105(e)(8).

<sup>90</sup> Attachment B photos submitted with initial claim dated March 6, 2024.

<sup>91</sup> Email from NPFC to Claimant dated March 21, 2024.

<sup>92</sup> Email from Claimant to NPFC dated March 28, 2024.

<sup>93</sup> Email from Claimant to NPFC dated March 28, 2024, answer to item #3.

facility, but the claimant states that the flood damaged the other equipment. In spite of its voluminous submission of photographs and its reply to the NPFC's question, the Claimant has not provided adequate documentation that the discharged oil damaged its claimed property.

Even if the claimant had proven oil damage to everything it claimed, the NPFC still cannot pay the claim for the property damage. The claimant only provided purchase price replacement costs for some of the allegedly damaged items.<sup>94</sup> The NPFC requested the valuations required by the regulations (i.e. repair or replacement costs, and the value of the property both before and after the alleged injury occurred).<sup>95</sup> The claimant did not provide any further values of the property and only reiterated the values provided with the initial submission.<sup>96</sup>

## **VI. CONCLUSION:**

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 claimant has not demonstrated that its alleged removal costs were oil removal costs as defined by OPA. The NPFC also finds as a matter of fact that claimant did not provide evidence of damage by oil or valuations of the allegedly damaged property as required by the claims regulations.

Based on a comprehensive review of the record, the applicable law and regulations, and for the reasons outlined above, Aztec Marine LLC dba Yacht Deck's request for uncompensated removal costs and damages is denied.

(b) (6)(b) (6)(b) (6)  
Claim Supervisor: (b) (6)(b) (6)

Date of Supervisor's review: July 14, 2025

Supervisor Action: ***Denial Approved***

Supervisor's Comments:

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<sup>94</sup> Initial claim submission dated March 6, 2024.

<sup>95</sup> Email from NPFC to Claimant dated March 21, 2024.

<sup>96</sup> Email from Claimant to NPFC dated March 28, 2024.