CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: E13305-0002
Claimants	: CAW Energy, LP and SWK Energy, LP
Type of Claimants	: Corporate
Type of Claim	: Removal Costs
Amount Requested	: $245,000.00

INTRODUCTION:
CAW Energy LP and SWK Energy LP (hereinafter collectively referred to as "Claimants") have requested reconsideration of their claim against the Oil Spill Liability Trust Fund ("OSLTF") for $245,000. For the reasons articulated below, the National Pollution Funds Center ("NPFC") denies Claimant's request for reconsideration.

PA DEP'S RESPONSE TO THE OIL SPILL:
At about 5:30 p.m. on February 25, 2013, personnel from the Pennsylvania Department of Environmental Protection ("PA DEP") responded to a discharge of oil into an unnamed tributary of Surveyor Run. Because Surveyor Run is a tributary of the west branch of the Susquehanna River, a navigable waterway of the United States, the unnamed tributary was a waterway covered by the Oil Pollution Act of 1990 ("OPA").[1]

Upon arriving on scene, PA DEP's staff observed oil contamination in and along the tributary ("Site 1" or "South Spill Area"). The oil in the water had pooled in the area because an ice dam was preventing it from flowing downstream. As there was very little oil contamination on the banks, PA DEP's staff concluded that the oil had probably been dumped directly into the tributary with a hose connected to a truck on a nearby road.[2] Consistent with this theory, they also observed a pool of oil on the road with a trail of oil leading towards the tributary.[3]

After inspecting Site 1, PA DEP's staff investigated the surrounding area to determine if any additional oil could be found. PA DEP's staff walked to the north about 300 feet and found another area of contamination ("Site 2" or "North Spill Area"). The oil at Site 2 was concentrated around an end of a corrugated pipe that was partially buried underground. There was no visible contamination upstream of the pipe. Oil had been splattered on pipe's end and surrounding vegetation. Additionally, Site 2 had a higher elevation than Site 1. Even though the pipe connected Site 2 with Site 1, PA DEP staff concluded that the oil at Site 1 had not migrated to Site 2.[4]

PA DEP staff retained Eagle Towing & Recovery, Inc. ("Eagle Towing") to remove the oil. Eagle Towing arrived on scene shortly after PA DEP staff and worked through the night. By

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[1] See PA DEP Emergency Response Incident Report dated February 27, 2013, Exhibit A to Claimants' Reconsideration Request dated August 5, 2014.

[2] See email from [redacted] dated February 27, 2013, Attachment C to PA DEP's claim E13305-0001 dated October 23, 2013.

[3] See PA DEP Emergency Response Incident Report dated February 27, 2013, Exhibit A to Claimants' Reconsideration Request dated August 5, 2014.

[4] See PA DEP Emergency Response Incident Report dated February 27, 2013, Exhibit A to Claimants' Reconsideration Request dated August 5, 2014.

7:00 a.m. the next day, on February 26, 2013, Eagle Towing had removed about 9,000 gallons of oily water. PA DEP staff continued to inspect the area around Site 2 and found another area of contamination ("Site 3" or "Uphill East Area"), which was located up a hill from both Site 2 and the tributary. Site 3 was also near a private road called Stoney Lane. At Site 3, it initially appeared that a few hundred gallons of oil had been dumped onto the ground and flowed downhill towards Site 2 and the tributary. Based upon what was observable at that time, PA DEP staff opined that little, if any, oil from Site 3 made it to the tributary. PA DEP staff further opined that about 1,000 to 2,000 gallons of oil had been spilled on all three sites.[5]

Eagle Towing returned on March 1, 2013, to vacuum oil from the tributary and change absorbent materials.[6] On March 4, 2013, Eagle Towing removed the pipe at Site 2. Because the pipe was corroded, oil had leaked through and contaminated the soils underneath the pipe. As a result, Eagle Towing excavated soils from a 150-foot section underneath the pipe. Eagle Towing also removed all stained vegetation in the stream and along the stream including contaminated leaves. Contaminated soils on the banks of the tributary were also excavated. At that point, PA DEP staff estimated that about 90% of the oil initially observed had been removed from the surface waters and that remediation could be completed in another three days.[7]

Eagle Towing also excavated some soils from Site 3. During these operations, Eagle Towing discovered a 3,000-gallon underground storage tank ("UST"). Surface water had entered the tank through an open valve on top of the UST and filled it full of oily water. Eagle Towing also observed that oil contamination covering the ground above the UST. The contamination extended down about 100 feet down the hill towards Site 2. In order to prevent any further discharges, Eagle Towing removed about two feet of water from the UST and left the rest of the oily water in the tank so that it could be tested later.[8]

Despite their earlier opinion that oil from the UST probably did not reach the tributary, PA DEP staff eventually connected oil in the UST with the contamination in the tributary. After testing a sample of the product contained in the UST, the PA DEP's lab provided the following analysis:

> The IR scan cannot positively identify the compound that is present in this sample. The IR spectra has characteristics similar to fuel oil, diesel fuel, or gas oil. The sample is very similar to 1625-831 [oily water obtained from the tributary].
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[5] See PA DEP Emergency Response Incident Report dated February 27, 2013, Exhibit A to Claimants' Reconsideration Request dated August 5, 2014.

[6] See PA Dep General Inspection Report dated March 5, 2013, Attachment F to PA DEP's claim E13305-0001 dated October 28, 2013. *See also*, Eagle Towing Invoice #041313-2 dated April 13, 2013, page 2, Attachment S to PA DEP's claim dated October 28, 2013.

[7] See PA DEP General Inspection Report dated March 5, 2013, Attachment G to PA DEP's claim E13305-0001 dated October 28, 2013. *See also*, Eagle Towing Invoice #041313-2 dated April 13, 2013, page 3, Attachment S to PA DEP's claim dated October 28, 2013.

[8] See PA DEP General Inspection Report dated March 5, 2013, Attachment G to PA DEP's claim E13305-001 dated October 28, 2013.

> The UV analysis indicates that a weathered petroleum product is present in this sample, possibly #2 fuel oil or diesel fuel. The sample is very similar to 1625-831 [oily water obtained from the tributary].[9]

During the time period of March 5-19, Eagle Towing returned seven times to vacuum oil from the surface water and to change absorbent materials. They also stoned and rocked the ditch line and graded some of the tributary's banks. During the entire response, Eagle Towing removed and disposed of 30,915 gallons of oily water and 125.3 tons of contaminated soils. By March 19, 2013, Eagle Towing's response efforts had concluded.[10]

CLAIMANTS' RESPONSE ACTIVITIES:
Because it was located on their property, PA DEP requested that Claimants remove the UST and clean up the surrounding area. Specifically, on March 11, 2013, PA DEP sent Claimants an email requesting the following:

1. The contents of the tank should be pumped out, containerized and arrangements made to properly dispose of the liquids. Please note that most of the liquid in the tank has already been pumped out by the DEP contractor.

2. The tank should be excavated and properly disposed.

3. Any visible soil contamination should be excavated and sent to a landfill for proper disposal.

4. Soil samples should be taken in accordance with the Corrective Action Process for storage tanks as outlined in the Closure Requirements for Underground Storage Tanks Systems . . . . The results of sampling should meet DEP's cleanup standards.

5. The booms and pads on the tributary to Surveyor Run that has the oil should be checked routinely and replaced if they become saturated.

6. Within 60 days of completing the above activities, a report should be submitted to DEP documenting their completion.[11]

Although they denied any liability for the oil or the UST, Claimants hired Bigler Boyz, a response contractor, who removed the UST on March 22, 2013. The UST's exterior was corroded, but did not appear to have any holes in it. The UST's extraction line was plugged with soil/clay and there was no evidence of leakage from the line. Also, the soils underneath the UST showed no signs of an oil leak. Based upon these facts, Claimants concluded that the UST had not discharged oil.

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[9] See PA DEP Bureau of Laboratories Analysis dated March 16, 2013, Attachment E to PA DEP's claim E13305-0001 dated October 28, 2013.

[10] See Eagle Towing Invoice #041313-2 dated April 13, 2013, pages 4-7, Attachment S to PA DEP's claim E13305-0001 dated October 28, 2013.

[11] See email from [redacted], dated March 11, 2013, Exhibit 11 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013.

In addition to removing the UST, Bigler Boyz also excavated some contaminated soils along the southern end of the UST.[12] Even though these soils were near the UST, Claimants argued that the contamination resulted from illegal dumping instead of being discharged from the UST. Claimants failed to support this contention by having a laboratory analyze the soils to determine whether that contamination was linked to the oil in the UST.

On April 9, 2013, PA DEP advised Claimants that, as the property owners of the site where the UST was located, they had responsibilities regarding the contamination on their property under the Corrective Action Process ("CAP") regulations in 25 PA Code Chapter 245, Subchapter D. In particular, Claimants were required to remove regulated substances from leaking tank systems and preventing any future releases. Claimants were also required to submit a Site Characterization Report so that PA DEP could determine whether additional steps would be needed to address the oil contamination on Claimants' property.[13]

Upon returning to Claimants' property on April 11, 2013, PA DEP staff observed a black petroleum sheen seeping from the face of concrete on top of the hill where the UST had been located. During this inspection, surface water was flowing down the hill in between Site 2 and Site 3. A light petroleum sheen was observable on the flowing water. In an effort to prevent the oil from flowing down the hill and into the tributary, Claimants installed a series of underflow dams and absorbents at the bottom of the hill. The pooled water behind the dams had black petroleum floating on the surface and that contamination had saturated some of the absorbents.[14]

During the April 11, 2013 inspection, PA DEP observed additional contamination near Site 2. Surface water contamination had pooled in an area that was directly north of the pipe at Site 2. Some of the absorbent pads on the surface water were completely saturated with oil and a black petroleum sheen stretched out for about 25 feet. Also, a small amount of petroleum had stained the soil where the pipe had been located even though Eagle Towing had previously remediated that area. Based upon the conditions observed, PA DEP staff opined that oil had seeped out from the hill side and into the water. As a result, PA DEP staff concluded that the area needed constant monitoring for oil.[15]

Bigler Boyz continued to remediate the oil on Claimants' property. On April 22, 2013, Claimants submitted a UST System Closure Report to PA DEP as requested.[16] By April 23, 2013, Bigler Boyz had determined that soils around Site 2 were saturated with contamination and needed to be excavated.[17] On April 30, 2013, Bigler Boyz excavated soils and removed oil from

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[12] See DMS Environmental Services, LLC, Underground Storage Tank System Closure Report dated April 2013, Exhibit 17 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013.

[13] See PA DEP correspondence dated April 9, 2013, Exhibit 15 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013.

[14] See PA DEP General Inspection Report dated April 12, 2013, Exhibit 16 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013.

[15] Id.

[16] See DMS Environmental Services, LLC, Underground Storage Tank System Closure Report dated April 2013, Exhibit 17 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013.

[17] See Bigler Boyz Invoice # 30145 dated July 30, 2013, p. 7, Exhibit 2 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013.

both Site 2 and Site 3.[18] Claimants also registered the UST with PA DEP. Based upon the work completed, on May 24, 2013 PA DEP advised that Claimants were in compliance with the regulations cited in its April 9, 2013 correspondence so long as Claimants continued to address "contamination emanating from the site."[19]

On June 19, 2013, Bigler Boyz recommended to Claimants that the remaining contaminated areas needed to be excavated to "prevent current/future contamination."[20] By late July 2013, Bigler Boyz had mitigated subsurface oil contamination by excavating soils along the left descending shoreline at Site 2. Bigler Boyz further mitigated subsurface contamination by excavating a significant amount of soils from the hill in between Site 2 and Site 3. The pipe at Site 2 was replaced and soils along the tributary in between Site 1 and Site 2 were also excavated. The contractor completed excavation of soils along the right and left descending shorelines at Site 1 and downstream from Site 2. Bigler Boyz backfilled, graded, seeded, and mulched the three sites where needed.[21]

MONITORING BY THE ENVIRONMENTAL PROTECTION AGENCY:

After the oil was initially discovered, the Environmental Protection Agency ("EPA") received notification of the incident. The EPA Federal On Scene Coordinator ("FOSC") agreed that PA DEP should be the lead agency responsible for responding to this oil spill.[22] The FOSC also acknowledged that PA DEP would attempt to investigate who was liable for this incident.[23] After learning more about the incident, the FOSC delivered notices on March 29, 2013 to Claimants explaining that the UST was the suspected source of the oil. The notices provided Claimants an opportunity under the National Contingency Plan ("NCP") to remediate the property and thereby avoid any potential liability for removal costs incurred by authorities. [24]

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[18] See Bigler Boyz Invoice # 30145 dated July 30, 2013, p. 7-8, Exhibit 2 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013. *See also*, pictures showing removal activities at Site 2 and Site 3 dated April 30, 2013, Exhibit 4 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013.

[19] See PA DEP correspondence dated May 24, 2013 to [redacted] c/o CAW Energy, LP and SWK Energy, LP, Attachment N to PA DEP's claim E13305-0001 dated October 28, 2013.

[20] See Bigler Boyz Invoice # 30145 dated July 30, 2013, p. 10, Exhibit 2 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013.

[21] See EPA POLREP Five dated July 31, 2013, p 3, Exhibit 21, Bigler Boyz Invoice # 30145 dated July 30, 2013, p. 10-19, Exhibit 2 and Claimant's Exhibit 4, pictures July 11-21, 2013 showing removal activities at CAW Energy LP and SWK Energy LP, claim E13305-0002 dated December 19, 2013. *See also*, PA DEP, Storage System Report dated July 24, 2013, Attachment P to PA DEP's claim E13305-0001 dated October 28, 2013 .

[22] See EPA POLREP One dated February 26, 2013, p 1, Exhibit 21 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013.

[23] See EPA POLREP One, dated February 26, 2013, p 2, Exhibit 21 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013.

[24] See EPA FOSC Legal Notice to Suspected Discharger dated March 29, 2013, Exhibit 13 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013. *See also*, 40 C.F.R. § 300.305 (d)("If effective actions are not being taken to eliminate the threat, or if removal is not being properly done, the OSC should, to the extent practicable under the circumstances, so advise the responsible party. If the responsible party does not respond properly the OSC shall take appropriate response actions and should notify the responsible party of the potential liability for federal response costs incurred by the OSC pursuant to the OPA and CWA. Where practicable, continuing efforts should be made to encourage response by responsible parties.").

Claimants responded to the FOSC's notices by arguing that vandals discharged oil on their property.[25] Claimants further argued that they were not liable for the UST because they had not "exercised ownership, use or control of the oil tank on the premises".[26] Claimants explained that they did not own the UST or even know of its existence before the oil spill incident. According to Claimants, in the mid-1970's Linglewood Lodge, Inc. ("LWL") owned the property and used it to operate a coal tipple that loaded coal onto railway cars. The UST was believed to be part of the facility used to the fuel front-end loaders. Although they did not articulate exactly when the loading operations ceased, Claimants reasoned that the UST was not used after LWL sold the property in 1989.

After Claimants submitted their UST closure report, the EPA FOSC ultimately concluded that no responsible party could be identified. The FOSC also concluded that the UST was not the source of any discharge. The FOSC explained:

> Review of documentation and observations made on-site this date indicated that if the UST leaked, it would have been a separate incident and not the source of the discharge at two locations into and onto the adjoining shorelines of the unnamed tributary to Surveyor Run. However, based upon the UST Closure Report and an observation of no clear overland pathway from the UST to the two locations on the unnamed tributary, general consensus was that cause of the incident was deliberate dumping at the three locations.[27]

PA DEP'S CLAIM:

On May 24, 2013, PA DEP demanded that Claimants pay $172,238.00 as reimbursement for its response to the oil spill on Claimants' property. PA DEP's demand recognized that "a portion of the material released at this site appears to have been the result of an illegal dumping act". Despite that possibility, PA DEP was still authorized to collect its costs. On July 3, 2013, Claimants refused to pay PA DEP's costs arguing that the "entire incident was the result of illegal dumping by unknown third parties."[28] In response, PA DEP submitted a claim to NPFC requesting reimbursement of $185,385.55 from the OSLTF.[29] When describing the source of the oil removed, PA DEP explained:

> The petroleum substance that was in the ust was compared to that in the surface water drainage way directly down gradient of the [UST]. The results indicate that the petroleum substances were similar in comparison. PA DEP cannot determine how much the UST contributed to the total volume of the discharge, but is

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[25] See Correspondence from [redacted] dated April 9, 2013, Exhibit 14 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013.

[26] Id.

[27] See EPA POLREP Four, dated May 31, 2013, p 4, Exhibit 21 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013.

[28] See Correspondence from [redacted] dated July 3, 2013 to PA DEP, Attachment O to PA DEP's claim E13305-0001 dated October 28, 2013.

[29] See Commonwealth of Pennsylvania's OSLTF Claim Form regarding PA DEP claim E13305-0001 dated October 28, 2013.

estimated by Eagle Towing representative to be insignificant when compared to the total oil/water recovered from the alleged disposal incident.[30]

After adjudicating the claim, the NPFC determined that PA DEP was entitled to $137,046.88 from the OSLTF as compensation for its removal costs under the OPA.[31] PA DEP accepted the NPFC's determination and assigned all of its rights against any party, including Claimants, to the United States.[32]

***HISTORY OF CLAIMANTS' CLAIM*:**

On Dec 19, 2013, Claimants submitted their claim to the NPFC seeking reimbursement of their removal costs incurred during the removal of the UST and excavation of contaminated soils.[33] Claimants sought reimbursement of $245,000 ($17,000 tank removal and $228,000 in soil removal and revegetation costs) from the OSLTF. In support of their claim, Claimants made the following arguments:

1. Claimants did not own or operate the UST;

2. Claimants did not know that the UST was on their property;

3. The UST was not the source of the discharge; and

4. Unknown parties or vandals illegally dumped oil on their property, causing the discharge.

On June 18, 2014, the NPFC denied the claim because Claimants had failed to establish an entitlement to damages. The facts showed that Claimants were liable as responsible parties and they failed to establish a third-party defense. On August 13, 2014, Claimants submitted a five-page request for reconsideration that included a Pennsylvania Emergency Response Incident Report (PA ERIR) dated February 27, 2013. The PA ERIR provided a detailed description of the spill sites and included photos of oil in the unnamed tributary and at Site 1 and Site 2. Claimants also included photos of Site 3.

Claimants argued several points in support of their request for reconsideration:

1. Claimants deny being responsible parties because they did not cause the discharge of oil to the unnamed tributary. They argue that the discharge was caused by vandals and illegal dumping. As evidence they provided the PA ERIR and photographs reflecting oil at the three sites;

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[30] Id.

[31] See NPFC's Claim Summary/Signed determination to Commonwealth of Pennsylvania regarding Claim E13305-0001 dated June 18, 2014 with enclosures.

[32] See Commonwealth of Pennsylvania's Acceptance/Release Agreement to the NPFC regarding Claim E13305-0001 dated July 16, 2014.

[33] See CAW Energy LP and SWK Energy LP OSLTF Claim Form regarding Claim E13305-0002 dated December 19, 2013.

2. Claimants further argue that they are not liable as responsible parties because they did not know the underground storage tank was on the property. Claimants contend that they did not own or operate the UST and it was abandoned; and

3. Claimants argue that there is no evidence that the UST was the source of the discharge of oil to the unnamed tributary because (a) PA DEP presumed that the UST discharged oil instead of relying on direct proof of a discharge; (b) PA DEP and EPA determined there was no pathway from the UST to the unnamed tributary; and (c) the UST was not holed or compromised. Therefore, Claimants reason that the discharge could not have originated from the UST.[34]

NPFC ANALYSIS:

Request for Reconsideration

The NPFC's initial determination dated June 18, 2014 is hereby incorporated by reference. A request for reconsideration of an initial determination must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim.[35] When analyzing a request for reconsideration, the NPFC performs a ***de novo*** review of the entire claim submission, including new information provided by the claimant in support of the request for reconsideration. As a fact finder, the NPFC will consider all relevant evidence and weigh its probative value when determining the facts of claim during its adjudication of a claim. If there is conflicting evidence, the NPFC will make a determination as to what evidence is more credible or deserves greater weight.

Burden of Proof

Just like any other claimant, Claimants bear the burden of proving that they are entitled to payment of their claim.[36] Moreover, if Claimants are responsible parties, then they must prove that a defense to liability applies to this case. Specifically, the OPA provides:

> The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 2713 of this title **only if the responsible party demonstrates that**—
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> (1) the responsible party is entitled to a defense of liability under section 2703 of this title.[37]

Claimants Owned the UST

Under the OPA, a responsible party for an onshore facility includes "any person owning or operating the facility, except a Federal Agency, State, municipality, commission, or political subdivision of a State or any interstate body, that as the owner transfers possession and right to

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[34] See CAW Energy LP and SWK Energy LP's Request for Reconsideration regarding claim E13305-0002 to the NPFC dated August 5, 2014.

[35] See 33 CFR § 136.115(d).

[36] See 33 C.F.R. § 136.105 (a).

[37] See 33 U.S.C. § 2708 (a)(emphasis added). *See also, Bean Dredging, LLC v. United States*, 773 F.Supp.2d 63, 86 (D.D.C. 2011); and Water *Quality Insurance Syndicate v. United States*, 632 F.Supp.2d 108, 113-114 (D. Mass. 2009).

use the property to another by lease, assignment or permit."[38] The OPA further defines the phrase "owner or operator" of onshore facilities to include "any person owning or operating such facility".[39] When determining whether a person is an owner under the OPA, the NPFC considers the property law of the state where the onshore facility is located.[40]

Under Pennsylvania law, items used in connection with real property fall into three different classifications. An item's classification turns on its relationship to the land. The Pennsylvania Supreme Court explained the different classifications with the following:

> Chattels used in connection with real estate are of three classes: First, those which are manifestly furniture, as distinguished from improvements, and not peculiarly fitted to the property with which they are used; these always remain personalty. [Citations omitted.] **Second, those which are so annexed to the property that they cannot be removed without material injury to the real estate or to themselves; these are realty, even in the face of an expressed intention that they should be considered personalty-to them the ancient maxim 'Quicquid plantatur solo, solo cedit,' applies in full force.** [Citations omitted.] Third, those which, although physically connected with the real estate, are so affixed as to be removable without destroying or materially injuring the chattels themselves, or the property to which they are annexed; these become part of the realty or remain personalty, depending upon the intention of the parties at the time of the annexation; in this class fall such chattels as boilers and machinery affixed for the use of an owner or tenant but readily removable. [Citations omitted.][41]

The preponderance of the credible evidence in this case shows that the UST was a fixture on Claimants' land, and, therefore, part of the realty. In support of this conclusion, the NPFC determined that removal of the UST resulted in a material injury to the property. Because the UST could not be removed without material injury to Claimants' land, under Pennsylvania property law the UST was part of the realty.

Pennsylvania property law also directs that, unless otherwise stated in the deed, a grantor transfers all of its rights associated with the property identified in a deed including all fixtures

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[38] See 33 U.S.C. § 2701 (32)(B).

[39] See 33 U.S.C. § 2701 (26)(A)(ii).

[40] See *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 378 (1977)("Under our federal system, property ownership is not governed by general federal law, but rather by the laws of the several states. 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.'" (*quoting Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944)). *See also*, *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1498 (11th Cir. 1996)(relying on Alabama law to determine ownership liability under the CERCLA because it's a "settled principal that property interests and rights are defined by state law"); *U.S. v. Union Corp.*, 259 F.Supp.2d 356, 395 (E.D. Pa. 2003)(relying on Pennsylvania property law to determine owner liability under CERCLA); and *U.S. v. Burlington Resources Oil and Gas Co.*, 2007 WL 773716 (W.D. La. 2007)(applying Louisiana law to hold that the landowner was a responsible party under the OPA because, in addition to owning the land, it also owned the onshore facility).

[41] See *Clayton v. Lienhard*, 167 A. 321, 436-437 (Pa. 1933).

attached to the property.[42] Stated differently, "[i]n the absence of a reservation in the deed, buildings, and property affixed to, or used in connection with, the realty in such was as to constitute fixtures pass as a matter of course to the grantee upon a conveyance of the land."[43] As a result, the deed transferring ownership of the land to Claimants also transferred ownership of all fixtures located on the property, including the UST.[44]

Despite the above, counsel for Claimants argued that they did not own the UST because it had been abandoned by Claimants' predecessor-in-title, LWL.[45] In order to establish abandonment of ownership under Pennsylvania property law, Claimants must show:

1. LWL intended to abandon ownership of the UST; and

2. LWL committed some act to carry out its intent to abandon.[46]

Mere non-use does not establish abandonment of ownership.[47] Moreover, title to realty cannot be abandoned by a valid owner[48] and ownership of trade-fixtures reverts to the landowner as a matter of law after abandonment.[49]

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[42] See 21 P.S. § 3. *See also*, *Kramer v. Dunn*, 749 A.2d 984, 992 (Pa. 2000)("We conclude that, where there is a sale of real estate and the seller conveys the property with all the structures and buildings thereon, the deed is a representation that the buildings are a part of the sale and are a part of the property described in the deed.").

[43] See 6 Summ. Pa. Jur. 2d Property § 9:100.

[44] See Deed transferring ownership on December 15, 2012, Exhibit 23 to CAW Energy LP and SWK Energy LP claim E13305-0002 dated December 19, 2013 .

[45] The Claimant's arguments are not assisted by the OPA's abandonment provision at 33 U.S.C. § 2701 (32)(F). Put bluntly, the OPA's abandonment provision does not exonerate Claimants from ownership liability simply because another party stopped operating the facility. Although abandonment of operations could support a claim against the former operator, it does not create a defense to ownership liability. Congress intended for the abandonment provision to expand liability, not to create a mutually exclusive definition that allows a responsible party to escape liability when another party may also be liable as a result of its abandonment. *See*, *U.S. v. Bois D'Arc Operating Corp.*, 1999 WL 130635, 48 ERC 1540 (E.D. La. 1999)("Therefore, I find that the section on abandonment, 33 U.S.C. § 2701 (32)(F), expands rather than contracts the definition of responsible party. In the case of abandonment, OPA provides for liabilities by both previous and current lessees/operators."). *See also*, *Smith Property Holdings v. U.S.*, 311 F.Supp.2d 69, 81 (D.D.C. 2004)(holding that even if the onshore facility was abandoned by another party, the claimant could still be liable for the oil spill if it met the definition of a responsible party.)

[46] See *United Natural Gas Co. v. James Bros. Lumber Co.*, 191 A. 12, 14 (Pa. 1937).

[47] *Id. See also*, *Penneco Pipline Corp. v. Dominion Transmission, Inc.*, 2007 WL 1847391 (W.D.Pa.)("Under Pennsylvania law, to successfully establish a claim for abandonment, a party must show an intentional relinquishment of rights; a mere failure to exercise such rights, however, does not constitute abandonment.").

[48] See *Pocono Springs Assoc., Inc. v. MacKenzie*, 667 A.2d 233, 235-236 (Pa. Super. 1995).

[49] See *Shellar v. Shivers*, 33 A. 95, 97 (Pa. 1895)(upholding the trial court's conclusion that ownership of oil wells will revert to the landowner unless the lessee removes them from the property within a reasonable time after the lease expires). *See also*, *Banner v. U.S.*, 238 F.3d 1348, 1356 (Fed. Cir. 2001) ("Under the general law of improvements, it is well settled that improvements to realty are considered part of the real property; ownership of the improvements follows title to the land."); and *U.S. v. National Wood Preservers, Inc.*, 1986 WL 12761 (E.D. Pa. 1986)("Indeed, on termination of the lease, permanent improvements, including buildings, are considered a landlord's property unless a lease provision provides otherwise.").

After carefully weighing all the facts in this case, the NPFC has determined that the preponderance of the credible evidence does not show that LWL abandoned its ownership of the UST. First, as discussed above, the UST was part of the realty and therefore could not be abandoned by a valid owner like LWL. Second, even if the UST was a trade fixture that could be removed without damaging the land, its ownership would have reverted to the landowner upon being abandoned. Thus, if Claimants correctly argued that LWL abandoned the UST, then under Pennsylvania law ownership would have reverted right back to LWL as the landowner. Third, even if the UST was personalty with no connection to the land, Claimants have produced no evidence of LWL's intent to abandon ownership of the UST. Rather, without offering any corroborating facts, Claimants theorize that the UST was abandoned because they did not know of its existence before this incident. The NPFC has determined that Claimants' evidence lacks credibility and was insufficient to establish an abandonment of ownership under Pennsylvania law.

The UST Discharged Oil Into The Tributary

The NPFC considered all the facts of this case when determining whether the UST discharged oil into the tributary. In particular, Claimants' Request for Reconsideration relied on statements from PA DEP and the EPA FOSC that the landowners (Claimants) were not the responsible parties for the UST.[50] However those statements are not binding here because the Coast Guard's NPFC is the entity authorized to adjudicate claims under 33 U.S.C. § 2712, not the EPA FOSC or PA DEP.[51] As discussed in detail below, the NPFC ultimately determined that the preponderance of the credible evidence showed that the UST discharged oil into the tributary.

Claimants argue at length that they cannot be a responsible party because all of the oil in this matter was discharged by unknown vandals. In particular, Claimants argue that the UST discharged no oil at all. In support of this argument, Claimants observe that after the UST was excavated, it was found to be intact and the soil directly underneath the UST did not show any signs of an oil leak. Although this evidence suggests that the tank's bottom and sides did not leak into the ground underneath the tank, it does not establish an absence of a discharge.

Despite Claimants' contentions, the preponderance of the credible evidence in this record showed that the UST discharged oil. When the UST was first discovered, its cap was off and the tank was full of 3,000 gallons of oily water. This condition could have easily allowed oily water to discharge out of the UST and then migrate through the soils and down the hill to Site 2. Although it was not initially observable, on April 11, 2013 oil was seeping from the face of concrete on top of the hill where Site 3 was located. Additionally, oil sheen was observed on surface water flowing down the hill from Site 3 toward site 2. The problem of oil weeping from the hill near Site 3 continued for some time and necessitated significant additional removal activities for Site 2 and Site 1 even though they had both been cleaned up by Eagle Towing. Relying on its experience and expertise with adjudicating oil spill claims, the NPFC determined that the amount of removal activities conducted in the area by both Eagle Recovery and Bigler Boyz coupled with the amount of contamination removed far exceeded what should have been required to address the few hundred gallons of oil observed by PA DEP staff when Site 3 was initially found on February 26, 2013. Because of the UST's unsecured condition and its close

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[50] See CAW Energy LP and SWK Energy LP's Request for Reconsideration, Page 3, regarding claim E13305-0002 to the NPFC dated August 5, 2014.

[51] See Exec. Order No. 12,777 § 7, 56 FR 54757 (Oct. 18, 1991). *See also*, Bean Dredging, LLC v. U.S., 699 F. Supp. 2d 118 (D.D.C. 2010) (holding that when adjudicating a claim against the OSLTF the NPFC was not bound by the failure of other investigators to find that the responsible party violated an operating regulation.)

proximity to the area where oil seeped out of the hill, the preponderance of the credible evidence shows that the UST discharged oil.

The laboratory testing of the oil in the tributary showed that oil from the UST at least contributed to the contamination in the tributary. Claimants argued that simply because the oil in the UST was "very similar" to oil in the tributary does not mean that the oil in water originated from the UST. In this case the oil in the UST was analyzed and compared to the oily water in the tributary. The PA DEP laboratory analysis noted that a "weathered petroleum product is present in this [UST] sample and the sample is very similar to the oily water obtained from the tributary."[52] When oil migrates through soils and becomes weathered, its chemical composition changes slightly. This change precludes a laboratory from showing an exact match between oil sampled from a source and oil remaining in the discharging onshore facility.[53] Therefore, even though PA DEP's laboratory was unable to fingerprint the oil in the tributary, its test strongly supports the conclusion that the UST discharged oil and that oil migrated through the environment until it discharged into the tributary. Moreover, Claimants declined to support their arguments with their own laboratory testing. Given the state of the record, the preponderance of the credible evidence showed that the UST discharged oil into the tributary.

PA DEP recognized that the UST discharged oil into the tributary, but opined that the UST oil did not make a significant contribution to the total amount of contamination recovered. Despite this opinion, Claimants should still be liable as responsible parties for all costs resulting from this incident unless Claimants can prove that a defense exonerates them from liability. Liability under the OPA is strict, joint, and several.[54] In particular, joint and several liability under the OPA is not divisible among responsible parties.[55] Moreover, even if OPA liability was divisible, Claimants have made no attempt to produce evidence showing how liability should be divided between discharges from the UST and any other onshore facility owned by another person.[56] As a result, Claimants are jointly and severally liable as responsible parties for all removal costs unless they show that a defense exonerates their liability.[57]

Claimants Have Not Established Entitlement to a Third-Party Defense

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[52] See PA DEP Bureau of Laboratories Analysis dated March 16, 2013, Attachment E to PA DEP's claim E13305-0001 dated October 28, 2013.

[53] See U.S. Coast Guard Marine Safety Laboratory, "Oil Sample Handling & Transmittal Guide," Eighth Edition, January 2013, page 5. A sample may not be useful for **conclusive** evidence if severe weathering has occurred because some weathering processes alter petroleum fingerprints. Further, contamination by other substances in the environment (like water in a tributary) may interfere with the petroleum fingerprint.

[54] 33 U.S.C. § 2701 (17). *See also*, H.R. Conf. Rep. 101-653, at 780 (1990), reprinted in, 1990 U.S.C.C.A.N. 779, 1990 WL 132747 ("The term 'liable' or 'liability' is taken from the Senate amendment and is to be construed to be the standard of liability which obtains under section 311 of the FWPCA for liability for removal costs and damages from discharges of oil. That standard of liability has been determined repeatedly to be strict, joint and several liability.").

[55] *In re Deepwater Horizon*, 844 F.Supp.2d 746, 754 (E.D. La. 2012), *reversed in part by*, 2014 WL 4375933 (E.D. La. 2014).

[56] The Claimants have claimed uncompensated costs for removing the UST and soil remediation. There is no evidence suggesting that the UST removal costs resulted from vandalism. Claimants removed the UST because PA DEP requested that they do so. Similarly, Claimants' soil remediation costs are not related to the oil at Site 1 or Site 2 discovered on February 25, 2013 because that contamination was removed by Eagle Towing.

[57] See 33 U.S.C. § 2702.

Based upon the above, Claimants are responsible parties under the OPA. Nevertheless, Claimants argued that they have no liability in this case because this entire incident was the result of illegal dumping by vandals. OPA allows a responsible party to be exonerated from liability under a third-party defense when the responsible party can show that the discharge was solely caused 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 (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail), if the responsible party establishes, by a preponderance of the evidence, that the responsible party –
>
> (A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and
>
> (B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.[58]

The preponderance of credible evidence does not establish a third-party defense in this case. Claimants argued that vandals dumped oil in three separate places on their property, but they did not offer any proof that vandals solely caused the UST discharges. To the contrary, Claimants argued that the UST did not discharge any oil at all. The mere fact that vandals may have dumped oil on Claimants property does not show how they were the sole cause of discharges from the UST. That's particularly true here as the UST was unsecured and full of oily water. This condition suggests that surface water entered the UST over time and mixed with its contents until it gradually became full and discharged oily water. Given the state of this record, Claimants are not entitled to a third-party defense because they have not shown that vandals solely caused the UST discharges.

Even if Claimants had proven that vandals solely caused the UST discharges, the facts of this case still do not support a third-party defense because Claimants failed to show that they took sufficient precautions to guard against vandalism.[59] Portions of Claimants' property were not

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[58] See 33 U.S.C. § 2703 (a)(3). *See also*, *Unocal Corp. v. United States*, 222 F.3d 528, 534 (9th Cir. 2000)(holding that in order to assert the defense, the pipeline owner had to show "(1) the discharge was caused solely by the act or omission of a third party; (2) the responsible party exercised due care with respect to the pipeline; and (3) the responsible party took precautions against foreseeable acts or omissions of third parties and the foreseeable consequences of those acts or omissions.").

[59] See *Travelers Ins. Co. v. U.S.*, 2 Cl.Ct. 758, 762 (1983)(holding that vandalism did not support a third-party defense under the FWPCA because the facility was not completely fenced, and there was no security personnel on duty during non-business hours. *See also*, *Atlantic Richfield Co. v. U.S.*, 1 Cl.Ct. 261, 263-64 ((1982)(holding that a terminal owner was not entitled to a third-party defense under the FWPCA against unknown vandals because the owner left a tanker unguarded in an area without spill control measures); *Proctor Wholesale Co., Inc. v. U.S.*, 215 Ct.Cl. 1049, 1978 WL 23785 (1978)(denying a third-party defense under the FWPCA based on vandalism because "[t]here was no fence around the tanks or property, there was no external lighting on the property to help prevent vandalism, and the area was not patrolled by police or other security personnel."); *The City of Pawtucket v. U.S.*, 211 Ct. Cl. 324, 1976 WL 23902 (1976)(rejecting a third-party defense under the FWPCA based on vandalism because

fenced or gated, which could have deterred vandals from entering the property. While there was a gate across Surveyor Run Road at the bottom of the hill and west of Site 1 and Site 2, there was nothing to restrict access to Stoney Lane. That road ran parallel to and past Site 3. Additionally, the property was not necessarily in a remote location. According to local maps there were several residences located near the spill sites. Moreover, there was no evidence that Claimants had external lighting on the property or security guards patrolling the area. All of these facts show that Claimants did not take reasonable precautions to protect their property from vandalism.

Even if Claimants could show that they took reasonable precautions against vandalism, they still would not be entitled to a third-party defense because they failed to exercise due care with respect to the oil in the UST. Under Pennsylvania regulations, all underground storage tanks installed before December 1989 must have been inspected by October 11, 1999.[60] Pennsylvania regulations also required owners of underground storage tanks to either meet performance standards or meet closure requirements before December 22, 1998.[61] Among other things, the performance standards require an underground storage tank to have "[s]pill prevention equipment that will prevent release of product to the environment when the transfer hose is detached from the fill pipe—for example, a spill catchment basin or spill containment bucket."[62] Alternatively, in order to be properly closed, the UST should have been emptied and cleaned.[63] Proper closure of the UST also required that it either be removed or filled with an inert solid matter.[64] If Claimants had exercised due care and complied with these regulations, then UST would not have been unsecured and full of oily water.

Claimants attempt to avoid responsibility for this OPA incident by disclaiming any knowledge of the UST. Under limited circumstances, a responsible party's ignorance of oil on its property may allow for a third-party defense against certain entities even though they had a contractual relationship with the responsible party.[65] This defense is commonly known as the innocent landowner defense. Before the innocent landowner defense can apply, the responsible party must show, among other things, that it "did not know and had no reason to know that oil that is the subject of the discharge or substantial threat of discharge was located on, in, or at the facility."[66]

In order to show that it had no reason to know about the oil, the responsible party must show that it made all appropriate inquiries into the property before purchasing it.[67] Claimants purchased

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the evidence showed "gaping holes in the protective fence, no lighting in the tank area, lack of a working lock on the gate (City personnel desiring access were forced to crawl under the fence), unprotected oil tank spigots, improper drainage spouts for possible overflow oil, . . .").

[60] See 25 Pa. Code § 245.411 (b)(1).

[61] See 25 Pa. Code § 245.422

[62] See 25 Pa. Code § 245.421 (b)(3)(i)(A).

[63] See 25 Pa. Code § 245.452 (b).

[64] See 25 Pa. Code § 245.452 (b).

[65] See 33 U.S.C. § 2703 (d).

[66] See 33 U.S.C. § 2703 (d)(2).

[67] See 33 U.S.C. § 2703 (d)(4).

the property on December 15, 2012. Because the property was not purchased for residential purposes by a noncommercial entity, an appropriate inquiry required more than simply inspecting the property and conducting a title search.[68] Instead, Claimants should have hired an environmental professional to conduct an all appropriate inquiry into the property as required by 33 C.F.R. Part 137. As Claimants have offered no proof of such an inquiry, they have failed to carry their burden of proof for an innocent landowner defense against LWL or any other former owner of the property.

Under the facts of this case, Claimants' failure to have an environmental professional conduct an all appropriate inquiry before they purchased the property also shows that they did not exercise due care with respect to the oil in the UST as required by 33 U.S.C. § 2703 (a)(3). At least one of Claimants' principals was a sophisticated businessman who should have understood the importance of complying with environmental laws and regulations. Because the property was located in an area that had a long history of environmental contamination and Claimants' principals have been involved with this property since 1989, Claimants should have known that an environmental professional needed to conduct an all appropriate inquiry into the property before it was purchased. Given this context, Claimants' failure to have an environmental professional conduct any investigation established a lack of due care with respect to Claimants' obligation to identify and address any unknown environmental risks posed by the property.

In support of the above finding that an all appropriate inquiry should have been conducted, the NPFC notes the following:

1. An all appropriate inquiry should take into account the specialized knowledge of the responsible party.[69] In this case, [redacted] is a principal in one of Claimants, CAW Energy LP. Mr. [redacted] has also served as the President for Bradford Coal Company, Inc., Manor Mining & Contracting Corporation, and [redacted] Contracting Company. These companies were engaged in the business of mining bituminous coal and Mr. [redacted] was responsible for the day-to-day operations of these companies. In that capacity, Mr. [redacted] entered into a consent decree with the Commonwealth of Pennsylvania that, among other things, recognized the obligation to treat post-mining acid mine drainage created by the operations of these companies.[70] Although this consent decree apparently did not address discharges on the property where this OPA incident occurred, the consent decree's broad scope suggests that Mr. [redacted] is a sophisticated businessman with a significant amount of experience in environmental compliance.

2. Properties adjoining or nearby the facility can be relevant during an all appropriate inquiry.[71] Claimants' property was located near the Surveyor Run Watershed. This was significant because Lingle Coal Company and A W Bigler Coal Company operated underground coal mines in the watershed during the 1950's and 1960's and then later

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[68] See 33 U.S.C. § 2703 (d)(4)(E).

[69] See 33 C.F.R. § 137.70.

[70] See Consent Decree in Commonwealth of Pennsylvania v. Al Hamilton Contracting Co., et al., Case No.: 441 M.D. 2002. *See also, In re Al Hamilton Contracting Co.*, Case No.: 08-70800-BM (Bankr. W.D. Pa. 2008)(Statement of Financial Affairs identifying Mr. [redacted] as the President, Sole Director, Officer, Shareholder owning 100% of Al Hamilton's common stock).

[71] See 33 C.F.R. § 137.30.

abandoned those mines.[72] During the 1960's through the early 1980's, Shawville Coal Company conducted surface mining in the watershed and left hundreds of acres of abandoned unreclaimed mine lands in the general area where Claimants' property was located.[73]

3. Past uses of the property where the facility was located should be considered during an all appropriate inquiry.[74] The specific area where these oil spills occurred was near two mines known as the Ridge Road site and the Surveyor Run site. The Ridge Road site was about half a mile away from the area and the Surveyor Run site was a little more than a mile from the area.[75] [redacted] was issued a permit to operate the Surveyor Run mining site on May 8, 1995 and at least proposed to operate Ridge Road mining site in September 1999.[76] Although it's not clear who was operating the mine at that time, the Ridge Road site was active in 2004 with plans to continue operations until 2008.[77] Similarly, the Surveyor Run site was mined until 2000. By 2004, acid discharges from mining discharges had degraded Surveyor Run for most of its length until it was unsuitable for aquatic life. The proximity of these mines to the area where this incident occurred should have prompted a very thorough all appropriate inquiry.

4. An all appropriate inquiry should also consider the responsible party's knowledge of the property's previous uses.[78] In this case, Claimants' principals should have a significant amount of knowledge regarding the property's historic uses. As noted above, [redacted] is a principal in CAW Energy LP. Also, [redacted] is a principal of SWK Energy LP. Both Mr. [redacted] have previously been involved with Claimants' property. On January 5, 1989, LWL transferred ownership of the property to M[redacted] in his capacity as the President of [redacted][79] On April 27, 2004, Mr. [redacted] as President of [redacted] transferred ownership of the property to both Mr. [redacted] and Ms. [redacted] as partners of Shannon Land and Mining Company.[80] Further, on May 14, 2007 Mr. [redacted] and Ms. [redacted] received the oil and gas rights for the property.[81] Thereafter, on December 15, 2012 Mr. [redacted] and Ms. [redacted], as partners

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[72] See Pennsylvania Department of Environmental Protection, *Surveyor Run Watershed TMDL Clearfield County*, p. 7 dated June 29, 2004.

[73] Id.

[74] 33 C.F.R. § 137.30.

[75] See Google Maps printed by NPFC personnel.

[76] See EPA Project XL, Proposal for Best Management Practice Surface Coal Remining Permits, Pennsylvania Prototype Study dated September 30, 1999.

[77] See Pennsylvania Department of Environmental Protection, *Surveyor Run Watershed TMDL Clearfield County*, p. 7 dated June 29, 2004.

[78] See 33 C.F.R. § 137.70.

[79] See Parcel Second of Deed dated January 5, 1989 from LWL to Al Hamilton Contracting Company.

[80] See Parcel Two of Deed dated April 27, 2004 from Al Contracting Company to [redacted] t/d/b/a Shannon Land and Mining Company.

[81] See Deed dated May 14, 2007 from [redacted] to C. [redacted].

trading and doing business as Shannon Land and Mining Company, transferred ownership of the property to Claimants.

For the reasons stated in this determination, this claim is denied upon reconsideration.

[redacted]

Claim Supervisor: [redacted]

Date of Supervisor's review: ***February 3, 2015***

Supervisor Action: ***Denial of reconsideration approved***

Supervisor's Comments: