CLAIM SUMMARY / DETERMINATION

Date	: 5/02/2011
Claim Number	: E07635-001
Claimant	: Travelers Insurance Company
Type of Claimant	: Corporate (US)
Type of Claim	: Removal Costs
Claim Manager	: [redacted]
Amount Requested	: $714,971.68

FACTS:

Oil Spill Incident: On August 1, 2007, an employee of Voyager Energy, Inc. (Voyager) discovered an oily sheen on the Cochran Creek near Tullos, LaSalle Parish, LA, approximately 0.5 miles southwest of the intersection of US Highways 84 and 165.[1] The employee notified the Louisiana State Police Hazardous Material and Explosives Control Unit (HAZMAT), who then notified the Louisiana Oil Spill Coordinator Office (LOSCO). LOSCO notified EPA Region 6, who activated a Superfund Technical Assessment and Response Team (START-3) contractor to travel to the scene and perform a response.[2] Subsequently the incident was reported to the LA Department of Natural Resources (LADNR) and LA Department of Environmental Quality (LADEQ). The Voyager employee, who estimated the slick to be three to four miles long and 50 yards wide in some areas, placed containment booms at two places in Cochran Creek in order to help contain the oil.[3]

On or about August 2, 2007, the EPA Federal On-Scene Coordinator (FOSC) determined that the source of the oil discovered in Cochran Creek was the saltwater tanks on the Evolution Petroleum facility[4] and issued a Notice of Federal Interest to the owner of the facility, Evolution Petroleum Corporation.[5] The Emergency Response Report states that both of the saltwater tanks had released most of their contents including crude oil that had accumulated in the tanks.[6] According to a Site Sketch prepared by USEPA Region 6 START-3 contractors, EPA surmised that the discharge migrated from the Evolution saltwater tanks through a gully into an unnamed creek, continued southwesterly under the Herbert Road crossing (containing a culvert west-northwest of US Highway 165) and eventually into Cochran Creek.[7]

Evolution contested EPA's determination that the Evolution facility was the source of the oily sheen in Cochran Creek. EPA explained that if Evolution did not take responsibility for the removal actions, EPA would hire its own contractors to conduct removal actions, which would

[1] See "Incident Information" in the Claim Submission, submitted to the NPFC by the claimant on 5/26/2010.
[2] See US EPA Emergency Response Report for Mystery E07635, dated 1/07/2008 and submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 1).
[3] See NRC Report # 844158, dated 8/01/2007, and US EPA POLREP 1, dated 8/01/2007.
[4] See US EPA POLREP 2.
[5] See US EPA Emergency Response Report for Mystery E07635, dated 1/07/2008 and submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 1).
[6] Ibid.
[7] See US EPA Region 6 Attachment C, Site Sketch, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 1c).

be more costly, and Evolution could be subject to penalties of $32,500 per day.[8] Evolution then chose to accept responsibility (qualifying that it was innocent and accepted responsibility under duress) and contracted with Oil Mop, Inc. to conduct removal actions.[9]

During the early removal actions EPA determined that approximately 20-40 barrels of crude oil was discharged.[10] Active cleanup activities continued through August 28, 2007, at which time removal actions went into a maintenance phase.[11] On September 7, 2007, EPA estimated that the amount of crude oil recovered from 8 miles of affected creeks was 50-60 barrels and, to date, 900 bags of oil adsorbents, adsorbent booms and debris were recovered during cleanup.[12] On December 13, 2007, the FOSC determined that no further maintenance would be required.[13]

THE CLAIM AND CLAIMANT:

Between October 1, 2007 and March 13, 2009, Travelers Insurance Company (Travelers or Claimant) paid Evolution $777,379.30 for costs associated with the incident. On May 26, 2010, through its legal counsel, Kean Miller Hawthorne D'Armond McCowan & Jarman, LLP, Claimant, Travelers, subrogee to Evolution Petroleum Company, presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for reimbursement of removal costs in the amount of $714,971.68.[14] Claimant argues that the discharge of oil to the Cochran Creek did not originate at Evolution's facility, that it has proven that the oil spill was caused by the act or omission of a third party and that it is entitled to reimbursement of the removal costs it incurred to conduct removal actions.

CLAIMANT'S SUBMITTALS AND INFORMATION TO SUPPORT THE CLAIM:

The Claimant submitted the following documents in support of its claim:

1. Claimant Information presented to the NPFC on May 26, 2010, including Exhibits
2. EPA Pollution Reports (POLREPS) 1-6, dated August 1, 2007 – December 20, 2007
3. Emergency Response Report for Mystery – EO7635 (Evolution Petroleum Spill, Tullos, LA) prepared for EPA Region 6 by Weston Solutions, Inc. and dated January 7, 2008
4. Site Location Maps and Sketches prepared EPA Region 6, Start-3
5. Sample Locations Map prepared by EPA Region 6, Start-3
6. Digital Photos taken by EPA from August 2, 2007 – December 2007 depicting cleanup areas and removal actions
7. Notice of Federal Interest dated August 2, 2007
8. Core Laboratories Petroleum Services Analytical Results for four samples, received by Core on August 7, 2007, and reported on August 13, 2007
9. Start-3 Logbook for Robert Raney
10. DVD of EPA Flyover

[8] See letter from Mr. [redacted] Evolution, to Mr. Mr. [redacted] US EPA Region 6, dated 11/19/2007 (Attachment 1).
[9] See US EPA POLREP 2, dated 8/03/2007.
[10] See US EPA POLREP 3, dated 8/4-5/2007..
[11] See US EPA POLREP 5, dated 9/07/2007.
[12] Ibid.
[13] See US EPA POLREP 6, dated 12/20/2007.
[14] See "Incident Information" in the Claim Submission, submitted to the NPFC by the claimant on 5/26/2010.

11. Video of Visual Inspection of the Path Leading From the Creek to the Salt Water Tanks
12. Flyover Coverage
13. Video of an Old Abandoned Flow Line
14. LADNR map dated November 9, 2007, outlining the spill area
15. ALTEC soil sample analysis dated October 8, 2007
16. Oil Tracers Report 1 dated August 25, 2007
17. Oil Tracers Report 2, Phase 2 Update dated September 14, 2007
18. Identification of Oil Tracers Samples
19. LA DNR Lease Inspection Report from August 2, 2007
20. Evolution Petroleum Corporation Production Records, January 2007 – December 2007
21. [redacted] Vice President, Operations, Evolution Petroleum, Affidavit dated September 2, 2010
22. [redacted] November 19, 2007, letter to [redacted] US EPA Region 6
23. [redacted] Memorandum to File dated August 30, 2007
24. [redacted] OSC, EPA Region 6 e-mail t[redacted] Ph.D. re: Evaluation/Assessment of Analytical Report
25. 2007 Rate Sheets for ESA Consulting
26. Invoices and Proof of Payment
27. Checks representing Travelers' Payments to Evolution
28. Travelers' Authorization for [redacted] and [redacted] of Kean, Miller, Hawthorne, D'Armand, McCowan and Jarman LLP to submit the claim for reimbursement to the OSLTF

CLAIMANT'S ARGUMENT:

The Evolution Petroleum facility, also known as the Lexington-Zimmerman Salt Water Disposal facility, is located near Tullos, LA, approximately one-quarter mile northwest of the intersection of U.S. Highways 165 and 84, and approximately 500 yards upstream from the Herbert Road crossing/culvert at US Highway 165 (Herbert Road crossing), where the first evidence of oil sheening was observed on EPA videography.[15] There is a 100-yard long drainage pathway or gully from the salt water tanks at the facility to the unnamed creek, which flows southerly and under the Herbert Road crossing and ultimately into Cochran Creek.[16]

Evolution Petroleum produces oil from three leases on the Lexington- Zimmerman facility.[17] The facility includes both an oil facility and a salt water facility.[18] The oil facility includes a tank battery which stores the oil produced from the wells permitted under the three leases. It is equipped with an oil/water separator (OWS) and a gun barrel inside the battery.[19] The gun barrel

[15] See DVD of EPA Flyover, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 1c).
[16] See US EPA POLREP 2, dated 8/03/2007.
[17] See "Incident Information" (describing the leases and production records) in the Claim Submission, submitted to the NPFC by the claimant on 5/26/2010.
[18] See "Incident Information" in the Claim Submission, submitted to the NPFC by the claimant on 5/26/2010.
[19] Ibid.

prevents oil from escaping the tank battery.[20] Evolution maintains daily oil production records and monthly inventory and sales records for all its leases on monthly spread sheets.[21]

The salt water facility, located approximately 100 yards west of the tank battery, includes two 400-barrel salt water storage tanks, a salt water pump enclosed within an earthen berm and two salt water disposal wells located outside the berm. A flow line, located outside the earthen berm, connects the tank battery to the salt water tanks. Salt water produced with the oil travels through the flow line to the salt water tanks, where the salt water is stored until it is injected back into the ground via the salt water wells. LADNR permits several salt water injection wells at the facility to Evolution.[22]

Claimant argues that there is no evidence that the oily sheen discovered in Cochran Creek on August 1, 2007, originated from tanks at the Evolution facility and that the EPA estimate of 20-40 barrels of oil could not have discharged from the facility.[23] [redacted] Vice-President of Operations at Evolution ([redacted], states that there are only two areas at the facility that could discharge oil: (1) the salt water tanks via the bottom flow line or (2) the flow line connecting the salt water tanks and the tank battery, and that there is no evidence to establish that a 20-40 barrel discharge occurred at either point on or about August 1, 2008.

Mr. [redacted] describes the mechanics of the salt water tanks, the gun barrel and the oil/water separator.[24] The flow line was situated approximately three feet higher in elevation than the bottom flow line out of the salt water tanks. Therefore, there would have to be over three feet of oil in both salt water tanks for any oil to have leaked from the hole in the flow line. Three feet of oil would be approximately 120 barrels of oil and it is not likely that the tanks held that much oil. The oil had been skimmed off the tanks one year prior to August 2007, and only ten barrels of oil were removed at that time.[25] Therefore, Claimant argues, there could not have been 20-40 barrels of oil in the salt water tanks available to discharge.

Mr. [redacted] states that the other potential source of a discharge of oil would be at the flow line from the tank battery. The tank battery collects oil from leased wells. Within the tank battery is the OWS, which separates the produced oil and gas from the salt water. The salt water in the tank battery flows from the gun barrel to the salt water tanks through the flow line. At the time of the incident, the gun barrel was functioning properly and was in the correct position to prevent oil from escaping the gun barrel. Also, because the gun barrel is located vertically higher than the salt water tanks, any leak in the flow line would be fed preferentially by the salt water coming from the gun barrel, thus limiting or preventing any potential flow of oil from the salt water tanks.[26] Any discharge of oil from the tank battery would be reflected on the production sheets. A comparison of Tables 1 and 2 on the production sheets evidences that all of the oil

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[20] See letter from Mr. [redacted] Evolution, to Mr. [redacted] US EPA Region 6, dated 11/19/2007 (Attachment 1).

[21] See "Oil Production Spreadsheets," from Mr. [redacted] Keene Miller, to Ms. [redacted] NPFC, sent via first-class mail and received on 9/09/2010.

[22] See LADNR Lease Facility Inspection Report, dated 8/02/2007, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 8).

[23] See letter from Mr. [redacted] Evolution, to Mr. [redacted], US EPA Region 6, dated 11/19/2007.

[24] Ibid, Attachment 1.

[25] Evolution's contract pumper, who had been employed at Evolution for more than 20 years, did not recall that the salt water tanks had been skimmed of oil in those 20 years.

[26] See letter from Mr. [redacted] Evolution, to Mr. [redacted] US EPA Region 6, dated 11/19/2007 (Attachment 1).

produced and inventoried for July and August 2007 is accounted for; thus no oil was lost from the tanks for July and August 2007.[27]

Claimant acknowledged that a contract pumper for Four Star Development, Evolution's operator, discovered a hole in the four-inch flow line when he inspected the facility on July 27, 2007, and repaired it the same day by replacing a section of the flow line.[28] This line originated from the salt water leg of the separation facility (gun barrel). A small amount of salt water and oil was discharging from the flow line.[29] He disconnected the electricity and shut a valve on the flow line to stop the discharge while he repaired the hole. At that time, he visually surveyed the drainage path or gully and did not observe any material oil staining of the vegetation or soil nor did he observe any oil in the unnamed creek. He did not report the discharge because he did not believe it was a reportable quantity and it did not reach the gully or the unnamed creek.[30]

Claimant next argues that there is no physical evidence that the oil sheen discovered in Cochran Creek came from the Evolution facility. In order for a discharge of oil at Evolution to reach the Cochran Creek, it would have to migrate through the natural drainage pathway or gully from the salt water tanks and into the unnamed creek that interfaces with the pathway, eventually traveling southward until it entered Cochran Creek.

The natural drainage path from the salt water tanks at the facility to the unnamed creek is a 100-yard long gully or pathway with pockets of vegetation both within and surrounding it.[31] Claimant states that there was no significant staining of oil in the natural drainage path or gully. Claimant provided a video of the gully prepared by EPA. The video shows small pockets of oil but no continuous staining of oil.[32] The narrator on the video describes the oil as "very sporadic;" "there is not a lot of oil; there are little clumps of oil; and in some areas, "there is no evidence of oil."[33] The Emergency Response Report states there was little staining of the soil observed in the drainage path from the vegetated area near the storage tanks to the unnamed creek.[34]

Moreover, there were only trace levels of oil constituents found in four soil samples taken in the gully. On August 16, 2007, ALTEC Environmental Consultants, Inc. (ALTEC) collected four surface soil samples in the gully adjoining the facility. The samples were analyzed for Total Petroleum Hydrocarbons – Oil (TPH-Oil). The ALTEC reports states that only minor staining was observed in the drainage area. The analytical data confirmed that the levels of TPH-Oil in

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[27] See "Oil Production Spreadsheets," from Mr. [redacted] Keene Miller, to Ms. [redacted] NPFC, sent via first-class mail and received on 9/09/2010.

[28] See letter from Mr. [redacted] Evolution, to Mr. [redacted] US EPA Region 6, dated 11/19/2007 (Attachment 1).

[29] According to the memorandum Mr. [redacted] believes that a small amount of crude oil had accumulated in the dips in elevation of the line between the leak point and the upper end of the flow line from the gun barrel.

[30] See "Incident Information" (describing the leases and production records) in the Claim Submission, submitted to the NPFC by the claimant on 5/26/2010.

[31] Ibid.

[32] See "Video Footage of a Visual Inspection of the Path Leading from the Creek to the Salt Water Tanks," submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 2a).

[33] Ibid.

[34] See US EPA Emergency Response Report for Mystery E07635, dated 1/07/2008, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 1).

the soil samples were minimal and were below the Louisiana Department of Natural Resources – 29- B Standard for Oil and Grease.[35]

Claimant argues that there is no chemical or fingerprint evidence tying the oily sheen in Cochran Creek to any oil sources on the facility. When Evolution continued to contest the EPA determination that its facility was the source of the discharge the FOSC collected four samples of oil. The samples were taken on August 3 and 4, 2007, at the following locations: (1) at the oil storage tank site [Z-0010]; (2) at the Herbert Road culvert/crossing [CC-0010]; (3) at Cochran Creek east of US Highway 165 Bridge [CC-0020], and (4) at a culvert at the Voyager lease site [PV80Miles – 0010].[36] It is unclear exactly where the sample at the Evolution facility was collected; the map states "Sample location: oil storage tank."[37] EPA forwarded the samples to OilTracers L.L.C. (OilTracers) for analysis. OilTracers analyzed the four samples using a geochemical fingerprint comparison (a Phase I gas chromatography comparison). It concluded that the four samples were unresolved complex mixtures, which are characteristic of severely biodegraded crude oils. OilTracers concluded that the CC-0010 and CC-0020 samples were the most similar and the Z-0010 sample is "by far the most geochemically different oil of the group."[38]

Since the oils were highly biodegraded, OilTracers, at the request of Evolution, conducted further analysis of two samples, the Z-0010 and CC-0010 samples. OilTracers did a GC-MS biomarker comparison of Z-0010 (sample from the storage tank) and the CC-0010 (sample from the Herbert Road culvert). It determined that, while both were severely degraded, the Z-0010 was slightly less biodegraded than the CC-0010. OilTracers determined that "the GC fingerprint comparison (Phase 1) and the saturate and aromatic biomarker parameters indicate that the Z-0010 and CC-0010 oils are compositionally different and therefore are from different facilities (tanks, pipelines, etc.)."[39]

Claimant also states that no oil was found in the unnamed creek directly connected to the gully at the facility. The first removal activities were conducted on the downstream side of the Herbert Road crossing, which is approximately 500 yards downstream of the facility.[40]

On August 2, 2007, EPA participated in a flyover of the area with the START-3 contractor, LDEQ and LDNR representatives (A DVD contains the flyover videography.[41]).[42] One observer stated that one "can't see much because of the vegetation." Another observer noted that he "did not see much oil down there." One more observer stated that with the four inches of rain that had just fallen, no oil would be evident. [43] No oil was observed in the area of the unnamed creek and the gully at the Evolution facility. It is only after the plane flies south and past the Herbert Road

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[35] See ALTEC Soil Sample Summary Report, dated 10/08/2007, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 4).

[36] See US EPA Region 6 Attachment D, Sample Locations Map, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 1d).

[37] The Evolution facility had both saltwater storage tanks and oil storage tanks in the tank battery.

[38] See OilTracers Report # 07-605, dated 8/25/2007, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 5).

[39] See OilTracers Report # 07-605, dated 8/25/2007, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 5).

[40] See pages 4-5 in the Claim Submission letter, submitted to the NPFC by the claimant on 5/26/2010.

[41] See DVD of EPA Flyover, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 1c).

[42] See "Incident Information" in the Claim Submission, submitted to the NPFC by the claimant on 5/26/2010.

[43] Ibid.

culvert/crossing that there is visual evidence of oil staining.[44] On the DVD, the Herbert Road culvert/crossing appears to be the initial point on the creek for booming and removal activities.[45] Observers state on the DVD that "you can't see much because of the vegetation," but there is a discussion of the oil gathered at the Herbert Road crossing.[46]

In summary, Claimant argues that, based on the evidence presented to the NPFC, it has borne its burden of proving, by a preponderance of the evidence, that the oil on Cochran Creek did not originate from the Evolution facility.

Claimant submitted cost documents, including invoices and dailies, to support removal costs associated with removal activities totaling $714,971.68.

APPLICABLE LAW:

Each responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines is liable for removal costs and damages resulting from such incident. 33 USC § 2702(a).

A responsible party for an onshore facility means the owner or operator of the facility except a Federal agency, State, municipality, commission or political subdivision of a State, or any interstate body. 33 USC § 2701(32)(B).

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

"Removal costs" means the costs of removal that are incurred after a discharge has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such incident, and include any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan. 33 U.S.C. §§ 2701(31) and 2702(b)(1)(B).

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, for the payment of claims in accordance with section 2713 of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages. 33 USC § 2712(a)(4).

The President shall promulgate, and may from time to time amend, regulations for the presentation, filing, processing, settlement, and adjudication of claims under this Act against the Fund. 33 U.S.C. § 2713(e). The claims regulations are found at 33 CFR Part 136.

Under 33 CFR 136.105(a) and 136.105(e)(6), 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.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136, the claimant bears the burden to prove the removal actions were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, "a claimant must establish -

[44] Ibid.
[45] Id.
[46] See "Incident Information" in the Claim Submission, submitted to the NPFC by the claimant on 5/26/2010.

(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 determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC."

Under 33 CFR 136.205 "the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC." [Emphasis added].

NPFC ANALYSIS:

Claimant asserts that Evolution is not the Responsible Party (RP) for the discharge of oil into Cochran Creek because its facility was not the source of the oily sheen, and that it submitted substantial information and data in support of its argument. The argument is based on mechanical/technical information and physical and chemical evidence provided by the Claimant. The record also includes documents, videos and pictures prepared by EPA. For the reasons set forth below, the NPFC determines that the Claimant establishes by a preponderance of the evidence that the oily sheen on the Cochran Creek did not originate at the Evolution facility.

EPA identified Evolution as the RP on August 2, 2007, the day before the EPA FOSC arrived on-scene.[47] This identification appears to be based on the LADEQ determination that a broken pipe from the oil water separator to the salt water tanks released oil and salt water that flowed to the unnamed creek and ultimately to the Cochran Creek.[48] However, the Emergency Response Report for the Mystery E07635, a document prepared by an EPA contractor, states that the saltwater tanks released most of their contents, including crude oil that had accumulated in the tanks. On August 4 or 5, 2007, EPA estimated the discharge to be 20 to 40 barrels of crude oil.[49]

It is also not clear which alleged discharge of oil (the Evolution flow line or the salt water storage tanks) the EPA identified as the source of the oily sheen in the Cochran Creek. Mr. [redacted] acknowledged that several days prior to the discovery of the oily sheen on the Cochran Creek, July 27, 2007, a small volume of salt water and oil was discharged from the flow line that connects the tank battery to the salt water tanks. However, the contract pumper who repaired the flow line, walked the gully to the unnamed creek and did not observe that any oil or salt water migrated into the gully or into the adjoining unnamed creek.

Mr. [redacted] acknowledged that the tank battery and the flow line could be potential source areas for a discharge of oil but argues that mechanically neither source could discharge the EPA estimate of 20-40 barrels of oil. The first area was the flow line that was repaired on July 27, 2007. The flow line is located outside the containment berm and is higher vertically than the salt water tanks. Any flow through the line would be from the tank battery toward the salt water tanks. The flow line transfers salt water from the oil water separator(s) through the gun barrel to the salt water tanks. The gun barrel was designed to prevent oil from flowing through it and

[47] See Notice of Federal Interest, dated 8/02/2007.
[48] See US EPA POLREP 2, dated 8/03/2007.
[49] See US EPA POLREP 3, dated 8/4-5/2007.

outside the tank battery. Mr. [redacted] stated that the gun barrel was operating correctly and was in a position to keep the oil from entering the flow line.[50] Furthermore, the production records for July and August 2007 do not reflect a loss of any oil; thus, there is no evidence that a discharge of oil occurred through the flow line from the tank battery.

Second, Mr. [redacted] noted that the salt water tanks are the only other possible source for an oil spill. The hole in the flow line was located approximately three feet higher in elevation from the bottom flow line out of the salt water tank.[51] Consequently, there would have to have been over three feet of oil in both saltwater tanks (the tanks are tied together) in order for any oil to have discharged through the hole in the salt water line. (Three feet of oil in both tanks is approximately equivalent to 120 barrels of oil.[52]) He explains that this is extremely unlikely because such a volume of oil would not accumulate in the salt water tanks within a one-year period. About one year prior to the incident, ten barrels of oil were recovered from the salt water tanks and the facility had not retrieved oil from the tanks for about 20 years.[53]

Claimant submitted pictures taken by EPA on August 2, and August 5, 2007, of the salt water tanks, the berm and the surrounding area reaching to the gully. These pictures, taken during the early days of the removal action, show a small volume of oily water within the berm but no oil or oily vegetation outside the berm, and no evidence that any oil or oily water had overtopped the berm.[54] The oily water within the berm could be from the salt water tanks, but it could also be remnants of the heavy rains that had fallen in the area several days prior to the discovery in Cochran Creek.[55] The Emergency Response Report noted that the tanks were stained with oil up to a height of 6 inches, but there is no evidence or information in the record reflecting *when* the six inches of oil may have contaminated the outside of the tanks.[56] This staining is reflected in the pictures. Because there are no pictures reflecting oil or oily water outside the berm as early as the second day after the oily sheen was discovered, it is not conceivable that the six-inch tank staining resulted from the incident at issue. Based on the pictures there is no evidence that 20-40 barrels of oil discharged from the salt water tanks or the flow line.

EPA surmised that the alleged oil discharge originated at the facility, migrated to and through the gully into the unnamed creek and eventually into Cochran Creek, where the oily sheen was discovered by the Voyager employee.[57] Claimant agrees that this could be a pathway; however, there is no evidence that any oil migrated through this route. According to Claimant, the distance from the facility through the gully to the unnamed creek is approximately 100 yards and the distance from the gully to the Herbert Road crossing is approximately 500 yards.

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[50] See letter from Mr. [redacted] Evolution, to Mr. [redacted], US EPA Region 6, dated 11/19/2007 (Attachment 1).

[51] The Emergency Response Report seems to say that the salt water and oil discharged from the bottom of the salt water tanks.

[52] Ibid.

[53] The record reflects that 10 barrels of oil was removed from the saltwater tanks about one year before this incident and that the contract pumper could not recall that the oil had ever been removed from the tanks prior to that time and he was employed for 20 years at the facility.

[54] See "Digital Photographs," submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 1e).

[55] US EPA POLREP 1 dated August 1, 2007, notes that, because of recent heavy rains in the area, the water levels in the area were high and cause the water to move fast.

[56] See US EPA Emergency Response Report for Mystery E07635, dated 1/07/2008, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 1).

[57] See US EPA Region 6 Attachment C, Site Sketch, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 1c).

There is no physical evidence that any alleged oil from the Evolution facility reached the gully. The Video of Visual Inspection of the Path Leading from the Creek to the Salt Water Tanks begins at the unnamed creek where it meets the gully and moves upland through the gully to the salt water tanks. The video shows only sporadic patches of oil in the gully and no oil in the area to the salt water tanks. The narrator on the video stated that there wasn't much oil, and the oil that was there was sporadic. The video did reflect some staining on the vegetation on the edges of the gully; however, again, this staining was sporadic.[58] Moreover, the ALTEC analysis shows only traces or very low concentrations of oil constituents in the four samples collected in the gully.[59] Large amounts of oil-- specifically 20-40 barrels of oil-- would be evidenced in the gully and in the vegetation. There is no credible evidence that oil had travelled through the gully.

There is no evidence of oil or oil accumulation until the Herbert Road crossing/culvert, which is approximately 500 yards down steam of the area where the gully meets the unnamed creek.[60] The video does not show oil on the creek upstream of the Herbert Road crossing, and EPA did not conduct any removal activities there. The approximate 600 yards between the salt water tanks at the Evolution facility and the Herbert Road culvert leaves a large area that could potentially house other sources of oil that had accumulated at the Herbert Road culvert.

Claimant provided the OilTracers analyses of the oil sampling as evidence that the oil did not originate at the Evolution facility. The sampling analyses do not provide clear evidence that the source of the oily sheen was the Evolution facility. According to the analysis, the sample taken at the facility (Z-0010) does not match either the sample taken at Cochran Creek at Highway 165 (CC-0020) or the sample taken at the Herbert Road crossing (CC-0010). While all the samples were heavily biodegraded, these two samples were more heavily biodegraded than the sample taken at the facility. This could mean that the oil in the samples taken in the creeks had been exposed to the environment longer than the sample taken at the facility, which makes sense because the oil sample taken at the facility would have been in storage tanks and not exposed to the environment for a long period of time. A further OilTracers analysis states that the sample taken at the facility (Z-0010) and the sample taken at the Herbert Road crossing (CC-0010) reflects that the samples were "compositionally different and therefore from different facilities (tanks, pipelines, etc.)."[61]

A March 26, 2008 e-mail from [redacted] PhD, to [redacted], FOSC for this incident, raises questions about the OilTracers conclusions of non-matches and states that the 91% and 93% variances discussed in the analysis are not necessarily non-matches. Dr. [redacted] further states other factors (weathering or contact with the environment) could change the character of the samples and, thus, the samples could be from the same source. Dr. [redacted] cautions that if the results were contested, EPA would have to bolster its own interpretation to determine the origins of the oil.[62]

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[58] See "Video Footage of a Visual Inspection of the Path Leading from the Creek to the Salt Water Tanks," submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 2a).

[59] See ALTEC Soil Sample Summary Report, dated 10/08/2007, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 4).

[60] See letter from Mr. [redacted] Evolution, to Mr [redacted] US EPA Region 6, dated 11/19/2007 (Attachment 1).

[61] See OilTracers Report # 07-605, dated 8/25/2007, submitted to the NPFC by the claimant on 5/26/2010 (Claim Submission Exhibit 5).

[62] See e-mail from Mr. [redacted] US EPA, to Mr. [redacted] FOSC, US EPA, dated 3/26/2008.

The EPA concerns that it would have to bolster its analysis if the claim was contested raises questions as to the credibility of EPA's identification of the Evolution facility as the source of the oil. More convincing evidence that the discharge did not originate at the Evolution facility is EPA's failure to collect a sample of oil in the unnamed creek where it meets the gully. As discussed above, any oil discharge from the facility would migrate through the gully into the unnamed creek.[63] Therefore, if a sample taken at the interface of the gully and the unnamed creek had matched the oil sample taken at the facility, there might have been persuasive evidence that the oil originated at the facility. Without such evidence, it cannot be concluded that the oily sheen in Cochran Creek originated at the facility because there is approximately 600 yards between the storage tanks at the facility and the location of the oil sample collected at the Herbert Road crossing. There is evidence in the record (discussed below) that there are numerous abandoned pipelines in the area that could have been the source of the discharge to Cochran Creek.

Perhaps the reason EPA did not collect a sample at the interface of the gully and the unnamed creek was because there was no oil in this area. EPA did not conduct removal actions in the unnamed creek upriver of the Herbert Road crossing. The flyover DVD does not show any oil in the unnamed creek until the Herbert Road crossing. If there was no oil in the creek upriver of the Herbert Road crossing, there is no pathway from the Evolution facility to the oil found at the Herbert Road crossing.

While there is no evidence identifying a source or sources of the oily sheen, there is some evidence in the record that the oil could have originated at various locations in the area of the Herbert Road crossing or downstream of the unnamed creek at the gully. According to narrative on the DVD flyover, the area surrounding the many creeks evidenced on the DVD and the videos is an oil production area with many pipelines, some of which appear to be abandoned and corroded. There was pictorial evidence on the video, the DVD flyover and the video footage of an old abandoned flow line, of numerous abandoned, corroded and holed pipelines. Several of these pipelines were surrounded by oily vegetation. It is possible, then, that the heavy rains that had inundated the area on or about July 30, 2007, two days prior to the discovery of the oily sheen in Cochran Creek washed out oil and oily vegetation when the creeks were high.[64] There are various pictures depicting removal actions in various creeks unidentified and their adjoining shorelines. There is no evidence that these unidentified creeks were the unnamed creek at the gully.

For the reasons stated in the analysis above and the evidence provided by the Claimant, the NPFC determines that the Claimant has established, by a preponderance of the evidence, that the oily sheen on the Cochran Creek did not originate on the Evolution Facility and the Claimant is entitled to its removal costs associated with removal actions consistent with the National Contingency Plan and coordinated with the FOSC.

DETERMINED AMOUNT:

The OSLTF will pay **$695,910.59** as full compensation for the removal costs incurred by the claimant and submitted to the NPFC under claim # E07065-001. All costs claimed are for charges paid for by the claimant for removal as that term is defined in OPA and, are

[63] There is no evidence in the record that there was another pathway from the Evolution facility to the oily sheen in Cochran Creek.

[64] See US EPA POLREP 1, dated 8/01/2007.

compensable costs, payable by the OSLTF as presented by the claimant. The NPFC denies **$19,524.42** in claimed removal costs (See included NPFC Audit for a complete description of denied costs.) An audit of the claimed costs was performed and the claims manager discovered a number of non-OPA compensable costs and a number of mathematical errors. These costs were denied.

DETERMINED AMOUNT: $695,910.50

Claim Supervis[redacted]

Date of Supervisor's review: ***4/29/11***

Supervisor Action: ***Approved***

Supervisor's Comments: