

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (Ca)
Phone: 800-280-7118

NPFC INSTRUCTION M5890.3A

**Technical Operating Procedures Relating to
Designation of Source and Advertisement
Under
The Oil Pollution Act of 1990**

31 August 2011

U.S. Department of
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NATIONAL POLLUTION FUNDS CENTER (NPFC) INSTRUCTION M5890.3A

Subj: Technical Operating Procedures (TOPs) Relating To Designation of Source and Advertisement under the Oil Pollution Act of 1990 (OPA 90)

Ref: (a) NPFC Technical Operating Procedures Series Resource Documentation TOPs (NPFCINST 16451-2)
(b) Marine Safety Manual, Volume IX, COMDTINST M16000.14

1. PURPOSE. The enclosed directive has been developed to provide guidance and procedures on appropriate notification and "designation of source" requirements under OPA 90. It is intended as internal guidance only, and is not intended to create any right or benefit, substantive or procedural, enforceable by law.
2. ACTION. On-Scene Coordinators (OSCs) and the NPFC's personnel shall be guided by this directive in identifying, notifying and designating a source of an oil discharge or the substantial threat of a discharge into the navigable water of the United States.
3. DIRECTIVES AFFECTED. This directive cancels NPFCINST M5890.3A, Technical Operating Procedures for Designation of Source under OPA 90 and clarifies and expands upon guidance issued in the Marine Safety Manual, COMDINST M16000.14, Volume IX, relating to Designation of Source.
4. MAJOR CHANGES.
5. REQUEST FOR CHANGES. The NPFC welcomes your comments regarding changes to NPFC INST M5890.3A. Please address your remarks to: Director (cm); NPFC; U.S. Coast Guard; 4200 Wilson Blvd., Suite 1000; Arlington, Virginia 22203-1804. This document will be reprinted and redistributed, as necessary.
6. RECORDS MANAGEMENT CONSIDERATIONS. This directive has been thoroughly reviewed during the clearance process, and it has been determined there are no further records scheduling requirements, in accordance with Federal Records Act, 44 U.S.C. 3101 et seq., NARA requirements, and Information and Life Cycle Management Manual, COMDTINST M5212.12 (series). This policy does not have any significant or substantial change to existing records management requirements."
7. ENVIRONMENTAL ASPECT AND IMPACT CONSIDERATIONS.
 - a. The development of this directive and the general policies contained within it have been thoroughly reviewed by the originating office and are categorically excluded under current USCG categorical exclusion number 22 from further environmental analysis, in accordance with Section 2.B.2. and Figure 2-1 of the National Environmental Policy Act

(NEPA), Implementing Procedures and Policy for Considering Environmental Impacts, COMDTINST M16475.1 (series).

- b. This directive will not have: significant cumulative impacts on the human environment; substantial controversy or substantial change to existing environmental conditions, or inconsistencies with any Federal, State, or local laws or administrative determinations relating to the environment. All future specific actions resulting from the general policies in this directive must be individually evaluated for compliance with the NEPA, Council on Environmental Policy, at 40 CFR Parts 1500-1508, Department of Homeland Security (DHS) and Coast Guard NEPA policies, and all other environmental mandates.

8. FORMS / REPORTS. Notice of Designation (4-15) (Appendix 4 Sample)

9. DISCUSSION. Pursuant to the Oil Pollution Act of 1990 (OPA) § 1002, (33 U.S.C. § 2702(a)), each responsible party (RP) for a vessel or a facility from which oil is discharged, or which poses a substantial threat of a discharge, into or upon the navigable waters or adjoining shorelines or the Exclusive Economic Zone is liable for the removal costs and damages specified in § 2702(b) of the statute. When possible and appropriate the source of the discharge shall be designated and the Responsible Party and Guarantor, if known, shall be notified of that designation. Unless the designation is denied the Responsible Party or Guarantor shall advertise the designation and procedures by which claims may be presented. If the designation is denied the NPFC shall advertise or notify potential claimants of procedures for presenting claims to the NPFC for payment from the Oil Spill Liability Trust Fund. This instruction provides guidance and procedures for NPFC personnel and Coast Guard Federal On Scene Coordinators for designation of a source and notification under 33 USC § 2714 and for advertising Responsible Party claims procedures under 33 Code of Federal Regulations Part 136 subpart D .

C. A. BENNETT /s/
Director, NPFC

CHAPTER 1 DESIGNATION

A. General

1. Either the Coast Guard OSC or the NPFC may designate the source of a discharge and notify the responsible party and any guarantor if "appropriate." See reference (b), Chapter 5 for criteria on when designation and notice may be appropriate (essentially, the likelihood the incident will result in damages or removal costs that may be claimed). A source is designated pursuant to OPA §1014 (33 U.S.C. § 2714), a process designed to advertise and start a claims process by the responsible party (RP) or guarantor, or by the NPFC if the RP or guarantor denies the designation or fails to advertise.
2. Designation and notice to the RP or guarantor is not required in order to establish liability under OPA. The fact that designation and notice is not issued in respect to any particular incident or RP or guarantor for an incident does not affect the liability of any RP or guarantor or of any other person for the incident.
3. Designation and notice should not be confused with (i) an OSC's directions or notices to a RP, or potential RP, to ensure an effective and immediate removal of a discharge and mitigation or prevention of a substantial threat of a discharge of oil; (ii) administrative orders under the Federal Water Pollution Control Act (FWPCA) § 311, (33 U.S.C. § 1321(c) and (e)); (iii) notices of federal interest or assumption; or (iv) cost recovery demand letters and invoices enforcing liability under OPA and federal claims collection law.
4. Notice.
 - a. Identified RPs or Guarantors: When a source is designated the notice should be sent to all identified RPs and Guarantors. Acceptance of the designation and advertisement (as approved by NPFC) of a claims process by any one RP or Guarantor is sufficient to meet the purposes of designation.
 - b. Later Identified RP or Guarantors. If additional RPs or Guarantors are later identified, the need for any additional notices shall be coordinated with the NPFC and shall depend on whether further advertisement by later identified RPs or Guarantors would be "reasonably calculated to advise the public how to present a claim." 33 C.F.R. § 136.303.
 - c. Liability of multiple RPs and Guarantors for an incident is joint and several. The almost universal practice is that where there are multiple RPs one RP or Guarantor will accept a designation and advertise a claims process as approved by NPFC. If in the unusual case more than one RP or Guarantor proposes to advertise a claims process NPFC will not approve

advertisement of competing claims processes that could confuse the public or require the public to present any claim under more than one process. RPs or Guarantors for an incident should be directed to coordinate potentially competing or confusing claims processes.

CHAPTER 2 PROCEDURES FOR DESIGNATION AND NOTIFICATION OF RP

A. General Procedures.

1. On-Scene Coordinators' (OSC) Duties and Responsibilities.

- a. The OSC shall conduct investigations, to the extent practicable, to identify the source of the discharge or substantial threat of discharge. OSCs should promptly determine the source of the oil pollution, and where it involves a vessel or a facility, identify potential RPs to ascertain their present intentions with respect to removing the oil or the threat of its discharge. This investigation does not require the identification of every potential RP, some of whom may only be discoverable at some later time. The OSC should attempt to fully identify the potential RPs: names, addresses, telephone/telex/fax numbers, resident agents or agents for service of process, those authorized to speak and act for the RP in this situation (particularly where the RP is an organization) and how they can be contacted, their tax ID number, and information concerning RP organizational structures which could assist in this endeavor.
- b. OSC shall assess the possibility or likelihood for OPA third party claims for removal costs or damages due to the incident. Information to be considered in determining the possibility or likelihood of claims, to include a description of type of claims that are compensable under OPA is included in Appendix 1.
- c. The OSC shall notify the NPFC either by phone or message of the source vessel or facility, the known RP(s) and the possibility or likelihood of third-party claims due to the incident. The information listed in Appendix 1 and 2 is designed to assist OSC's in identifying the information necessary to properly designate the source and to ensure that a Notice of Designation (NOD) is issued when appropriate.
- d. The NPFC Case Officer can be contacted through the 24-hour-manned NPFC Command Duty Officer (CDO) phone at (202) 494-9118. The Case Officer will in turn engage the appropriate people within the NPFC Case Team.

2. The NPFC Case Team's Duties and Responsibilities.

- a. The NPFC Case Team shall assess the need to designate and advertise for claims. The NPFC Case Team will include a representative from the NPFC Claims Adjudication staff who will assist the OSC and Case Team in ascertaining the possibility of claims based on their experience with similar incidents. If the NPFC Case Team determines that designation is appropriate, they will coordinate their efforts with the OSC and request that the OSC provide the source and RP information detailed in Appendix 2 and 3.

3. The OSC, in coordination with the NPFC Case Officer, must determine the appropriate means of advertising or to direct notifications to reach potentially injured parties.

- a. Either the FOSC or the NPFC will arrange for the written designation of the source and notification to the appropriate RP(s) and guarantors based upon the information described in Appendix 2. Appendix 4 is a sample Notice of Designation with enclosures.
- b. The designation shall advise the RP(s) that any denial must be made in writing within 5 days of receipt to the NPFC Claims Manager as indicated in the designation letter. The OSC may receive the RP's denial and must notify the NPFC upon receipt.
- c. If the RP fails to advertise as required, the NPFC may advertise on the RP's behalf.

CHAPTER 3 ADVERTISING REQUIREMENTS

- A. General. It is not necessary to issue a NOD unless there is a need for the RP(s) to institute and advertise their procedures for accepting third-party OPA claims.
- B. Forms of Advertisements. 33 C.F.R. § 136.309, authorizes the Director, NPFC, to determine for each incident the type, geographic scope, frequency, and duration of advertisement required. 33 C.F.R. § 136.311 clarifies the form of advertisements.
1. Paid advertisements in newspapers having general circulation which encompasses the spill area.
 2. Posting notices at marinas, marine supply stores, bait and tackle shops, and other appropriate business establishments or public facilities in the specific area.
 3. Direct mailing of notices to known individual claimants or categories of potential claimants, e.g., towboats which may have been delayed by a waterway closing.
 4. News releases or paid announcements on radio or television broadcasts serving the general area.
 5. Other advertisement methods as specified by the NPFC.
- C. Content of Advertisements. 33 C.F.R. § 136.313 clarifies the content required in each advertisement or notification or where to obtain the information.
1. Location, date and time of the incident.
 2. Geographical area affected.
 3. Quantity/type of oil involved (when pertinent).
 4. Name or other description of the designated source.
 5. Name of the RP (the person to whom the Notice of Designation is addressed unless otherwise stipulated).
 6. Name, address, telephone number, office hours, and work days of the person or persons to whom claims are to be presented and claim information obtained.
 7. The procedures by which a claim may be presented, including a statement that indicates that a claimant may present a claim for interim, short-term damages representing less than the full amount to which the claimant ultimately may be entitled. Payment of such claim shall not preclude recovery for damages not reflected in the paid or settled partial claim.
 8. Notification that if the RP denies or does not resolve a claim within 90 days after the date it is properly presented, the claimant may then submit the claim to the NPFC (ca), claims division, 4200 Wilson Boulevard, Suite 1000, Arlington, VA 22203-1804, for consideration for payment from the Oil Spill Liability Trust Fund.
 9. Advertisement/Notification should be made in English. Circumstances may dictate the

consideration of additional languages. The NPFC can assist an FOOSC in addressing these additional needs.

Appendix 1

Categories of Costs or Damages Which May be the Subject of Claims Under OPA

Definitions: 33 U.S.C. § 2701, defines "removal", "removal costs", "damages", and "natural resources" as follows:

"remove" or "removal" means containment or removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

"removal costs" means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident;

"damages" means damages specified in section 1002(b) of this Act, and includes the cost of assessing these damages;

"natural resources" includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government;

33 U.S.C. § 2702 (b), describes covered removal costs and damages.

"COVERED REMOVAL COSTS AND DAMAGES. —

(1) REMOVAL COSTS. — The removal costs referred to in subsection (a) are —

- (A) all removal costs incurred by the United States, a State, or an Indian tribe under subsection (c), (d), (e), or (1) of section 1321 of this title under the Intervention on the High Seas Act (33 U. S. C. 1471 et seq.), or under State law; and
- (B) any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.

(2) DAMAGES. — The damages referred to in subsection (a) are the following:

- (A) NATURAL RESOURCES. — Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.
- (B) REAL OR PERSONAL PROPERTY. — Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.
- (C) SUBSISTENCE USE. — Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural

resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.

- (D) REVENUES. — Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.
- (E) PROFITS AND EARNING CAPACITY. — Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.
- (F) PUBLIC SERVICES. — Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State."

Appendix 2

Information Required to Issue a Notice of Designation

Coast Guard FOSC's will be guided by this Appendix when gathering information necessary to issue a NOD. When requesting that the NPFC issue a NOD, all OSC's are required to provide the information in items 1-9. When assessing the potential for either removal cost claims or damage claims, OSC's will take into consideration items 10 and 11. OSC's should be prepared to describe, based on the information below, why a NOD is required in the current case. The NPFC will rely heavily upon the OSC's recommendation in determining whether to issue a NOD.

1. The name and other unique identifying information of the vessel or facility designated as the source.
2. List known or suspected RP(s) and guarantors. Provide addresses where possible.
3. Provide copy of Certificate of Financial Responsibility where applicable.
4. Actual and projected Magnitude of the spill.
5. The location, date, and time of the incident.
6. The specific body(ies) of water affected or threatened.
7. The OSC should determine the nature, amount, and location of the discharged oil; the probable direction of travel of the oil; and whether or not the spill was contained in determining if other entities may incur removal costs (to remove oil from water, shorelines, or property) or damages as a result of the spill. Summarize projection or provide POLREP with this information.
8. The name, address, phone and fax numbers of the OSC or OSC's representative.
9. Name and contact information for major Newspapers or publications in area of the spill.
10. Assessing Removal Costs: When recommending that an NOD be issued, OSC's should take into account the following factors when assessing potential removal cost claims.
 - a. Are State or local agencies responding to the spill? How many?
 - b. Is an Indian tribe responding to the spill? How many?
 - c. How many Federal agencies are responding to the spill?
 - d. Has the OSC recommended or approved the use of any Pollution Removal Funding Authorizations (PRFAs)?
 - e. Provide a brief summary of the number of other organizations engaged in removal actions and summary of actions taken. Summary can be provided in the form of a POLREP.
11. Anticipating Damages: When recommending that an NOD be issued, OSC's should take into account the following factors when assessing potential damage claims.

- a. Have environmentally sensitive areas been impacted? Obtain preliminary evaluation by Scientific Support Coordinator and/or cognizant federal, state, or Indian tribe trustee if available.
- b. Impact upon Real or personal property - check impact on boats, docks, nets, beach, shoreline, marinas, etc.
- c. Impact upon areas of potential subsistence use - query local Fish and Wildlife or cognizant state representatives.
- d. Impact upon business or property generating governmental revenues - check with state or local officials concerning tax, royalty, or fee assessments.
- e. Are businesses or private enterprise experiencing a change in income or profits? Check if the clean up prevents access to commercial enterprise, closes areas used for transit of watercraft or closes bridges affecting vehicle traffic, affects use of beaches, or damages inventory of waterside businesses such as hatcheries. (Note alternative income or profits available as a result of the incident or reasonable under the situation since claimants are required to mitigate damages.)
- f. Have state and local representatives needed to provide increased or additional services in connection with the incident such as security, traffic control, evacuations, or arranging access.
- g. Consider the type of oil spilled, length of time in one area, and the concentration.
- f. Consider the type of natural resource potentially affected. Again, seek advice from the Scientific Support Coordinator, and/or cognizant federal, state, or Indian tribe trustee.
- h. Consider the effectiveness, or anticipated effectiveness, of the removal activities, including how much of the oil was contained, whether all the oil can be removed, etc.

Appendix 3

Contents of Notice of Designation

1. The name and other unique identifying information of the vessel or facility designated as the source.
2. The location, date, and time of the incident.
3. The specific body(ies) of water affected or threatened.
4. Procedures to deny designation and requirement to deny in writing within 5 days after receipt of notification.
5. The name, address, phone and fax numbers of the federal official to be contacted for additional information or denial of designation.
6. Requirements for advertising for claims (or information that the NPFC will establish requirements for advertising through separate correspondence when the Coast Guard OSC issues the notification) as outlined in chapter 4 including that the NPFC will advertise on behalf of the RP if the RP fails to deny the designation and then does not comply with the advertising requirements.
7. The date of the designation and the date that the notification was issued.

Appendix 4
Sample Notice of Designation

U.S. Department of
Homeland Security

**United States
Coast Guard**



Commanding Officer
Location
United States Coast Guard

Command
US COAST GUARD
Address
Staff Symbol: (ss)
Phone:
Fax:
Email:

5890

[DATE]

Certified Mail Return Receipt Requested Number:

RP Name
RP Address
RP City, State, Zip Code

Subject: NOTICE OF DESIGNATION Re: Federal Project Number [FPN]

Dear Sir:

On or about [date] an incident under the Oil Pollution Act of 1990 (OPA), 33 USC § 2701 et. seq., occurred [location]. The incident involved [details of discharge or substantial threat of discharge]. This notice designates the [facility or vessel] as a source of an oil [discharge or substantial threat of discharge] pursuant to 33 USC §2714(a) and notifies [name of responsible party] a responsible party, of its responsibility to advertise for claims. By copy of this letter we are also notifying the guarantor, [name] of this designation and the responsibility to advertise for claims.

Unless you deny designation pursuant to 33 USC §2714(b) you must publicly advertise this designation and the procedures by which claims may be presented to you. The advertisement must begin within 15 days of the date of this letter and must continue for no less than 30 days. Enclosure (1) outlines the required content of this advertisement and enclosure (2) is a sample advertisement. You may choose to follow this sample but are not required to do so as long as your advertisement contains the required information. Your advertisement must be disseminated in such a manner that all potential claimants are notified. To accomplish this, we require that you advertise in the newspaper(s) having general circulation in the area(s) where claimants may be affected. We also require that you post notices in marinas, marine supply stores, bait and tackle shops located in the areas impacted by the incident. You must also provide direct notification where individuals have been identified as receiving damages from your spill. You may propose other methods of advertisement and notification, but they may be used only when approved in advance by the National Pollution Funds Center. The advertisement must note that a claimant may present a claim for interim short-term damages representing less than the full amount to which the claimant ultimately may be entitled. And that payment of such claim shall not preclude recovery for damages not reflected in the paid or settled partial claim.

You are directed to inform us of the specifics of your advertising, including the name of any newspaper or other publication in which the advertisement is run, the geographical area covered by the publication, and how often the advertisement will appear, as appropriate. Send us copies of the advertisement and advise us in writing that you have begun advertising within 20 days of receipt of this letter. If we do not receive these documents, we will assume that you did not comply. If you do not comply with these requirements, the National Pollution Funds Center will advertise for claims. If we advertise, you will be charged for our costs, as well as for the costs of any administration, adjudication, and payment of claims.

You may deny this designation within 5 days of receipt of this Notice of Designation. Your denial must be in writing, identify this Notice of Designation, give the reasons for the denial, include a copy of all supporting documents, and must be submitted to [OSC or NPFC contact], at the above address. If you deny this designation, the National Pollution Funds Center will advertise for claims. If we advertise, you may be charged for our costs, If you have any questions you may contact [contact information].

Sincerely,

[NPFC or OSC official]

Encl.: (1) Content of Advertisements
(2) Sample Advertisements

Copy: [NPFC or OSC], other Rps, Guarantors

Enclosure: (1)
Content of Advertisement

Each advertisement/notification is to contain the following information or to indicate where this information may be contained:

1. Location, date and time of the incident.
2. Geographical area affected.
3. Quantity of oil involved.
4. Name or other description of the designated source.
5. Name of the responsible party (you).
6. Name, address, telephone number, office hours, and work days of the person or persons to whom claims are to be presented and from whom claim information can be obtained.
7. The procedures by which a claim may be presented, including a statement that indicates that claimant may present a claim for interim short-term damages representing less than the full amount to which the claimant ultimately may be entitled. Payment of such claim shall not preclude recovery for damages not reflected in the paid or settled partial claim.
8. Notification that if you deny or do not resolve a claim within 90 days after the date of submission, the claimant may then submit the claim to the National Pollution Funds Center (ca), 4200 Wilson Boulevard, Suite 1000, Arlington, VA 22203-1804, for our consideration. We will then evaluate the claim and take appropriate action.
9. Unless noted below, the advertisement/notification must be in English.

Enclosure (2)
Sample Advertisement

PUBLIC NOTICE

In accordance with the Oil Pollution Act of 1990 (33 USC 2714(c)), the [name of vessel or facility] has been named as the source of a discharge of oil into the [name of navigable water] on or about [date of incident]. This spill impacted [describe area impacted] and the owner of the [your name] is accepting claims for certain uncompensated damages and removal costs.

Removal costs and damages which may be compensated include: removal costs; damage to natural resources; damage to or loss of real or personal property; loss of subsistence use of natural resources; loss of government revenues; loss of profits and earnings capacity; and increased cost of public services.

If there are multiple responsible parties or guarantors, claimants are not required to present their claim(s) under more than one responsible party or guarantor claim process.

Claims should be in writing, signed by the claimant, for a specified amount; and should include all evidence to support the damages. Claims presented may include claims for interim short-term damages representing less than the full amount to which the claimant ultimately may be entitled. It should be noted that payment of such claim shall not preclude recovery for damages not reflected in the paid or settled partial claims. Claims should be mailed to the following address:

[Address to which claims should be sent]

Office hours are from 9:00 AM to 5:00 PM ET, Monday through Friday, except holidays. Claimants may call [Telephone number for claims] for information.

Any claims which are denied or which are not resolved within 90 days after the date of submission to our claims representative may be submitted to the National Pollution Funds Center (ca), 4200 Wilson Blvd., Suite 1000, Arlington, VA 22203-1804 for consideration.