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Oil Spill Liability Trust Fund (OSLTF) Funding for Oil Spills

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PURPOSE

This document is designed to help the general public and other readers understand how Federal response to oil spills is funded under the Oil Pollution Act of 1990 (OPA). It also describes the roles of various parties involved in or affected by an oil spill, including responsible parties and claimants. The information is provided as a general summary and is not intended to be a complete statement of the law in respect to the rights and liabilities of polluters and those damaged by pollution.

This guidance does not constitute a regulation and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity by any person. The U.S. Coast Guard National Pollution Funds Center may change this guidance at any time, without prior notice, and may act at variance with this guidance or with internal procedures adopted hereto.

OSLTF FUNDING FOR OIL SPILLS

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I. HOW IS RESPONSE TO OIL SPILLS FUNDED?

The Oil Spill Liability Trust Fund (OSLTF or Fund) is a billion-dollar fund established as a funding source to pay removal costs and damages resulting from oil spills or substantial threats of oil spills to navigable waters of the United States. The OSLTF is used for costs not directly paid by the polluter, referred to as the responsible party (RP). The fund is also used to pay costs to respond to "mystery spills," for which the source has not been identified.

The OSLTF has two major components:

- ◆ **The Emergency Fund** is available for Federal On-Scene Coordinators (FOSCs) to respond to oil discharges and for Federal natural resource trustees to initiate natural resource damage assessments. The Emergency Fund is capitalized by an annual \$50 million apportionment from the OSLTF.
- ◆ **The remaining Principal Fund balance** is used to pay claims and to fund appropriations by Congress to Federal agencies to administer the provisions of OPA and support research and development.

The United States Coast Guard's National Pollution Funds Center (NPFC), in Arlington, Virginia, manages use of the OSLTF.

II. ACCESS TO THE OSLTF

What Can the Fund be Used for?

- ◆ **Federal Removal Costs**, which include payment to cleanup contractors (Oil Spill Response Organizations, or OSROs), overtime for government personnel, equipment used in removal operations (generally at established standard rates or lease costs), testing to identify the type and source of oil, disposal of recovered oil and oily debris, and preparation of associated cost documentation.
- ◆ **Claims** for costs and damages specified in OPA:
 - Uncompensated removal costs,
 - Natural resource damages (NRD),
 - Real/personal property,
 - Loss of profits,
 - Loss of subsistence use of natural resources,
 - Loss of government revenues,
 - Increased costs of government services, and
 - Claims from RPs asserting a defense to liability.

Who Can Access the Fund?

- ◆ **All Federal On-Scene Coordinators (FOSCs)** obtain immediate access to a funding account and ceiling for incident response through a Web application managed by the NPFC.
- ◆ **Other Federal, State, Local, and Indian tribal government agencies** assisting the FOSC get reimbursable funding authority via an FOSC-approved Pollution Removal Funding Authorization (PRFA). NPFC works with the FOSCs and the agencies to set PRFAs in place.
- ◆ **Natural resource trustees** (designated by the President of the United States, state, territorial governor, or Indian tribal governing authority) have several tools for accessing the OSLTF to pay for natural resource assessments and restoration.
- ◆ **Claimants** (individuals, corporations, and government entities) can submit claims for uncompensated removal costs and OPA damages (listed above) caused by the oil spill to the NPFC if the RP does not satisfy their claims. NPFC adjudicates the claims and pays those with merit.

Limitations to Accessing the OSLTF

- ◆ The discharge (or substantial threat of discharge) must be into or on the navigable waters of the United States or adjoining shorelines or the Exclusive Economic Zone (EEZ).
- ◆ The discharge (or substantial threat of discharge) must be **oil**, which can include petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil; however, it cannot include any substance which is specifically listed or designated as a hazardous substance under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).
- ◆ In general, the maximum amount available from the OSLTF per incident is \$1 billion or the balance in the OSLTF, whichever is less.
 - Funding for Federal removal (including response to a substantial threat) and natural resource damage preassessment activities is limited to the funds available in the OSLTF Emergency Fund, which receives an apportionment of \$50 million on October 1st of each fiscal year (another \$100 million can also be advanced from the OSLTF Principal Fund if necessary).
 - Natural resource damage claims are limited to a maximum of \$500 million per incident.

III. LIABILITY ISSUES

COFR Requirements/Role of Guarantor

- ◆ Before any vessel larger than 300 gross tons can operate in U.S. waters, the owner/operator must obtain a Certificate of Financial Responsibility (COFR) from the NPFC. This COFR is only issued if the owner/operator provides evidence of financial responsibility to pay for removal costs and damages up to the applicable limit of liability (LOL), which is based on the gross tonnage and type of the vessel (e.g., higher limits apply to tank vessels than cargo vessels).
- ◆ Owners/operators are permitted to self-insure their financial responsibility requirements, or they may purchase insurance from an OPA guarantor, which NPFC also certifies, who is contractually obligated to pay for oil spill costs.
- ◆ If a spill occurs, OPA guarantors are subject to direct action for payment under OPA-- except for incidents caused by RP willful misconduct or where OPA defenses, described below, are available to the RP.

Responsibility of RP to Respond to a Spill

- ◆ When an oil spill occurs, the RP is responsible for complete cleanup of the spill up to its limit of liability.
- ◆ If the RP does not fully remove the spill (or if the spill is so large that it involves government response), then the FOSC responds to the spill, tracking all costs, most of which are paid from the OSLTF Emergency Fund.
- ◆ The RP is later billed for all Federal response costs, which include all costs paid from the OSLTF as well as costs incurred by the agencies themselves, such as Coast Guard personnel and equipment.

Responsibility of RP to Settle Claims

- ◆ The RP likewise has primary responsibility for handling claims, including advertising, adjudication, and payment. The RP may establish a claims office to serve the affected area for spills with large claims potential.
- ◆ If the RP does not fulfill this responsibility, the NPFC performs the claims adjudication function and charges the cost to the RP. The government uses the OSLTF Principal Fund to pay these claims.
- ◆ Likewise, if the RP denies a claim, the claimant can then submit it to the NPFC for adjudication. If the NPFC pays the claim, it then bills the cost to the RP.

Multiple RPs

- ◆ Some incidents have multiple RPs. RP liability is “joint and several;” this means that each RP is liable for the entire amount of removal cost and damages resulting from a spill. Accordingly, the NPFC bills each RP the full cost of the spill response and damages.

Impact of Liability Limits and OPA Defenses

- ◆ When a vessel is identified as the source of a spill, NPFC provides information regarding the potential statutory limit of liability to which the RP may be entitled; however, entitlement to the limits of liability is not usually well defined until long after the response. This issue may be resolved in litigation.
- ◆ The OSLTF provides continued funding if the RP will not or cannot pay up to, or beyond, its limit of liability.
- ◆ Under OPA, the RP may also establish a defense to OPA liability if, for instance, the spill was solely caused by a third party, an Act of God, or an Act of War. If a third party defense is established, the third party is the OPA RP.
- ◆ If the RP pays or incurs removal costs and damages greater than its applicable limit of liability, it may submit a claim to the NPFC for excess removal costs and damages. Likewise, if the RP has a defense under OPA, the RP may submit a claim to the NPFC for all of its removal costs and damages. NPFC adjudicates these claims according to the claims provisions in OPA and the claims regulations (at 33 C.F.R. § 136). The RP has the burden to establish entitlement to the OPA liability limit or defense that is a basis for its claim. With respect to claimed removal costs, FOSCs must certify that all actions of the RP were necessary for the response and consistent with the National Contingency Plan.
- ◆ The RP is not entitled to the limit of liability if the incident is found to have been caused by gross negligence; willful misconduct; or a violation of Federal operating, construction, or safety regulations. Furthermore, entitlement to the limit of liability or an OPA defense is not established if the RP failed or refused:
 - to report the incident as required by law,
 - to provide all reasonable cooperation and assistance requested by the FOSC in connection with removal activities, or
 - to comply with an order issued by the FOSC without sufficient cause.
- ◆ The fact that an RP stops paying for a response, in good faith reliance on its having paid or incurred removal costs and damages in excess of its liability limit, has not been considered in itself a failure to provide all reasonable cooperation and assistance.

IV. FUND MANAGEMENT

Tracking Daily Removal Costs

- ◆ The FOSC tracks the daily costs for an incident. These costs include:
 - Coast Guard personnel and equipment used in the response (Coast Guard personnel and equipment are not paid for out of the OSLTF; however, the RP is billed for these costs as well as those paid out of the OSLTF);
 - direct costs incurred by the OSLTF Emergency Fund (Federal contracts, travel, purchases, etc.); and
 - other government agencies (Federal, State, Local) support costs funded under a PRFA and also paid from the OSLTF.
- ◆ NPFC carefully monitors ceilings on all ongoing removal efforts to ensure the OSLTF has adequate funds to cover all OSLTF costs.
- ◆ FOSCs must predict ceiling increases early so NPFC can estimate time to Fund depletion by tracking OSLTF costs for each activity.

OSLTF Emergency Fund Advancement Authority

- ◆ **Emergency Fund Apportionment** – The Emergency Fund annual apportionment of \$50 million occurs at the start of each fiscal year. The Fund is drawn down for the rest of the year and could be substantially depleted by late in the fiscal year.
 - Spill size and location alone do not determine the impact on the Fund. The RP's limit of liability, assets, and responsiveness are equally important.
 - Two or more major spills in the same fiscal year could easily deplete the Emergency Fund.
- ◆ **May supplement the Emergency Fund** – In 2003, the Coast Guard was given authority to advance up to \$100 million from the OSLTF Principal Fund to supplement Emergency Fund shortfalls.
- ◆ **Notification** – The Coast Guard must notify Congress within 30 days after an advance as to the amount advanced and the facts and circumstances necessitating the advance.
- ◆ **Impact on Response** – This advancement authority does not provide for any new or different uses of the Emergency Fund for Federal response, but may help the Coast Guard ensure funds are available for Federal response when needed and are not delayed should a costly response to a major spill threaten the balance of the Emergency Fund.

Funding Considerations for Mixed Oil and Hazardous Substance Incidents

- ◆ Occasionally, a pollution incident may include both oil removal, which is covered under the Oil Pollution Act and funded by the OSLTF, and hazardous substance removal, which falls under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and is funded by Superfund.
- ◆ In these cases, the responders must be careful to separate and carefully document cleanup of the different substances because the OSLTF is not used to fund hazardous substance removal. If the substances become so co-mingled that they cannot be separated, Superfund is used to clean the spill.
- ◆ A primary difference between the OSLTF and Superfund is that the OSLTF is available to pay third party claims for certain damages caused by the oil discharge or substantial threat of discharge to navigable waters, adjoining shorelines or the exclusive economic zone. Superfund is generally not available for similar damages caused by hazardous substance releases to the environment. Therefore, when both oil and hazardous substances are involved in a single pollution incident, it may be important to carefully distinguish and document the impacts from oil as opposed to hazardous substances.

V. CLAIMS FOR DAMAGES AND REMOVAL COSTS

The OSLTF can be used to pay for claims for:

- ◆ uncompensated removal costs;
- ◆ loss of profits or earning capacity;
- ◆ loss of Federal, State, or Local government revenues;
- ◆ costs to state or local governments for increased public services;
- ◆ loss of subsistence use of natural resources;
- ◆ damages to real or personal property; and
- ◆ natural resource damages.

Factors that Impact Claims Costs

- ◆ Typically, claims are presented long after removal is complete. Except for State removal costs claims, claims must be first submitted to the RP. If the RP denies the claims or does not settle with the claimant within 90 days, claimants can submit the claims to the NPFC or file an action in court against the RP.
- ◆ Damages may be far greater than removal costs.
- ◆ Some key factors that drive up claims costs are:
 - location of spill (e.g., if site isn't easily accessible or is a wildlife sanctuary),
 - type of oil spilled,
 - area and length of time for fisheries closures,
 - affected traffic and length of time for shipping lane closures,
 - population and commercial density of affected area,
 - magnitude and length of time for business interruptions,
 - types of natural resources impacted by the spill, and
 - extent of impact on environmentally sensitive areas.

RP'S Role

- ◆ When a spill occurs that has significant potential to result in claims, the NPFC may send the RP and guarantor a Notice of Designation (NOD), explaining their responsibilities for the spill, including accepting claims. The RP has five days to deny designation.
- ◆ If the RP does not deny the designation, the RP has 15 days to respond by advertising its designation and the procedures for submitting claims.
- ◆ The RP, if fully responsive to the requirements in OPA, assumes the entirety of claims responsibilities: advertising, receipt, adjudication, and payment of claims. The NPFC monitors these activities closely to assure compliance.
- ◆ The RP may publish a toll-free number for claimants and may establish a claims office to service the affected area.
- ◆ If the RP does not settle a claim within 90 days, the claimant may sue in court or submit the claim to the NPFC for adjudication.

Claimant's Role

- ◆ Claims must meet all requirements as defined by the Oil Pollution Act and must be fully documented. NPFC's Web site (www.uscg.mil/npfc) provides a checklist of these requirements and lists sample documentation.
- ◆ Claimants (other than states submitting claims for uncompensated removal costs) must first present their claims to the RP or the RP's guarantor.
- ◆ States may present removal cost claims directly to the NPFC without first presenting them to the RP.
- ◆ If the RP denies the claim or does not settle it within 90 days, a claimant may:
 - Commence action in court against the RP or
 - Present the claim to the NPFC.

When the RP Denies Designation or is Unknown

- ◆ The NPFC assumes claims responsibility if the RP denies designation, if the RP's claims response does not comply with OPA, or if the RP cannot be identified.
- ◆ The NPFC, if assuming claims responsibility, arranges for advertising, receipt, adjudication, and payment of claims, and publishes its toll-free phone number to claimants.
- ◆ For a major spill, the NPFC may establish one or more claims offices in the area of greatest impact.
- ◆ The NPFC also accepts claims when the claimant has presented a claim to the RP and the RP does not settle it within 90 days of presentment or when the RP denies the claim.

Submitting Interim Claims

- ◆ Claimants have the right to submit a number of smaller claims rather than waiting to submit a single, comprehensive claim after all known damages have been analyzed and tabulated.
- ◆ Documentation for each interim claim must clearly show that the cost was not included in a previous claim.
- ◆ Either the RP or the NPFC may pay interim claims with appropriate documentation.
- ◆ An interim payment does not limit a claimant's right to claim for other damages.

VI. NATURAL RESOURCE DAMAGES

- ◆ **Natural resources** include land, fish, wildlife, air, water, ground water, surface water, and other such resources belonging to, managed by, held in trust by, pertaining to, or otherwise controlled by the United States [including Exclusive Economic Zone (EEZ) resources], any state or local government or Indian tribe, or any foreign government.
- ◆ **Natural resource damages (NRD)** refer to costs to restore, rehabilitate, replace, or acquire the equivalent of the injured resource; any interim lost use or diminution in value of the injured resource pending restoration; and the reasonable cost of assessing those damages.
- ◆ **A natural resource damage assessment (NRDA)** is the process of collecting and analyzing information to evaluate the nature and extent of injuries resulting from an incident and determine the restoration actions needed to bring injured natural resources and services back to baseline and make the environment and public whole for interim losses. Natural resource trustees may submit a natural resource damage claim for any or all portions of the assessment and implementation of the resulting restoration plan.
- ◆ **Preassessment** is the first phase in the NRDA process by which trustees determine if they have jurisdiction to pursue restoration under OPA and, if so, whether it is appropriate to do so. Some data collection and analyses occurs during preassessment, including the collection of ephemeral data. Preassessment activities are generally paid out of the Emergency Fund of the OSLTF.
- ◆ **An initiate request** is a request by the natural resource trustees to the NPFC for funding to support preassessment activities. Whereas submitting a natural resource damage claim may take months or years to adjudicate, the initiate request usually provides funding within a few days.

Who are the Natural Resource Trustees?

- ◆ **Federal natural resource trustees** were established in Executive Order 12777:
 - Department of Agriculture,
 - Department of Commerce,
 - Department of Defense,
 - Department of Energy, and
 - Department of the Interior.
- ◆ **State trustees** are designated by the State's Governor to serve as the natural resource trustee.
- ◆ **Tribal trustees** represent Federally recognized **tribes** that have governmental authority over lands.

Role of Trustees

- ◆ Trustees are encouraged to coordinate with each other during all phases to ensure no double recovery of damages.
- ◆ **Preassessment Funding**
 - In the Preassessment Phase of a natural resource damage assessment, all affected trustees should select a Federal Lead Administrative Trustee (FLAT), who is then responsible for coordinating the effort and submitting necessary paperwork to NPFC. The NPFC only accepts initiate requests for preassessment activities from the FLAT.
 - The trustees are encouraged, but are not required, to first seek initiate funding from the RP for preassessment activities.
 - Funding from the OSLTF Emergency Fund is available exclusively to Federal trustees who may allocate such funds for preassessment activities to other trustees per Executive Order 12777.
- ◆ Trustees must also coordinate with the FOSC during the natural resource damage assessment process to avoid interference with the ongoing response and duplication of efforts.
- ◆ Trustees assess damages for injury to, destruction of, loss of, or loss of use of natural resources.
- ◆ Trustees develop restoration alternatives to address any injury to natural resources, from which they select the most appropriate alternative to implement.
- ◆ Trustees may develop and implement their plans only after adequate public notice, opportunity for a hearing, and consideration of all public comment.

Submitting Claims for Natural Resource Damages

- ◆ Only natural resource trustees can submit claims for natural resource damages.
- ◆ Like other claimants, trustees must first present claims to the RP or the RP's guarantor.
- ◆ If the RP denies the claim or does not settle it within 90 days, trustees can elect to commence action in court against the RP or present the claim to the NPFC.
- ◆ If the NPFC assumes claims responsibility, then NPFC arranges for the receipt, adjudication, and payment of claims.

NRD Impact on the Life Cycle Cost of Spill

- ◆ Natural resource damage costs can become substantial.
- ◆ Damages in environmentally sensitive areas (e.g., coral reefs) may be very costly. Many variables figure into the overall cost, including the composition of the product spilled, duration of spill, time of year, response-related conditions, geographic location, etc.
- ◆ Costs may not be known or estimable for months or years after the response is complete.

VII. ADDITIONAL RESOURCES

Visit the NPFC's Web site for more information on the topics discussed in this document, as well as related forms, regulations, guidelines, and technical operating procedures.

www.uscg.mil/npfc

VIII. ACRONYM LIST

COFR	Certificate of Financial Responsibility
EEZ	Exclusive Economic Zone
EPA	U.S. Environmental Protection Agency
FEMA	Federal Emergency Management Agency
FLAT	Federal Lead Administrative Trustee
FOSC	Federal On-Scene Coordinator
FPN	Federal Project Number
FWPCA	Federal Water Pollution Control Act
LOL	Limit of Liability
NCP	National Contingency Plan
NPFC	National Pollution Funds Center
NRD	Natural Resource Damage
NRDA	Natural Resource Damage Assessment
OPA	Oil Pollution Act
OSLTF	Oil Spill Liability Trust Fund (the Fund)
OSRO	Oil Spill Response Organization
P & I	Protection and Indemnity Insurance
PRFA	Pollution Removal Funding Authorization
RP	Responsible Party
USCG	United States Coast Guard