

U.S. Department
of Transportation



Commandant
U.S. Coast Guard

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United States
Coast Guard

NOV 6 1992

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From: Commandant
To: Distribution

Subj.: FORWARDING OF INTERIM RULE ON STATE ACCESS TO THE OIL
SPILL LIABILITY TRUST FUND FOR REMOVAL COSTS UNDER THE
OIL POLLUTION ACT OF 1990 (PURSUANT TO SECTION 1012(D) (1))
AND TECHNICAL OPERATING PROCEDURES (TOPs)

1. The interim rule, 33 CFR 133, implementing Section 1012 (d) (1) of the Oil Pollution Act of 1990 (OP 90) (PL 101380) which accord States access to Oil Spill Liability Trust Funds for the immediate removal of a discharge, or the mitigation or prevention of a substantial threat of a discharge of oil was signed by the Commandant 5 November 1992 and is effective the day of publication in the Federal Register. The Director, National Pollution Funds Center (NPFC) has distributed a copy of this rule and Technical Operating Procedures (TOPs) to facilitate administration of the Fund. I am forwarding a copy of both the interim rule and the TOPs for further distribution to Coast Guard OSCs in your district.
2. A natural working group of NPFC staff, an Environmental Protection Agency representative, and members of my staff developed these TOPs. To the extent we were able, these procedures were drafted for use by all parties: the NPFC, the States, OSCs, the District and Commandant (G-MEP). These procedures were also written to allow for maximum flexibility to allow the OSC to work with State officials in a mutually comfortable manner.
3. We also did not want to burden the OSC with unnecessary paperwork. So, for example the OSC is not required to review state cost accounting paperwork: however we directed that the NPFC case officer consult with the OSC on questions of an operational nature. We also assumed that the State/OSC relationship with respect to State access under this rule would be addressed in the Coast Guard/State Memoranda of Agreement.

I understand that we are breaking new ground, procedural as well as programmatic. We have already heard talk of the states using the Fund for abandoned oil well clean up. This will likely increase unit workload. And because the OSC has final authority

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on granting State access, we recognize that the OSC will be placed in awkward position at times. I therefore encourage constructive comments on the rule and the TOPs, not only on their content, but also to better define the Coast Guard/State relationship and our response to oil spills. Comments should be dual addressed to the Director, NPFC and Commandant (G-ME). Commandant (G-ME) will address those concerns related to operational matters and impact on work load. NPFC will address those concerns related to Fund administration. My point of contact is Commander Bruce Russell, Commandant (G-ME-3) at (202) 267-0421.

Encl: (1) Interim Rule
(2) Technical Operating Procedures for State Access under Section 1012 (d) (1) of the Oil Pollution Act of 1990 (PL 101-380)

Dist: All District (m)
RTC Yorktown
NSFCC

**Friday
November 13, 1992**

Part II

**Department of
Transportation**

Coast Guard

**33 CFR Part 133
State Access to the Oil Spill Liability
Trust Fund for Removal costs Under the
Oil Pollution Act of 1990; Interim rule**

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 133
[CGD 92-014]
RIN 2115-AE19

State Access to the Oil Spill Liability Trust Fund for Removal Costs Under the Oil Pollution Act of 1990

AGENCY: Coast Guard, DOT.
ACTION: Interim rule with request for comments.

SUMMARY: This rulemaking implements the provisions of the Oil Pollution Act of 1990 (OPA 90) concerning the procedures by which the Governor of a State can request payments of up to \$250,000 from the Oil Spill Liability Trust Fund (the Fund) for removal costs required for the immediate removal of a discharge, or the mitigation or prevention of a substantial threat of a discharge of oil.

This action is a temporary measure needed primarily to provide a

procedure by which the Governor of a State can make a request for payments from the Fund. This interim rule will be replaced by a more comprehensive rule that addresses, in addition to requests by Governors, formal agreements between the States and the Coast Guard providing specific procedures for fund use.

DATES: This rule is effective on November 13, 1992. Comments must be received on or before February 11, 1993.

ADDRESSES: Comments may be mailed to the Executive Secretary, Marine Safety Council (G-LRA/3406) (CGD 92-014), U.S. Coast Guard Headquarters, 2100 Second Street, SW, Washington, DC 20593-0001, or may be delivered to room 3406 at the above address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 287-1477. Comments on collection of information requirements also must be mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, ATTN: Desk Officer, U.S. Coast Guard.

The Executive Secretary maintains the public docket for this rulemaking. Comments will become part of this docket and will be available for inspection of copying at room 3406, U.S. Coast Guard Headquarters.
FOR FURTHER INFORMATION CONTACT: Mr. Donald Taylor

(Project Manager), National Pollution Funds Center, (703) 235-4805.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written data, views, or arguments. Comments are specifically requested on the effect the U.S. Department of Transportation regulations regarding cooperative agreements may have on State access to the Fund. These regulations are contained in 49 CFR parts 18, 20, 29, and 90. Persons submitting comments should include their names and addresses, identify this rulemaking (CGD 92-014) and the specific section of the rule to which each comment applies, and give the reason for each comment. Each person wanting acknowledgment of receipt of comments should enclose a stamped, self-addressed postcard or envelope.

The Coast Guard will consider all comments received during the comment period. It may change this rule in view of the comments.

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to the Marine Safety Council at the address under "ADDRESSES". If it determines that the opportunity for oral presentations will aid this rulemaking, the Coast Guard will hold a public hearing at a time and place announced by a later notice of the Federal Register.

Drafting Information

The principal person involved in drafting this document is Donald Taylor, Project Manager, National Pollution funds Center.

Regulatory Information

This rule is being published as an interim rule and is being made effective on the date of publication to provide a procedure whereby funds for the immediate removal of an oil discharge, or the mitigation or prevention of a substantial threat of an oil discharge, may be made available as soon as possible. A delay in providing a procedure may delay the payment of the necessary funds. Such a delay would be contrary to the intent of Congress under the Oil Pollution Act of 1990 (OPA 90) and to the interests of the public. For these reasons, the Coast Guard for good cause finds, under 5 U.S.C. 553 (b)(3)(B) and (d)(3), that notice and public procedure thereon before the effective date of the interim rule are unnecessary and that the interim rule

should be made effective in less than 30 days after publication.

In addition to this rulemaking, the Coast Guard is developing a second, separate rule which will replace this rule. A notice of proposed rulemaking and opportunity for public comment will be provided. The second rulemaking address not only requests by State Governors for payments between the States and the Coast Guard that may provide for advance payments to facilitate immediate removal of oil discharges, or the mitigation or prevention of substantial threats of oil discharges.

The Coast Guard consulted with representatives from the States at regional meetings held in December 1991 and January 1992. There was general support for the content of this rulemaking. A synopsis of the discussions that took place at those meetings is in the public docket for this rulemaking.

This rulemaking (CGD 92-014) is separate from the Coast Guard's ongoing claims regulations project (CGD 91-035). The state access regulations concern payment to the States outside the normal claims process.

Discussion of the Regulations

This interim rule implements the provision under section 1012(d)(1) of the Oil Pollution Act of 1990 (Pub. L. 101-380; August 18, 1990) (OPA 90) which states that in accordance with regulations promulgated under section 1012(d)(1), the President, upon the request of the Governor of a State, may obligate the Fund for payment in an amount not to exceed \$250,000 for removal costs consistent with the National Contingency Plan required for the immediate removal of a discharge, or the mitigation or prevention of a substantial threat of a discharge, of oil.

The objective of this rulemaking is to develop the basic request procedures. Elaboration of this procedure, if deemed necessary after further consultation with the States and consideration of the comments on this rule, will be handled in the second rulemaking discussed under "Regulatory Information" in this preamble.

The interim rule addresses only requests by Governors or their representatives. Requests are made directly to the On-Scene Coordinator (OSC). The OSC reviews the request for eligibility both under section 1012(d) and under the interim rule and approves or denies the Governor's request. To guide the OSC in making eligibility recommendations, the

interim rule provides minimum standards. This provides consistency in applying the interim rule. The States are required to coordinate their removal actions with the OSC and retain records of expenditures of the funds. The provisions of the Federal Grant and Cooperative Agreement Act and the regulations of the U.S. Department of Transportation regarding Federal assistance programs apply to payments from the Fund.

In developing this rule, the Coast Guard consulted with the Environmental Protection Agency.

Regulatory Evaluation

This rule is not major under Executive Order 12291. It is significant under the Department of Transportation Regulatory Policies and Procedures (44 FR 11040; February 26, 1979). This rulemaking is considered significant because of the substantial interest by the States. The Coast Guard expects the economic impact of this rule to be so minimal that a separate Regulatory Evaluation is unnecessary. Though the Coast Guard expects the economic impact of this rule to be minimal, it specifically requests comments and data on this subject.

The impacts of this rule arise from the procedures the Governor of a State must follow requesting payments for immediate removal costs from the Fund and from the recordkeeping by the State necessary to account for their expenditures. The cost of making a request is expected to be as little as the cost of making a telephone call or sending a facsimile. The cost of conforming with Federal cooperative agreement administrative requirements is expected to be minimal. This cost is intrinsic to all of the cooperative agreements a State may have with the Federal government. The costs of transferring and expending funds and keeping records of the expenditures of the payments obligated from the Fund would vary with the nature of the removal activity. Recordkeeping of removal activities and costs, however, is required already for actions consistent with the National Contingency Plan.

Small Entities

The entities affected by this rulemaking are State governments. This rulemaking does not affect "small entities", as the term is defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

Federalism

The Coast Guard has analyzed this rule in accordance with the principles and criteria contained in Executive Order 12612 and has determined that this rule does not have sufficient implications to warrant the preparation of a Federalism Assessment. Though this rulemaking affects the States by providing a procedure whereby they may request money from the Fund, the implications of that procedure are not sufficient enough, under the Department of Transportation's federalism guide, to warrant the preparation of a Federalism Assessment. In addition, States are not preempted from utilizing their own funds in a removal activity.

Collection of Information

Under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) reviews each rule that contains a "collection of information requirement" to determine whether the practical value of the information is worth the burden imposed by its collection. Collection of information requirements include reporting, recordkeeping, notification, and other similar requirements.

This rule prescribes requirements for requesting access to the Fund, for following up those requests with a confirmation, and for keeping records of expenditures. These requirements are discussed in the "Regulatory Evaluation" section of this preamble.

The Coast Guard has submitted the collection of information requirements to OMB for review under section 3504(h) of the Paperwork Reduction Act. Persons submitting comments on the requirements should submit their comments both to OMB and to the Coast Guard where indicated under "ADDRESSES".

For further information, contact the Information Requirements Division, M-34, Office of the Secretary of Transportation, 4400 Seventh Street, SW, Washington, DC 20590, (202) 366-4735; the Desk Officer, U.S. Coast, at the Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, (202) 395-7340; or the person under "FOR FURTHER INFORMATION CONTACT" in this preamble.

Environment

The Coast Guard considered the environmental impact of this rule and concluded that, under section 2.B.2 of Commandant Instruction M16475.1B, this rule is categorically excluded from further environmental documentation. This rule concerns procedures relating to a request for payments to expedite

the removal of an oil discharge or the mitigation or prevention of a substantial threat of an oil discharge. This action concerns internal administrative procedure. A Categorical Exclusion Determination is available in the docket for inspecting or coping where indicated under "ADDRESSES".

List of Subject in 33 CFR Part 133

Administrative practice and procedure, intergovernmental relations, Oil pollution, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Coast Guard amends 33 CFR chapter I as follows:

1. Part 133 is added to read as follows:

PART 133 OIL SPILL LIABILITY TRUST FUND; STATE ACCESS

Sec.

- 133.1 Purpose.
- 133.3 Definitions.
- 133.5 Requests: General.
- 133.7 Requests: Amount.
- 133.9 Requests: Where made.
- 133.11 Requests: Contents.
- 133.13 Removal actions eligible for funding.
- 133.15 Determination of eligibility for funding.
- 133.17 Conduct of removal actions.
- 133.19 Recordkeeping.
- 133.21 Records retention.
- 133.23 Investigation to determine the source and responsible party.
- 133.25 Notification of Governor's designee.

Authority: 33 U.S.C. 2712(e); E.O. 12777 (3 CFR, 1991 Comp., p. 351); 49 CFR 1.48.

§ 133.1 Purpose.

This part prescribes procedures for the Governor of a State to request payments from the Oil Spill Liability Trust Fund (the Fund) for oil pollution removal costs under section 1012(d)(1) of the Oil Pollution Act of 1990 (the Act) (33 U.S.C. 2712(d)(1)).

§ 133.3 Definitions.

(a) As used in this case the following terms have the same meaning as set forth in section 100 of the Act (33 U.S.C. 2701): "discharge", "inclusive economic zone", "Fund", "incident", "National Contingency Plan", "navigable waters", "oil", "remove", "removal", "removal costs", "responsible party", "State", and "United States".

(b) As used in this part—
Act means Title I of the Oil Pollution Act of 1990 (33 U.S.C. 2701 through 2719).

Director, NPFC, means the person in charge of the U.S. Coast Guard National Pollution Funds Center or that person's authorized representative.

NPFC means the U.S. Coast Guard National Pollution Funds Center, 4200 Wilson Boulevard, Suite 1000, Arlington, Virginia 22203-1804.

On-Scene Coordinator or *OSC* means the Federal-official predesignated by the Environmental Protection Agency or the U.S. Coast Guard to direct and coordinate all efforts for removal of a discharge, or the mitigation or the prevention of a substantial threat of a discharge, of oil.

Removal action means an incident-specific activity taken under this part to contain or remove a discharge, or to mitigate or prevent a substantial threat of a discharge, of oil.

§ 133.5 Requests: General.

(a) Upon a request submitted in accordance with this part by the Governor of a State or his or her designated State official, the OSC may obtain a Federal Project Number (FPN) and a ceiling not to exceed \$250,000 per incident for removal costs. The removal costs must be for the immediate removal of a discharge, or the mitigation or prevention of a substantial threat of a discharge, of oil.

(b) Before a request under this part is made, the State official shall ensure that the procedures in the National Contingency Plan (40 CFR part 300) for notifying Federal authorities of the discharge or threat of discharge have been met.

(c) The Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. 8301-8308) and 49 CFR parts 18, 20, 29, and 90 apply to fund monies obligated for payment under this part.

§ 133.7 Requests: Amount.

(a) The amount of funds that may be requested under this part

(1) Is limited to the amount anticipated for immediate removal action for a single oil pollution incident, but, in any event, may not exceed \$250,000 per incident;

(2) Must be for removal costs consistent with the National Contingency Plan; and

(3) Must be reasonable for the removal actions proposed, considering such factors as quantity and composition of the oil, weather conditions and customary costs of similar services in the locale.

(b) The funds requested are obligated only to the extent they are determined to be for immediate removal actions which are reasonable and otherwise eligible for payment under this part.

§ 133.9 Requests: Where made.

Requests for access to the Fund under § 133.5 must be made by telephone or other rapid means to the OSC.

§ 133.11 Request: contents.

In making a request for access to the Fund, the person making the request shall

(a) Indicate that the request is a State access request under 33 CFR part 133;

(b) Give his or her name, title, department, and State;

(c) Describe the incident in sufficient detail to allow a determination of jurisdiction, including at a minimum the date of the occurrence, type of product discharged, estimated quantity of the discharge, body of water involved, and proposed removal actions for which funds are being requested under the part; and

(d) Indicate the amount of funds being requested.

§ 133.13 Removal actions eligible for funding.

To be eligible for funding under this part, each removal action must meet the following:

(a) Must be for an incident, occurring after August 18, 1990, which resulted in a discharge, or the substantial threat of a discharge, of oil into or upon the navigable waters or adjoining shorelines.

(b) Must comply with the National Contingency Plan.

(c) Must be an immediate removal action.

§ 133.15 Determination of eligibility for funding.

Upon receipt of the information under § 133.11 and, if necessary, from other sources determined to be appropriate at his or her discretion, the OSC will determine whether the proposed removal actions meet the requirements of § 133.13. If necessary, the OSC may seek further clarification of the proposed actions from the State official. The OSC shall expeditiously notify the State official and the Director, NPFC, of his or her decision.

§ 133.17 Conduct of removal actions.

Removal actions funded under this part must be coordinated with the OSC and conducted in accordance with the National Contingency Plan.

§ 133.19 Recordkeeping.

(a) The State official shall maintain detailed records of expenditures made from the funds

provided under this part, including records of

(1) Daily expenditures for each individual worker, giving the individual's name, title or position, activity performed, time on task, salary or hourly rate, travel costs, per diem, out-of-pocket or extraordinary expenses, and whether the individual is normally available for oil spill removal;

(2) Equipment purchased or rented each day, with the daily or hourly rate;

(3) Miscellaneous materials and expendables purchased each day; and

(4) Daily contractor or consultant fees, including costs for their personnel and contractor-owned or rented equipment, as well as that of any subcontractor.

(b) The State official shall submit a copy of these records and a summary document stating the total of all expenditures made to the NPFC official specified in § 133.25(c) within thirty days after completion of the removal actions. A copy of these documents shall also be submitted to the cognizant OSC.

(c) Upon request of the OSC or the NPFC, the State official shall make the original records available for inspection.

(d) If, after inspecting the records, the Director, NPFC, determines that expenditures by a State official from funds obligated under this part were not eligible for funding under this part and the expenditures were not made with the good faith understanding that they were eligible under this part, the Director, NPFC, may seek reimbursement to the Fund from the State.

§ 133.21 Records retention.

(a) The State official shall maintain all records for ten years following completion of the removal actions.

(b) If any litigation, claim, negotiation, audit, cost recovery, or other action involving the records has been started before the expiration of the two-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular ten-year period, whichever is later.

§ 133.23 Investigation to determine the source and responsible party.

(a) The State official shall promptly make a thorough investigation to determine the source of the incident and the responsible party.

(b) Upon completion of the investigation, the State official shall forward the results of the investigation and copies of the supporting evidence identifying the source and the responsible party to both the cognizant OSC and the NPFC official specified in § 133.25(c).

§ 133.25 Notification of Governor's designee.

(a) If the Governor of a State anticipates the need to access the Fund under this part, he or she must advise the NPFC in writing of a specific individual who is designated to make requests under this part.

(b) This designation must include the individual's name, address, telephone number, and title or capacity in which employed.

(c) The information required by paragraph (b) of this section must be forwarded to the Chief, Case Management Division, National Pollution Funds Center, Suite 1000, 4200 Wilson Boulevard, Arlington, Virginia 22203-1804.

Dated: November 5, 1992.

J.W. Kime,
*Admiral, U.S. Coast Guard
Commandant.*

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8:45 am]

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