

## **Appendix B**

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### **FOSC Funding Information for Oil Spills and Hazardous Materials Releases**

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# FOSC Funding Information

for  
Oil Spills and  
Hazardous  
Materials  
Releases



April 2003



# PURPOSE

This document is designed to assist Federal On-Scene Coordinators (FOSCs) during oil spill and other hazardous material responses. The intent of this document is to provide an overview of financial aspects of spill response issues. It is not intended to be an all-inclusive guide on spill management issues or on the rights and liabilities of polluters and those damaged by pollution as defined by the Oil Pollution Act (OPA) or the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

# FOSC Funding Information for Oil Spills and Hazardous Materials Releases

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## I. WHAT IS THE OSLTF?

The Oil Spill Liability Trust Fund (OSLTF or Fund) is a billion-dollar fund established as a source of money to pay removal and certain other 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 a responsible party (RP) or guarantor, including costs to respond to "mystery spills" for which there is no identified RP.

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

## II. ACCESS TO THE OSLTF

### FEDERAL WATER POLLUTION CONTROL ACT OIL SPILL RESPONSE AUTHORITY

- ◆ Federal On-Scene Coordinators may access the OSLTF Emergency Fund to respond to an oil spill under the President's FWPCA authority (33 U.S. Code § 1321(c)).
- ◆ Removal of a discharge or prevention and mitigation of a substantial threat of a discharge of oil into or on the navigable waters, adjoining shorelines, and the Exclusive Economic Zone (EEZ).

### WHO CAN ACCESS THE FUND

- ◆ **All Federal On-Scene Coordinators (FOSCs)** obtain immediate access to a funding account and ceiling for incident response by accessing the Ceiling and Number Assignment Processing System (CANAPS) on the Internet: [www.npfc.gov/canaps](http://www.npfc.gov/canaps) (see page 5).
- ◆ **Other Federal, state, local, and Indian tribal government agencies** assisting the FOSC get reimbursable funding authority via a FOSC-approved Pollution Removal Funding Authorization (PRFA). NPFC will work with the FOSCs, the agencies, and the Incident Command (IC)/Unified Command (UC) to set PRFAs in place.
- ◆ **States** may opt to access up to \$250,000 via the Oil Pollution Act's State Access provision. FOSCs still provide initial coordination of the request and subsequent oversight and coordination.
- ◆ **Federal Lead Administrative Trustees (FLATs)** may submit an Initiate Request to the NPFC to fund the initiation of a Natural Resource Damage Assessment (NRDA).
- ◆ **Natural Resource Trustees** designated by the President of the United States, state, territorial governor, or Indian tribal governing authority may submit natural resource damage (NRD) claims to the NPFC for NRD costs not paid by the RP.
- ◆ **Claimants** (individuals, corporations, and government entities) can submit claims for uncompensated removal costs or certain damages (natural resources, real/personal property, loss of profits, loss of subsistence use of natural resources, loss of government revenues, and increased costs of government services) 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. RPs can submit claims provided that:

- the total of all response costs and damage claims exceed the RP's statutory limit of liability, or
- the spill was solely caused by a third party, an Act of God, or an Act of War.

**COSTS FOR THE FOLLOWING CAN BE CHARGED TO THE OSLTF**

- ◆ **Removal** – includes cleanup contractors (Oil Spill Response Organizations or OSROs), overtime for government personnel, equipment used in removal (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
- ◆ **Natural Resource Damages** – refers 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
- ◆ **Claims** for removal and damages

**LIMITATIONS TO ACCESSING THE OSLTF**

- ◆ The maximum, per case, is \$1 billion, or the balance in the OSLTF, whichever is less.
- ◆ Removal funding (including response to a substantial threat) and Initiate request funding are limited to the funds available in the OSLTF Emergency Fund that receives and additional \$50 million on October 1st of each fiscal year.
- ◆ There is a maximum of \$500 million per case to satisfy NRD claims and assessments.
- ◆ Initiation of NRDA costs may be paid out of the Emergency Fund, subject to its availability and the process through which the funding was requested.
- ◆ The discharge (or substantial threat of discharge) must impact navigable waters of the United States [including the 200-mile Exclusive Economic Zone (EEZ)].

**III. NATIONAL POLLUTION FUNDS CENTER SUPPORT ROLE**

**SERVICES NPFC CAN PROVIDE DURING A SPILL**

- ◆ Serve as troubleshooters and the spokesperson for all OSLTF access, documentation, and claims issues. NPFC personnel can be dispatched to the Incident Commander (IC). In a Spill of National Significance (SONS), NPFC may be called upon to head the Finance Section under the Unified Command System (UCS) or Incident Command System (ICS)
- ◆ Assure that the OSLTF ceiling for the FOSC's removal efforts remains adequate and is adjusted as needed
- ◆ Assist in tracking obligations against the ceiling
- ◆ Advise the FOSC of the remaining ceiling balance
- ◆ Advise and assist in RP identification

- ◆ Provide information concerning validity of an RP's Certificate of Financial Responsibility (COFR) and guarantor identity for vessel spills
- ◆ Provide information concerning RP limits of liability (LOL)
- ◆ Prepare and deliver, with FOSC concurrence, Notices of Designation (including appropriate advertising requirements) to RPs
- ◆ Advise the FOSC and act as the FOSC's spokesperson on any matters related to the RP's response to the Notice of Designation
- ◆ Oversee the RP's efforts to advertise for claims or arrange for NPFC to advertise if the RP fails to do so or if an RP has not been identified
- ◆ Help negotiate and execute Pollution Removal Funding Authorizations (PRFAs) with any other Federal, state, local or Indian tribal government agency that the FOSC decides to use as part of the incident response and work with representatives of other agencies to ensure that their cost documentation is adequate for approval of reimbursement and supports cost recovery from the RP
- ◆ Negotiate and execute any requested funding agreement for Initiation of Natural Resource Damage Assessments (NRDA) with the Federal Lead Administrative Trustee (FLAT); Initiate requests are handled directly between the NPFC and the FLAT, but NPFC personnel coordinate the preassessment activities of the NRDA with the FOSC
- ◆ Handle all OPA claims-related issues, assist the FOSC in documenting the incident's impact with respect to potential claims, notify all RPs and guarantors when there are multiple RPs and arrange for adjudication of claims either directly or by the RP and answer claims-related questions for the FOSC
- ◆ Provide guidance on gathering/consolidating daily cost data and preparing the daily cost estimate summary for inclusion in Pollution Reports (POLREPs)
- ◆ Provide financial advice and forms for daily resource cost documentation and ensure that Coast Guard resources participating under the FOSC's direction satisfactorily complete this documentation and monitor and help troubleshoot cost documentation problems
- ◆ Provide legal advice, as required, in coordination with the relevant Command's servicing legal office

#### **SERVICES THAT NPFC CANNOT PROVIDE DURING A SPILL**

- ◆ NPFC case officers **do not** have contracting authority and cannot act as a contracting officer (KO). With the exception of contractor support for RP identification, support for commercial contracts for oil spill clean-up actions must come from the District staff or from the Maintenance and Logistics Command (MLC) contracting staff. This may require that a KO be temporarily assigned to the UCS/ICS.
- ◆ NPFC case officers **do not** act as the FOSC's general finance officer or logistics officer, **other than** in the capacity of designated UCS Finance Section Chief during a SONS.
- ◆ NPFC **does not** validate utilization of resources. It is important that the FOSC assign individuals under FOSC direction to validate and track personnel and equipment employed during the spill response. This includes both Coast Guard and commercial resources used at specific clean-up sites and within the UCS/ICS. Generally, the

individuals who validate the use of personnel and equipment are separate from the FOSC's pollution response on-scene representatives. **Other governmental agencies (OGAs)** must document their own costs of participation in order to be reimbursed under their PRFA agreements. Individuals responsible for validating resource utilization should, where possible, note the movement of OGA personnel into and out of a site.

## IV. OPA RESPONSIBLE PARTY LIABILITY ISSUES

### COFR REQUIREMENTS/ROLE OF GUARANTOR

- ◆ Prior to any vessel >300 gross tons operating in U.S. waters, the owner/operator must obtain a Certificate of Financial Responsibility (COFR). This COFR is only issued if the owner/operator provides evidence of financial responsibility to pay for removal costs and damages up to the vessel's limit of liability (LOL). A vessel's liability limit is based on its gross tonnage and vessel type (e.g., higher limits apply to tank vessels than cargo vessels).
- ◆ RPs are permitted to self-insure their financial responsibility requirements. In most cases that involve self-insurers, they also have other insurance through a guarantor who is contractually obligated to pay. In these cases, the U.S. government does not have OPA Direct Action Rights against the other insurer.

### DETERMINING LIMITS OF LIABILITY

- ◆ When vessel identity is reported in a spill incident, NPFC will provide information regarding potential statutory LOL to which an RP may be entitled; however, entitlement to the LOL is not usually well defined until long after the response. This issue may be resolved in litigation.
- ◆ What happens if the RP can only pay to their LOL?
  - *The OSLTF will provide continued funding if the RP stands down or cannot pay.*
- ◆ What happens if the RP pays more than their LOL?
  - *The RP may submit a claim to the NPFC for excess removal costs and damages. The claim will be adjudicated according to the claims provisions in OPA and the claims regulation. The RP will be compensated for all excess removal costs and damages to which the RP is entitled under OPA.*
- ◆ Entitlement to the LOL is lost if the RP fails or refuses:
  - 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
  - without sufficient cause, to comply with an order issued by the FOSC

### RP'S ROLE IN THE RESPONSE PROCESS

- ◆ **The RP has primary responsibility** for response to a spill incident, including setting up the ICS and joining with the FOSC and state on-scene coordinator (SOSC) in the UC.

- ◆ Even when the RP leads a reasonable response effort, **the FOSC is always in ultimate command** and may decide to direct specific action or, for whatever reason it is deemed necessary, actually take the lead role in the response.
- ◆ The RP faces challenges to balance their corporate response with the desires of the FOSC given cost, environmental, political, and public relations/media impacts. The FOSC's responsibility extends further than taking appropriate action if the RP's response is inadequate. The FOSC should be aware that the RP might request reimbursement from the OSLTF via the claims route if the RP exceeds the LOL or has a complete defense to liability. The FOSC should identify those times when a response may be inflated beyond the level necessary to ensure removal of the oil and should notify the RP and the NPFC of this observation.

#### **RP'S ROLE IN THE CLAIMS PROCESS**

- ◆ An RP 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 is deficient, NPFC will perform the claims adjudication function and charge the cost to the RP.
- ◆ The NPFC will assure that all of the above responsibilities are met.

## **V. FUNDS MANAGEMENT**

#### **CANAPS**

- ◆ The Ceiling and Number Assignment Processing System (CANAPS) automates and centralizes the creation and management of project numbers and ceilings for Federally funded responses initiated by Federal On-Scene Coordinators (FOSCs).
- ◆ CANAPS is a Web-based tool available at: <http://www.npfc.gov/canaps>
- ◆ CANAPS collects basic incident information via a user-friendly, Internet "wizard" and immediately assigns a project number and the requested spending ceiling – up to a preset limit. An email confirmation of the project number and ceiling is sent to the requesting FOSC. CANAPS then creates the required official message and releases it through the Coast Guard Messaging System (CGMS).
- ◆ A field user tutorial is available. The tutorial is a helpful, comprehensive document that steps users through the process of opening and modifying a Federal Project. The tutorial is available at:

[http://www.uscg.mil/hq/npfc/canaps/Tutorial/CANAPS\\_Field\\_Tutorial.pdf](http://www.uscg.mil/hq/npfc/canaps/Tutorial/CANAPS_Field_Tutorial.pdf)

#### ◆ Ceiling and Project Limits

- Federal Project Numbers (FPNs) can be opened by EPA and USCG FOSCs for the removal of oil using the Oil Spill Liability Trust Fund (OSLTF).
- CERCLA Project Numbers (CPNs) can be opened by USCG FOSCs for the removal of hazardous substances using Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) funds. The EPA has its own process for opening Superfund projects outside of CANAPS.
- The need to manage the respective funds requires limits to the amount of money that can be obligated automatically by the CANAPS system before having to speak to the National Pollution Funds Center (NPFC).
- The USCG can open FPNs up to \$500K and CPNs up to \$249,999.
- The EPA can open FPNs up to \$250,000.
- These thresholds are subject to change based on the availability of funds. Additional money is available. If the project is going to grow beyond these limits, contact the NPFC to request additional funding.

#### ◆ User IDs and Passwords

- Access to CANAPS is controlled by use of user IDs and passwords, which are administered by the NPFC and are specific to the FOSC's Unit or Region.
- Access keys are changed quarterly.

#### ◆ Demonstration Version

- A demonstration version of the CANAPS software is available at: <http://www.npfc.gov/canapsv2demo>
- The user ID for the demonstration version is Demo, and the password is DEMO.

### **CONSIDERATIONS FOR ESTIMATING THE TOTAL COSTS OF THE SPILL**

#### ◆ RP Limits of Liability (LOL)

- An RP can't be assured LOL will hold until investigation and possible litigation are resolved.
- An RP who holds a COFR and exceeds the established LOL is expected to continue the response and file a claim for the actual costs in excess of the LOL.
- An RP's involvement – and the increased probability of cost recovery – is more likely with the presence of a COFR guarantor or “other insurer.”
- An RP's P&I coverage, the “other insurance,” is often considerably greater than the LOL.

- ◆ RP Responsiveness
  - Media and public interest and political awareness often influence an RP's responsiveness.
- ◆ RP Spending Past LOL
  - RPs and their guarantors often continue to provide funding and support after exceeding the LOL (for which the RP may subsequently submit a claim to the NPFC for excess costs). The determination of whether or not this will be the case must be made as soon as it is feasible to minimize potential transition issues and to quickly estimate potential impacts to the OSLTF.
  - RP's spending and applicability of liability limits are usually not well defined until long after the response, especially in cases subject to litigation.

#### **TRACKING DAILY BURN RATE FOR REMOVAL**

- ◆ The FOSC tracks the daily costs (burn rate) for an incident. The RP may not be forthcoming with this data for legal or public relations reasons. These costs include:
  - costs incurred by the OSLTF **plus** USCG resource usage (personnel, equipment, Marine Safety Laboratory, etc.)
  - other government agencies (Federal, state, local) support costs
- ◆ Early warning is required to forecast ceiling increases so NPFC can estimate time to Fund depletion by tracking burn rates for each activity

**NOTE:** Regardless of whether the RP or the FOSC directs the response, government personnel, and equipment used in the response are considered a billable resource.

#### **ANALYZING AND MONITORING POTENTIAL DAMAGE CLAIMS COSTS**

- ◆ Typically, claims are presented long after removal is over. Claims must be first submitted to the RP. If the RP denies responsibility, or if 90 days passes without a settlement, claimants can submit the claim to the NPFC.
- ◆ Claims costs may be far greater than removal costs.
- ◆ Some key factors that drive up claims costs are:
  - area and length of time for fisheries closures [National Marine Fisheries Service (NMFS) may make this call]
  - 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
  - extent of impact on environmentally sensitive areas

## **FUNDING CONSIDERATIONS FOR NRDAS**

- ◆ FLATs may request obligation of funds from NPFC for NRDA initiation.
- ◆ Ceiling allocations and reimbursement for initiation of NRDA are funded from the OSLTF Emergency Fund.
- ◆ Up-front or after-the-fact funding for assessment, restoration, and/or emergency restoration is available from the OSLTF through the claims process.
- ◆ Any natural resource trustee (Federal, state, or tribal) may submit claims for NRD.
- ◆ Claims payments are based on approved plans.
- ◆ SONS presents high potential that removal costs and other claims may consume most of the OSLTF prior to NRD needs being met

## **CEILING MANAGEMENT IN THE EVENT OF MULTIPLE INCIDENTS**

- ◆ Two or more major spills (non-SONS) may deplete the Emergency Fund.
- ◆ The Emergency Fund apportionment of \$50 million per annum 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.
- ◆ Starting in FY 2003, advancements of up to \$100 million are available.

## **OSLTF EMERGENCY FUND ADVANCEMENT AUTHORITY**

- ◆ **May supplement the Emergency Fund** – The Coast Guard was recently given authority to advance up to \$100 million from the OSLTF 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 Responses** – 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 will be available for Federal response when needed and are not delayed when a costly response threatens the balance of the Emergency Fund.

## **FUNDING CONSIDERATIONS FOR MULTIPLE RP INCIDENTS**

- ◆ Spill size alone does not determine the impact on the Fund. The RP's LOL, assets, and responsiveness are equally important.
- ◆ FOSCs must segregate all costs among incidents.
- ◆ Portions of discharged oil from multiple incidents could eventually co-mingle. RPs may need to decide how to pay claims resulting from the co-mingled oil, usually after removal operations cease.

## **FUNDING CONSIDERATIONS FOR MIXED OIL AND CERCLA INCIDENTS**

- ◆ Presence of hazardous substances may create a mixed spill [co-mingled oil and hazardous substance(s)] or constitute a single response.



- ◆ A co-mingling scenario will generally be a Superfund response, although EPA and the USCG have not established a precise definition to distinguish between the two types of responses.
- ◆ A mixed site scenario requires that all costs be assigned to separate records for OSLTF or CERCLA cases. The FOSC must have both an FPN (Federal Project Number) for the OSLTF-funded removal actions and a CPN (CERCLA Project Number) for the hazardous substance response actions.

**NOTE:** FPN/CPN generated by CANAPS

- ◆ When substances are not mixed, a single incident may also include a response that falls under OSLTF and CERCLA.
- ◆ The NPFC **cannot** pay claims for uncompensated removal costs or damages arising from a release of a hazardous substance.

## VI. CLAIMS PROCESS

### WHAT CLAIMS ARE COMPENSABLE

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

### RP'S ROLE

- ◆ The RP and guarantor will receive a Notice of Designation (NOD). The RP has five days to deny designation.
- ◆ If the RP does not deny the designation, they have 15 days to respond by advertising their designation and the procedures for submitting claims.
- ◆ The RP, if fully responsive to the requirements in OPA, will assume the entirety of claims responsibilities: advertising, receipt, adjudication, and payment of claims. The NPFC will monitor closely to assure compliance.
- ◆ Claimants (other than states submitting claims for uncompensated removal costs) must first present their claims to the RP or the RP's guarantor.
- ◆ State removal cost claims are permitted to go directly to the NPFC.
- ◆ A claimant can elect to commence action in court against the RP or present the claim to the NPFC if the RP does not settle a claim within 90 days after filing.

## **NPFC'S ROLE IF RP DENIES DESIGNATION OR IS UNKNOWN**

- ◆ The NPFC, if assuming claims responsibility, will arrange for advertising, receipt, adjudication, and payment of claims.
- ◆ The NPFC will assume 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 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.

## **NEED FOR ON-SITE CLAIMS OFFICE**

For a major spill, either the RP or the NPFC may establish one or more claims offices in the area of greatest impact.

## **REQUIREMENT TO PAY INTERIM CLAIMS**

- ◆ Either the RP or the NPFC can pay interim claims with appropriate documentation.
- ◆ An interim payment does not limit a claimant's right to claim for other damages not paid or addressed under the interim claim.

## **IMPORTANCE OF ADDRESSING CLAIMS ISSUES IN PRESS RELEASES**

- ◆ Damaged parties are major public affairs clients.
- ◆ NPFC will provide information to help the Joint Information Center (JIC) educate the public. This may be a copy of the RP's advertisement and explanation of the RP's claims process and/or copies of the NPFC Claimant's Guide and phone numbers.
- ◆ Claims will be paid more quickly if the public knows the procedures. The need for good documentation by the claimant is especially important and is something that should be stressed in press releases.

# **VII. NATURAL RESOURCE DAMAGES**

## **DEFINITION**

"Natural resources" includes 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.

## **WHO ARE THE NATURAL RESOURCE TRUSTEES**

### **FEDERAL**

- ◆ Department of Agriculture
- ◆ Department of Commerce
- ◆ Department of Defense
- ◆ Department of Energy
- ◆ Department of the Interior

## **STATE**

State trustees are any state agency designated by the state's Governor to serve as the natural resource trustee.

## **TRIBAL**

Tribal trustees are federally recognized tribes that have governmental authority over lands. This does not include Alaska native regional or village corporations.

## **ROLE OF TRUSTEES IN THE FUNDING PROCESS**

- ◆ Trustees must coordinate with each other during all phases of NRDA to ensure no double recovery of damages.
- ◆ In the pre-assessment phase of a NRDA, all affected trustees must select a Federal Lead Administrative Trustee (FLAT), who is then responsible for coordinating the effort and submitting necessary paperwork to NPFC.
- ◆ 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 must also coordinate with the FOSC during the NRDA process to avoid interference with the ongoing response.

## **COMPENSABLE NATURAL RESOURCE DAMAGES**

- ◆ Costs to restore, rehabilitate, replace, or acquire the equivalent of the injured resource
- ◆ Any interim loss of use or diminution in value of the injured resource pending restoration
- ◆ The reasonable cost of assessing NRD damages

## **COORDINATION FOR NRD WITH THE RESPONSIBLE PARTY**

- ◆ The RP has primary responsibility to pay all of the costs/damages listed in previous sections.
- ◆ The trustees are encouraged, but are not required, to first seek Initiate funding from the RP for pre-assessment activities.
- ◆ Trustees must first present claims to the RP or the RP's guarantor. If the RP is not responsive and/or refuses to pay, trustees can come to the Fund for relief.
- ◆ If the RP does not settle a claim within 90 days after filing, a claimant can elect to commence action in court against the RP or present the claim to the NPFC.

## **NRD CLAIMS PROCESS – ROLE OF OSLTF/NPFC IF RP DOESN'T PAY**

- ◆ If the NPFC assumes claims responsibility, then NPFC will arrange for receipt, adjudication, and payment of claims.
- ◆ A contractor may be hired to analyze the supporting information submitted by the claimants.

## **NRD IMPACT ON THE LIFE CYCLE COST OF SPILL**

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

## **VIII. CERCLA / WEAPONS OF MASS DESTRUCTION**

### **COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA) FUND USE CRITERIA**

- ◆ The spilled substance must be a hazardous substance, pollutant, or contaminant.
- ◆ The substance cannot be oil; if oil is contaminated with CERCLA substances, then it is a CERCLA substance (e.g., oil contaminated with PCBs).
- ◆ The substance must impact land, water, or air in U.S. states, territories, possessions, and the EEZ.
- ◆ The substance must pose an imminent and substantial threat to public health or welfare.
- ◆ Immediate emergency response is necessary.
- ◆ CERCLA allows the FOSC to pre-position response assets, such as the Strike Teams, when there is potential for an incident involving a vessel offshore.
- ◆ CERCLA allows Coast Guard and EPA FOSCs response flexibility in dealing with threats of an unknown nature (e.g., an anthrax response).

### **LEGAL/REGULATORY FRAMEWORK FOR RESPONSE**

- ◆ The Commanding Officer of the Marine Safety Office (MSO) is the pre-designated FOSC and is in charge of the response.
- ◆ CERCLA, as amended, is the statutory basis for response.
- ◆ Response operations must comply with the NCP.

### **NON-COAST GUARD PARTICIPANTS**

- ◆ The funding process for the OSLTF and CERCLA, from the FOSC perspective, is the same. When the FOSC accesses the Superfund for response, the full resources of the NCP are at his/her disposal.
- ◆ The FOSC can hire contractors through BOA agreements or new contracts.
- ◆ The FOSC, as with oil spills, can provide funding to Federal, state, and local government responders through incident-specific PRFAs.
- ◆ For CERCLA cases, costs are tracked and RPs are billed for those costs. CERCLA does not, however, have the same claims provisions as OPA. Generally, CERCLA does not pay claims filed by injured third parties who must pursue damages through the courts.

## IX. STAFFORD ACT / FEMA

### STAFFORD ACT FUND USE CRITERIA

- ◆ There must be a Presidential Declaration of Disaster (natural or other).
- ◆ The affected state that has requested assistance will contribute matching funds.
- ◆ FEMA has to issue a Mission Assignment (MA) to the Coast Guard identifying the work to be done and authorizing spending.
- ◆ Use of Stafford Act funds differs from typical pollution response. States are expected to deal with most problems, and the Federal government only becomes involved when state resources are not sufficient for the disaster response.
- ◆ Stafford Act responses can be geographically limited (e.g., certain counties in a state).

### LEGAL/REGULATORY FRAMEWORK FOR RESPONSE

- ◆ When the President issues a Disaster Declaration, FEMA establishes a senior official as the Federal Coordinating Officer (FCO). The FCO determines which parts of the Federal Response Plan (FRP)- will be activated and which actions the Federal government will support.
- ◆ The FCO is paired with a state counterpart, the State Coordinating Officer (SCO), and the two, working together, oversee the combined state/Federal response.
- ◆ The SCO also must approve all Mission Assignments, since the state normally must provide matching resources or funds (10% - 25%) for every Stafford Act dollar spent.
- ◆ Under certain circumstances, the Presidential Declaration may waive the matching fund (State Match) requirement. (e.g., this was done for the World Trade Center and the Shuttle Columbia responses).

### NON-COAST GUARD PARTICIPANTS

- ◆ The funding process for Stafford Act Pollution Response (ESF-10), from the FOSC perspective is similar but not identical to oil or hazardous materials responses.
- ◆ Coast Guard Stafford Act responses must have an approved FEMA Mission Assignment (MA) in place or the Coast Guard cannot seek reimbursement after the response is completed. The FEMA MA defines what is to be done, where, and sets a spending limit.
- ◆ When the FOSC utilizes Stafford Act Funds, most of the resources of the NCP are at his/her disposal, including contractors and other Federal agencies (but not state or local agencies).
- ◆ The FOSC can hire contractors through BOA Agreements.
- ◆ The FOSC can provide funding to Federal government responders through incident-specific PRFAs (but not state or local agencies).
- ◆ The Stafford Act provides separate and distinct claims procedures for Third Party claims within its overall disaster response system in the FRP.

## X. TERRORISM AND FEDERAL RESPONSE AUTHORITY

- ◆ Whether terrorism or any other criminal act is the cause of an oil spill does not affect the President's authority to respond to the spill or use the OSLTF Emergency Fund in that response, nor does not affect the applicability of the OPA Title I liability and compensation regime. The OSLTF is available to pay if the responsible party does not pay removal cost and damages claims.
- ◆ Terrorism or other criminal acts that cause an oil spill MAY present a liability defense. Such acts that cause a spill may give rise to a defense from OPA liability for responsible parties (e.g., owners or operators of vessels) if certain defense criteria are met. Whether a defense may apply often requires a fact-intensive analysis and often cannot be resolved until the circumstances of the spill have been fully investigated.

## ADDITIONAL REFERENCES

Available via <http://www.uscg.mil/hq/npfc>

- ◆ NPFC User Reference Guide – available on CD-ROM
- ◆ Interim Claims Regulation
- ◆ Claimant Guide
- ◆ Supplemental Claims Guidance
- ◆ Natural Resource Damage Funding Guidelines
- ◆ Technical Operating Procedures
  - Resource Documentation
  - Removal Cost (Oil)
  - Removal Cost (CERCLA)
  - Designation of Source

## ACRONYM LIST

<b>BOA</b>	Basic Ordering Agreement
<b>CANAPS</b>	Ceiling and Number Assignment Processing System
<b>CERCLA</b>	Comprehensive Environmental Response, Compensation, and Liability Act
<b>CGMS</b>	Coast Guard Messaging System
<b>COFR</b>	Certificate of Financial Responsibility
<b>CPN</b>	CERCLA Project Number
<b>EEZ</b>	Exclusive Economic Zone
<b>EPA</b>	U.S. Environmental Protection Agency
<b>ESF-10</b>	Emergency Support Function #10 (Hazardous Materials Annex – Federal Response Plan)
<b>FCO</b>	Federal Coordinating Officer
<b>FEMA</b>	Federal Emergency Management Agency
<b>FLAT</b>	Federal Lead Administrative Trustee
<b>FOSC</b>	Federal On-Scene Coordinator
<b>FPN</b>	Federal Project Number
<b>FRP</b>	Federal Response Plan
<b>FWPCA</b>	Federal Water Pollution Control Act
<b>IC</b>	Incident Commander
<b>ICS</b>	Incident Command System
<b>JIC</b>	Joint Information Center
<b>KO</b>	Contracting Officer
<b>LOL</b>	Limit of Liability
<b>MA</b>	Mission Assignment
<b>MLC</b>	Maintenance and Logistic Command
<b>MSO</b>	Marine Safety Office (USCG)
<b>NCP</b>	National Contingency Plan
<b>NMFS</b>	National Marine Fisheries Service
<b>NPFC</b>	National Pollution Funds Center
<b>NOD</b>	Notice of Designation
<b>NRD</b>	Natural Resource Damage
<b>NRDA</b>	Natural Resource Damage Assessment
<b>OGA</b>	Other Government Agency(ies)
<b>OPA</b>	Oil Pollution Act
<b>OSLTF</b>	Oil Spill Liability Trust Fund (the Fund)
<b>OSRO</b>	Oil Spill Response Organization
<b>P &amp; I</b>	Protection and Indemnity Insurance
<b>PCB</b>	Polychlorinated biphenyls
<b>PRFA</b>	Pollution Removal Funding Authorization
<b>POLREPS</b>	Pollution Reports
<b>RP</b>	Responsible Party
<b>SCO</b>	State Coordinating Officer
<b>SOSC</b>	State On-Scene Coordinator
<b>SONS</b>	Spill of National Significance
<b>UC</b>	Unified Commander
<b>UCS</b>	Unified Command System
<b>USCG</b>	United States Coast Guard