

**PRESENTATION OF A CLAIM TO OIL SPILL LIABILITY  
TRUST FUND - PRACTICAL CONSIDERATIONS**

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**A. Introduction**

1. OSLTF established by Congress in 1986.
2. OSLTF authorized for use as part of OPA '90.
3. OSLTF funded primarily by 5¢ per barrel tax on oil produced in an imported to the United States.
4. OSLTF administered by National Pollution Funds Center (NPFC).
  - a. fiduciary agent of OSLTF.
  - b. independent unit of Coast Guard.

**B. OSLTF Functions**

1. provides funds for spill removal.
2. provides funds for natural resource assessment and restoration.
3. provides compensation to claimants.
4. pursues responsible parties for payments made by OSLTF.
5. issues COFRS.

**C. Responsible Party as OSLTF Claimant**

1. Threshold requirements.

Responsible Party's claims for "removal costs and damages" allowed under §2708 of OPA if:

- a. Responsible Party is entitled to §2703 defense to liability. §2703 applies if *sole cause of discharge* is:
  - i. act of god;
  - ii. act of War;
  - iii. act or omission of independent third-party, if responsible party acted with due care and took precautions against foreseeable acts of such third-party, and;
  - iv. reported incident and provided cooperation in removal activities; or,
- b. if no exceptions to limitation of liability apply.
  - i. Exceptions
    - a. gross negligence or willful misconduct proximately caused spill or;
    - b. violation of Federal safety, construction or operating regulation proximately caused spill.

**2. Amounts recoverable**

Responsible Party's recovery under §2708 for damages in excess of limits of liability provided under §2704.

- a. §2704 limits:
  - i. For tank vessels, the greater of \$1,200 per gross ton or \$10 million for vessels 3,000 gross tons or greater (\$2 million for vessels less than 3,000 gross tons);
  - ii. Other than tank vessels the greater of \$600 per gross ton or \$500,000.

**3. Categories of claims recoverable.**

- a. Removal costs.
- b. Third-party damages:
  - i. real or personal property damage.
  - ii. lost profits or earning capacity.
  - iii. loss of subsistence due to natural resource damage.
- c. Reimbursement of natural resource damages paid To Trustees for assessment and restoration.

**4. Burden of proving claim and entitlement to recovery is on Responsible Party.**

- a. §2708 provides that Responsible Party may assert a claim to OSLTF only if it demonstrates entitlement to a defense or a limitation of liability
- b. 33 CFR 136.105(a) provides that claimant bears the burden of providing all evidence, information and documentation deemed necessary by the NPFC.
- c. Practical effect:

- i. entitlement: Responsible Party has burden of showing defense or limitation rights i.e. affirmatively prove spill not caused by Responsible Party's gross negligence:
  - a. can rely on Coast Guard investigation findings.
  - b. judicial determination.
  - c. any other evidence responsible party wishes to submit.
  - d. difficulty arises when the Coast Guard investigation report is delayed. This will create an obstacle for proving its entitlement to file a claim.
  - e. Careful thought must be given to factual narratives and other evidence submitted by responsible party as part of this process:

**5. Procedures for filing claims.**

**a. Limitation Periods:**

- i. Removal Costs. Six(6) years after the date of completion of all removal actions;
- ii. Damages. Three(3) years from date injury was reasonable discoverable with due care;
- iii. NRDA. Same as above, or three(3) years after NRDA assessment, whichever is later.

**b. Mechanics:**

- i. Claims are submitted to NPFC in Arlington, Virginia (*NB*. Responsible Party and legal representatives should "reach out" and meet with or telephone NPFC claims personnel to facilitate process).
  - ii. No prescribed format for presenting claims.
  - iii. Claim forms are available from NPFC.
    - a. form not practical for use by Responsible Party.
  - iv. Claims regulations (33 CFR 136.105-136.113) provide some guidance as to content of claim submissions generally and for each category of claim.
    - a. Generally
      - 1. signed written document.
      - 2. identity of Claimant.
      - 3. date, time and place of incident;
      - 4. sum certain stated.
      - 5. statement certifying all material facts are included in submission and accurate.
    - b. Removal Costs
      - 1. narrative description of activity conducted, including details of labor and equipment employed and rates charged for each labor category, supplies, travel and materials used.
      - 2. narrative statement detailing actions taken to avoid, minimize and mitigate removal costs.
      - 3. demonstration that actions taken were directed by FOSC or consistent with National Contingency Plan.
      - 4. demonstration that removal action and accompanying cost "results from" spill.
        - a. remote responder costs such as dramatic mark-ups or surcharges, depreciation and other fixed-inventory expenses may not be recoverable.
          - 1. However, in HYUNDAI MERCHANT case Judge Holland allowed Coast Guard to recover exactly these types of expenses in direct action against Responsible Party.
- b. Damage Claims
  - 1. Third-party damage claims. Responsible Party must handle these claims with an eye toward obtaining reimbursement from OSLTF. As such, the following requirements in OSLTF regulations must be satisfied:
  - 2. proof of ownership (deed), damage (pictures) and value (appraisals).

3. cost of repair or replacement of damaged property.
  4. proof that economic harm resulted from unavailability of damaged property.
  5. loss of earnings and subsistence from damage to natural resources:
    - i. damage to resource, and;
    - ii. income reduced as consequence.
    - iii. tax records
    - iv. financial statements
    - v. comparable income earned outside of affected area
- c. NRDA
1. payments made to natural resource trustees for assessment and restoration damages may be submitted to OSLTF for reimbursement.
  2. September 1997 Advisory Opinion from Department of Justice superseded Comptroller General's opinion in 1995 which held that Trustees may only claim reimbursement from OSLTF subject to an annual appropriation by Congress.
  3. prior to DJ opinion, OSLTF was not considering NRDA claims for reimbursement.
  4. in exercise of caution responsible party should request that NRDA damages be used first to count against limit of liability levels in case department of Justice opinion reversed or not followed.
- d. Practical Approach:
- e. Responsible Party's submission should facilitate review and processing of claim. As such, should be as neat, detailed and organized as possible.
- i. summary sheets prepared on spreadsheet software should be provided as guide to review backups (invoices, dailies) for each responder;
  - ii. backup documents should be segregated in binders for each responder with clear delineation of sub-contractor supports and invoices;
  - iii. NPFC appreciates receiving summary spreadsheets on computer disk. All major spreadsheets can be used. Saves NPFC, and, in turn, responsible party, time and money;
  - iv. the neater and more organized a claim is, the more likely it will be reviewed and adjusted in-house. Haphazard submissions are contracted out for these functions resulting in delays in processing claim.

## 6. **Obstacles**

- a. NPFC claims review process is painstakingly slow. Claims adjuster reviews each and every item on each and every invoice. Often, problems in documentation may arise.
  - i. support documents (such as dailies or sign-in logs) are missing;
  - ii. documents are illegible;
  - iii. subcontractor back-up documents are inconsistent;

- iv. computation and transcription problems are evident in summaries or support documents.
  - b. Rates:
    - i. government will attempt to pay Basic Ordering Agreement (BOA) rates rather than contractor's response rate;
    - ii. BOA default rate applied where rate is inconsistent or missing;
    - iii. allow for some reasonable mark-ups;
    - iv. look for new policy directives on this issue;
    - v. overtime rates only considered after eight(8) hours and forty(4) hour weeks; vendor policies differ.
  - c. Sales tax for labor charges not reimbursed.
- 7. NPFC decision and remedy for denial.**
  - a. Decision on completion of review. NPFC issues recommendation and offer for each claim submitted:
    - i. offer is firm and final i.e. no negotiation unless additional proofs submitted;
    - ii. responsible party has sixty(60) days to reject, and thirty(30) days to file for reconsideration of claim.
  - b. Remedy
    - i. Administrative Procedures Act provides judicial review of "final agency action".
    - ii. Denial of appeal for reconsideration is final agency action. International Marine v. OSLTF, 903 F. Supp. 1097.
    - iii. Court will reverse a final agency action only if Responsible Party proves abuse of discretion or arbitrary and capricious agency action.