

COMPENSATION 101: SHIP-SOURCE OIL POLLUTION – WEBINAR QUESTIONS AND ANSWERS



Webinar and Claims Manuals

1. Can the Fund's claims manual documents be shared?

Absolutely! They are intended for public consumption and we encourage you to share them with anyone you know who may be interested.

2. Will the PowerPoint presentation be posted on your website?

The PowerPoint presentation is not designed to be a standalone resource. It will be available on the website, but only as an accompaniment to the webinar recording.

About the Ship-source Oil Pollution Fund (the Fund)

3. How is your office funded?

The Fund was capitalized in the 1970s through a levy imposed on oil shippers. Monthly interest accrues on the balance, and amounts the Administrator recovers from polluters are also credited to the Fund. The operating expenses of the Office of the Administrator are drawn from the Fund. The Administrator makes a regular financial disclosure in each annual report. All of our annual reports can be found here: http://sopf.gc.ca/?page_id=309.

- 4. Please confirm who is contributing to the Fund and who is not. Are there any changes, amendments, or additions currently in discussion regarding who is and who is not contributing to the Fund? Can you explain how the calculation for contribution is made, and any upcoming changes?**

The levy is currently inactive, and this has been the case since the mid-1970s. This is subject to change, however, at the discretion of the Minister of Transport. Though not currently being applied, the amount of the levy is updated annually, and published in the *Canada Gazette*. Currently, it stands at just over \$0.53 per metric ton of oil shipped in or out of Canada in bulk. Any questions on policy or regulatory amendments should be directed to Transport Canada, as these are beyond the purview of the Administrator. Transport Canada can be reached at marineliability-responsabilitemaritime@tc.gc.ca.

- 5. When you say there have been over 400 claims in the Fund's 30-year history, are you referring to separate incidents or individual claims?**

We are referring to individual claims. Sometimes, a single incident can generate multiple claims. To be clear, this means that several claimants may submit one claim each. It is important to note that the number of claims received by the Fund does not necessarily reflect the number of incidents in Canadian waters during a given period.

- 6. Do you try to recover costs from the polluter?**

Yes. In fact, the Administrator has a legal obligation to take all reasonable steps to recover from polluters (under Canadian law, the owner of the ship or the insurer). The Administrator can take legal action against a polluter even before receiving a claim.

- 7. How does the Fund relate to the International Oil Pollution Compensation Funds (IOPC Funds)?**

As discussed in the webinar, the Fund pays Canada's annual contribution to the IOPC Funds. In the context of a tanker spill, the Fund would be the final layer of compensation, after the shipowner and the IOPC Funds. With this in mind, the Administrator works closely with the IOPC Funds, and many of her policies are designed to match those of the IOPC Funds, to the extent that they are compatible with Canadian law.

8. What kind of incident would involve the IOPC Funds? If the IOPC Funds are engaged by an incident, will the Fund still be involved?

The IOPC Funds can only be engaged in the case of a spill or threatened spill from a tanker that carries persistent (i.e. heavy) oils in bulk as cargo. Such incidents in Canada are exceptionally rare. If such an incident were to occur, claimants could submit their claims directly to the Fund, as in any other case. In such a case, the Administrator would be able to recover payment from the vessel owner, its insurer, or the IOPC Funds. Alternatively, claimants could submit their claim directly to the ship's insurer or to the IOPC Funds. If a tanker spill were to occur in Canadian waters and generate a large number of potential claims, the payers (the ship's insurer, the Fund, and the IOPC Funds) would likely set up a Joint Claims Office to streamline and facilitate claims submission and management. More information on the IOPC Funds can be found here: <https://iopcfunds.org/>.

9. If a tanker spill causes damages that exceed the balance of the Fund, will a levy be re-imposed on oil shippers to retroactively recover these costs?

In the case of a tanker spill in Canadian waters, it is important to remember that there are several levels of compensation available. First, the shipowner (who in the case of tankers must hold liability insurance) is liable up to its maximum liability under the Civil Liability Convention. Second, the IOPC Funds would be engaged. Together, these tiers of compensation can amount to over a billion dollars. Finally, the Fund would be responsible for any excess, up to and beyond its current balance of \$411 million. Should the Fund be exhausted, the Minister of Finance may provide a top up from the Consolidated Revenue Fund, attaching any terms deemed appropriate. Finally, the Minister of Transport may decide to re-impose the levy on oil shippers in such a situation.

Claims, Eligibility, Compensation, and Assessment

10. Can the Fund be accessed directly?

Yes. Claims can be submitted directly to the Administrator. Provided the criteria set out in our claims manuals are met, claimants have no obligation to seek recovery from a polluter.

11. Now that the Nairobi International Convention on the Removal of Wrecks is in force in Canada, what order would claimants need to follow: seek compensation from the insurance held by the shipowner first, then go to the Fund?

Provided a person in Canada suffered damages as a result of ship-source oil pollution, that person would have every right to submit a claim directly to the Administrator. Nevertheless, when a claimant has a statutory right of direct action against an insurer (as in cases covered by the Nairobi Convention), the Administrator checks with claimants to

see if they wish to settle directly with the insurer. Where claimants decide to go directly to an insurer, the Administrator keeps the claim file in abeyance, only proceeding with assessment if the claimant does not reach a satisfactory settlement with the insurer.

12. When calculating a payout, how do you arrive at a fair number? Do you have a scale that you follow? Can the claimant counter your offer?

Each incident is different, as is each response. This means that the Administrator's assessments are very facts- and evidence-based. Claimants should always present the best evidence available. Often, those assisting the Administrator will reach out to claimants with clarifying questions or requests for more evidence. Ultimately, the Administrator makes a final offer that is subject to either acceptance or appeal to the Federal Court. There is no provision for negotiation.

13. Do you pay for response measures that do not work, so long as those measures were reasonable or justifiable, i.e. they had a reasonable chance of succeeding?

Yes, but it should be noted that claimants are responsible for providing detailed evidence of their thought process during a response. Reasonableness allows for unsuccessful measures, but as you say, those measures must be shown to have had a reasonable chance of success in the circumstances.

14. In the context of a "mystery" spill, might it be a health risk for an individual to collect a sample of spilled oil? Does the Fund provide coverage if someone taking this initiative harms him or herself in the process?

The Canadian Coast Guard should always be the first point of contact during an oil pollution incident. Anyone taking measures on his or her own initiative, including taking samples, would be doing so at his or her own risk.

15. "How clean is clean?" In other words, when do you walk away from a response operation, even though not everything has been cleaned up, or the environment completely restored?

In all cases, claims to the Administrator are subject to the test of reasonableness. In large part, this means that proportionality is taken into account, which is to say that a measure must fit the damage it seeks to prevent, repair, remedy, or minimize. A simple analogy is as follows: if a claimant spends \$10,000 to avoid \$2,000 in damages, the most that claimant can hope to recover from the Fund is \$2,000. Our claims manual documents address the concept of reasonableness, and environmental reinstatement measures, in much more detail.

16. Is compensation available when a vessel on dry land leaks oil into a body of water or threatens to do so?

Yes, but claimed measures and costs would be subject to the usual test of reasonableness.

17. Are measures to clean up heavy oil that sinks after a spill compensable?

Yes, subject to the usual test of reasonableness.

18. Is compensation available for costs associated with proving that a claimant has suffered damages?

Yes. In certain cases — particularly those involving economic loss or environmental damage — claimants may incur costs related to proving (1) That they have suffered damages; and (2) The monetary value of their damages. To the extent that such costs are reasonable, the Administrator would consider them for compensation.

19. Would a ship-source spill of vegetable oil or a similar product be compensable?

No. Only hydrocarbons or mineral oils qualify as “oil” under the Canadian regime.

20. Does Canadian law provide for punitive damages?

No. Neither the domestic regime nor the international conventions adopted by Canadian law allow for the imposition of punitive damages on polluting shipowners. Liability is limited to actual damages suffered by claimants. That said, provincial and federal law may impose regulatory or criminal sanctions on polluting shipowners, and these may include fines.

21. Must a claimant suffer property damage in order to claim for economic loss?

No. For example, if a community suffers an economic downturn as a direct result of a ship-source oil spill, any local businesses that can demonstrate an economic loss caused by the spill will be eligible for compensation.

22. What kinds of damages are compensable if there is no oil spill?

To date, the Canadian Coast Guard is usually the only claimant when measures are taken before a spill occurs. Such measures might include towage, dewatering, or pumping a vessel of hydrocarbons. In theory, preventive measures in the absence of a spill could cause economic loss (e.g. if commercial vessels are unable to enter or exit a port, or load or unload cargo, due to preventive measures being taken in the area), but this does not

appear to have happened in the Fund's history. More details on this are found in our General Claims Manual.

23. Does the Fund compensate anticipated costs for future plans to monitor post-spill environmental recovery?

Yes. Future environmental monitoring measures are compensable to the extent that they are reasonable. The Administrator would, however, require some degree of proof of a claimant's commitment or obligation (whether statutory, contractual, or otherwise) to conduct such future measures before granting compensation for them.

24. Would a Natural Resource Damage Assessment (NRDA) be compensable in the wake of an oil spill?

An NRDA appears to be a well-defined concept in US law, but the term is not widely used in Canada, as there is no Canadian statute governing the assessment of resource damages from a civil liability perspective. To the extent that an NRDA is conducted as a direct result of ship-source oil pollution damage, and within the mandate of a claimant organization, it *may* be compensable as an environmental reinstatement measure. Of course, the Administrator would consider the reasonableness of the NRDA in proportion to the damage or potential damage done by a spill. For more details on environmental reinstatement claims, see our General Claims Manual.

25. When can the Small Claims Process be used?

All of the triggering circumstances and eligibility criteria are set out in detail in our "Expedited Process for Small Claims: Guidelines & Form". In short, claimed damages cannot exceed \$35,000 in principal and cannot include claims for economic loss by those whose property has not been damaged. All Small Claims must be submitted within one year of the oil pollution incident that is the subject of the claim.

26. If a claimant misses the one-year Small Claims submission deadline, can the claimant submit a claim under the General Claims Process?

Yes. An unsuccessful Small Claim of any kind can be resubmitted with full documentation under the General Process, within the applicable timeframe.

27. What's the "trigger" for accessing the Fund when it comes to derelict vessels? Can a local marina clean up a derelict vessel and then access the Fund?

In all cases, a key "trigger" for accessing the Fund is an oil spill or the threat of a spill. It is important to remember that all claimable measures are subject to the test of reasonableness. Particularly in the context of protecting property from oil pollution

damage, a local marina would be entitled to seek compensation from the Fund. Note that the Canadian Coast Guard should always be the first point of contact when an oil pollution incident occurs.

28. Do local communities have to coordinate their actions with the Canadian Coast Guard in order to submit a claim to the Administrator?

Not necessarily. Coordination is very important in the context of large-scale incidents, but in some cases local governments or organizations are best placed to respond *before* Coast Guard arrives on scene. In any case, the measures taken should be reasonable, and duplicated efforts should be avoided. To the extent that measures are proportionate, safe, unlikely to cause substantial property damage, and likely to be effective, non-Coast Guard entities do not require specific permission or approval in order to respond, particularly if they are the first on the scene.

29. Can a response organization, certified under the *Canada Shipping Act, 2001*, claim directly to the Administrator?

No. A response organization must exhaust all other reasonable means of recovery as against the shipowner or insurer before accessing the Fund. This would likely include commencing a court action.

30. Can the Receivers of Wreck submit a claim to the Administrator?

All levels of government and government entities can access the Fund, but a valid claim from the Receivers of Wreck would have to be for damages in the oil pollution mitigation context.

31. Can Indigenous governments submit a claim to the Administrator?

Yes.

32. How does the Indigenous claims process work? Are there resources available on the Fund website?

Generally speaking, claims from Indigenous peoples or groups are processed no differently from claims from other entities. A technical report on incidents involving interaction between Indigenous peoples and the Fund is available here: <http://sopf.gc.ca/wp-content/uploads/2018/07/Indigenous-Peoples-Report-EN.pdf>.

33. Is compensation available for cultural losses within Indigenous communities? For example, such a loss may occur where fishing is not only about obtaining a food supply, but also about passing on a skill to younger generations. If compensable, how can such loss be represented by a dollar figure?

The Administrator's interpretation of economic loss covers cultural and ceremonial uses, to the extent that such usage is negatively affected by a ship-source oil pollution incident. In such cases, compensation would extend to the cost of reasonable replacement alternatives. If such a claim were made, the Administrator would almost certainly seek expert assistance during the assessment process in order to better understand and quantify the loss in question.

34. Are oil spills from floatplanes covered by the Fund?

Unfortunately, Canadian law is not clear on this question. That said, it is possible that in certain circumstances a floatplane or seaplane could be considered a "ship", but the Fund has never dealt with the question in the context of a claim.