

## General Claims Manual

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November 2019 Edition



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# General Claims Manual

November 2019 Edition

## About the General Claims Manual:

The **General Claims Manual** is designed to address the following questions:

- What is the mandate of the Ship-source Oil Pollution Fund (SOPF)?
- What types of damages does the SOPF compensate?
- Who can be compensated by the SOPF?
- How does the General Claims Process work?
- How does the SOPF apply the “polluter pays principle”?



**Note:** The information and directions contained in this document do not constitute legal advice and do not substitute any provision in the *Marine Liability Act*, its regulations, or any other applicable laws of Canada.

**Should you have any questions about the General Claims Manual, the General Claims Process, or the SOPF in general, please do not hesitate to get in touch with us.**

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# INTRODUCTION

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When a ship or boat spills or threatens to spill oil in Canadian waters, several forms of damages may result. For example, those whose property has been contaminated by spilled oil incur costs related to cleaning, repairing, or replacing that property. Businesses that suffer a disruption of their normal commercial operations will lose revenue. Government agencies who engage in a response can incur substantial costs related to containment measures or clean-up. The fisheries or tourism sectors can see ill effects that develop or emerge over time.

Recovering such damages in court can be complex, time-consuming, uncertain, and costly. Faced with litigation, those affected by an oil pollution incident may find themselves with no clear understanding of how to proceed or where to turn. Many of those affected by ship-source oil pollution will never have seen the inside of a courtroom before.

Canada's liability and compensation regime provides for a dedicated fund, the **Ship-source Oil Pollution Fund (SOPF)**, whose purpose is to be a one-stop shop for indemnification of damages related to ship-source oil pollution. The SOPF is an alternative to the courts for those affected.

This **General Claims Manual** provides information on Canada's regime and explains the requirements a claim must meet to be eligible for compensation from the SOPF under the General Claims Process. Complementing this manual, the Office of the Administrator of the SOPF has developed three additional documents to assist prospective claimants:

- **Guide for General Claims Preparation & Submission** — provides in-depth claims preparation guidance, along with specific examples;
- **Expedited Process for Small Claims: Guidelines & Form** — describes a dedicated fast-track process for claimants who have suffered damages of \$35,000 or less, also providing simplified guidelines and a fillable Small Claims form; and
- **Manual for Special Loss of Income Claims** — describes and provides guidance on a dedicated claims process for otherwise unrecoverable fisheries, aquaculture, and hunting losses suffered by certain limited classes of claimant.

While the use of the official claims manuals and guidelines is not mandatory, it is recommended that claimants, at a minimum, use these tools as guidance to ensure that claims, in whatever format they are submitted, provide relevant and accurate information and are complete for assessment by the Administrator.

# 1. CANADA'S LIABILITY AND COMPENSATION REGIME

The liability and compensation regime for ship-source oil pollution in Canada is governed by the **Marine Liability Act (MLA)**,<sup>1</sup> a federal statute that also incorporates a number of international conventions on liability and compensation into Canadian law.<sup>2</sup>

## 1.1 WHO SHOULD PAY FOR SHIP-SOURCE OIL POLLUTION?

The Canadian liability and compensation regime is based on the “**polluter pays principle**”, which holds that the polluter should bear the costs associated with pollution, not the government or the taxpayer.

### 1.1.1 The polluter pays principle

In accordance with the polluter pays principle, when an oil pollution incident caused by a ship occurs, the owner of the ship is liable to pay for response operations, clean-up costs, and any damage caused. Canada's regime imposes **strict liability** on the shipowner for damages caused by an oil pollution incident.<sup>3</sup> Consequently, when an incident occurs, compensation can be sought from the shipowner, or in some cases its insurer, up to the applicable limit of liability, which is based on the tonnage and type of the ship.

Large commercial ships carry mandatory insurance under Canadian law. When such a ship causes an oil pollution incident, the insurer will usually be the primary source of indemnification. When an uninsured smaller vessel causes an incident, however, it may be more difficult to obtain compensation.

### 1.1.2 The Ship-source Oil Pollution Fund

The Canadian government established the SOPF over thirty years ago to ensure that those affected by oil pollution incidents have access to compensation. It is fully capitalized from a levy imposed on oil shippers in the 1970s.<sup>4</sup> The SOPF provides claimants with an alternative to the court system and covers the limited gaps in shipowner liability. Since its inception, the SOPF has paid over 400 claims.

The SOPF provides compensation to victims of pollution in Canadian waters caused by all kinds of ships and boats, involving all types of oil. This compensation is provided in lieu of or in addition to compensation from shipowners or their insurers. An independent **Administrator** manages the SOPF, assesses claims, and authorizes payments to claimants, pursuing recovery from shipowners or their insurers thereafter.

1. Last amended on 13 December 2018. The current version of the MLA is available here: <https://laws-lois.justice.gc.ca/eng/acts/M-07/>.

2. Information about the international regime for liability and compensation is available on the Transport Canada website: <https://www.tc.gc.ca/eng/marinesafety/oep-ers-regime-legislation-2052.htm>. See also the International Oil Pollution Compensation (IOPC) Funds website: <https://www.iopcfunds.org>.

3. The liability of the shipowner is “strict” in that it does not depend on the establishment of fault or negligence on the part of the shipowner. Subject to limited defences found in the MLA (see **section 2.3**, below), the shipowner is liable if a causal link between the incident and the damage suffered can be demonstrated.

4. The levy was suspended in 1976, but the federal government can reinstate it at any time should the SOPF become depleted.



## 1.2 WHY BRING A CLAIM DIRECTLY TO THE ADMINISTRATOR?

**Negotiating with or suing a shipowner or its insurer can be a complex, lengthy, uncertain, and costly process.**

A claimant can instead avoid the court process altogether and go directly to the Administrator. After compensating a claimant, the Administrator pursues recovery from the shipowner or its insurer, in court where necessary.

**Per-incident compensation from the SOPF is now unlimited.** Because a shipowner can limit its liability under Canadian law, full indemnification may not be possible when a claimant sues a shipowner. In such cases, however, and in cases where the claimant goes directly to the SOPF, the Administrator can compensate to the full extent of proven damages.



In late 2014, the tug *Chaulk Determination* sank at Trois-Rivières, QC. The SOPF paid over \$4.3 million in compensation to two claimants, the Canadian Coast Guard and the Trois-Rivières Port Authority, as a result. To date, this represents the largest-ever payout from the SOPF for a single incident.



## 2. OVERVIEW OF COMPENSATION AVAILABLE FROM THE SOPF

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### 2.1 TRIGGERING CIRCUMSTANCES FOR COMPENSATION

The SOPF is available to compensate claimants when a ship spills or threatens to spill oil into Canadian waters.

- **Any person in Canada that has suffered damages can claim.** This includes the Canadian Coast Guard; ports, harbours, and marinas; those involved in the fishing and tourism industries; all levels of government; corporations; indigenous communities; individuals; coastal landowners; and owners of impacted ships and boats.<sup>5</sup>
- **An “oil pollution incident” does not require an actual oil spill.** If there is a threat of a spill as a result of an incident involving a ship, measures taken to stop a threatened spill from happening may be compensable (see **sections 2.2.2 and 3.2.2**, below, for more details).
- **“Ship” does not just mean large vessels.** Any type of ship or boat is covered, including, but not limited to the following: pleasure craft (including sailboats with oil on board), fishing vessels, tugs, barges, passenger vessels, cargo vessels, and tankers.
- **“Mystery spills” are compensable too.** Claimants who cannot identify the ship that caused a spill may still submit a claim, though the Administrator cannot pay compensation when the evidence shows that the spill did not come from a ship.<sup>6</sup>
- **“Oil” covers a wide range of mineral oils and hydrocarbons.** These include, but are not limited to, the following: petroleum, diesel, other fuel oils, lubricants, crude, sludge, oil refuse, and oils mixed with other substances.
- **Canadian waters include *both* internal *and* coastal waters.** This means that inland lakes, rivers, and canals are covered as well as coastal waters up to 200 nautical miles from shore.<sup>7</sup>

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5. Note that “response organizations” certified by Transport Canada can only submit a claim with the Administrator if they have first been unsuccessful in recovering directly from the shipowner or its insurer.

6. Although claimants are not required to present evidence that a given spill came from a ship, the Administrator strongly encourages claimants to submit any and all such evidence.

7. Coastal waters up to 200 nautical miles offshore are known as Canada’s “exclusive economic zone”. See the following link for more information on Canadian waters: [http://publications.gc.ca/site/archivée-archived.html?url=http://publications.gc.ca/collections/collection\\_2012/mpo-dfo/Fs23-571-2011-eng.pdf](http://publications.gc.ca/site/archivée-archived.html?url=http://publications.gc.ca/collections/collection_2012/mpo-dfo/Fs23-571-2011-eng.pdf).

## 2.2 OVERVIEW OF COMPENSABLE DAMAGES

Under the correct triggering circumstances (see **section 2.1**), the Administrator is able to compensate a number of different kinds of damages. These are briefly set out and explained below.



### 2.2.1 Oil pollution damage

The Administrator compensates two broad categories of oil pollution damage:

- **Property damage.** Compensation is available for the reasonable costs of cleaning, repairing, or replacing physical property contaminated by oil.
- **Economic loss.** Compensation is available for a loss of wages or earnings caused by an oil pollution incident, whether or not the physical property of the person who suffered the loss of wages or earnings was contaminated by oil. Economic loss can affect multiple industries, particularly the fishing and tourism sectors. Those who fish or hunt on a subsistence basis might also suffer economic loss in the form of reduced yields.

**Example of economic loss resulting from physical property damage.** Commercial fishers whose fishing equipment has been contaminated by oil may be prevented from fishing until their equipment can be cleaned, repaired, or replaced. The reasonable costs of cleaning, repairing, or replacing the contaminated equipment constitute compensable property damage. Lost wages or earnings resulting from an inability to use the contaminated equipment may also be compensable.

**Examples of economic loss without physical property damage.** Commercial fishers who do not suffer physical property contamination might nonetheless be prevented from fishing as they normally do as a result of fishing area closures. Similarly, businesses located near a contaminated site may suffer a slow-down during and after clean-up operations. In the latter scenario, demonstrably lost wages or earnings *and* the reasonable costs of measures taken to counter a business downturn, such as a marketing campaign, may be compensable.

### 2.2.2 *Preventive measures and clean-up*

Any measures taken to prevent, repair, remedy, or minimize oil pollution damage can be considered for compensation. Such measures may be taken in anticipation of a spill,<sup>8</sup> during a spill, or after a spill. During an incident and in its aftermath, measures may be taken to monitor the situation. Such monitoring measures represent compensable preventive measures. Also compensable are costs associated with mobilization and demobilization of resources needed to respond to an incident. Finally, any damage caused by preventive measures is compensable. The Administrator compensates preventive measures and clean-up efforts only to the extent that the measures and their associated costs were reasonable in the circumstances.

### 2.2.3 *Environmental reinstatement*

Compensation is available for reasonable measures taken or to be taken to accelerate the natural recovery of the environment in the aftermath of an oil spill. Such measures might include post-spill environmental assessment studies.

### 2.2.4 *Claim compilation costs*

Compiling the documentation necessary to submit a claim to the Administrator takes time. If a claim is particularly complex, claimants may seek professional assistance in compiling and submitting a claim. Compensation is available for reasonable claim compilation costs.

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8. The Administrator can compensate the Canadian Coast Guard or any anyone acting under its direction for measures taken in anticipation of a spill where the risk of a spill was not yet "grave and imminent". This allows the Coast Guard to obtain compensation for engaging in a proactive response.

## 2.3 A FUND OF FIRST AND LAST RESORT

Claimants are able to access compensation from the SOPF as either a first or last resort.

**Fund of first resort.** A prospective claimant may file a claim directly with the Administrator. In this case, there is no need for the claimant to go to court. Under this model, the Administrator receives claims, assesses them, and compensates claimants, ultimately taking on the obligation and responsibility to recover amounts paid to claimants from the shipowner or any other liable party. This option is also available to claimants in the case of a mystery spill (see **section 2.1**), where there is no clearly liable party against whom to recover.

**Fund of last resort.** Alternatively, a prospective claimant may sue a shipowner, or, in some cases, the shipowner's insurer. If a claimant goes to court, the Administrator becomes a party to the court action and is obligated to compensate claimants if and to the extent that:

- The shipowner successfully raises one of the limited defences to liability;<sup>9</sup>
- The claim or claims against a shipowner exceed its maximum liability;<sup>10</sup>
- The shipowner is financially incapable of meeting its obligations;<sup>11</sup> or
- The Administrator decides to settle with the claimant.<sup>12</sup>



The SOPF paid almost \$400,000 to the County of Prince Edward, ON as a result of the sinking of the barge *Pitts Carillon* in 2017. To date, this is the highest amount the SOPF has ever paid to a municipal government.

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9. A shipowner is not liable if it proves that the oil pollution incident resulted from (1) an act of war or an exceptional, inevitable, and irresistible natural phenomenon; (2) an act of a third party done with intent to cause damage; or (3) negligent or wrongful maintenance of lights or other navigational aids by a government authority or other authority responsible for their maintenance.

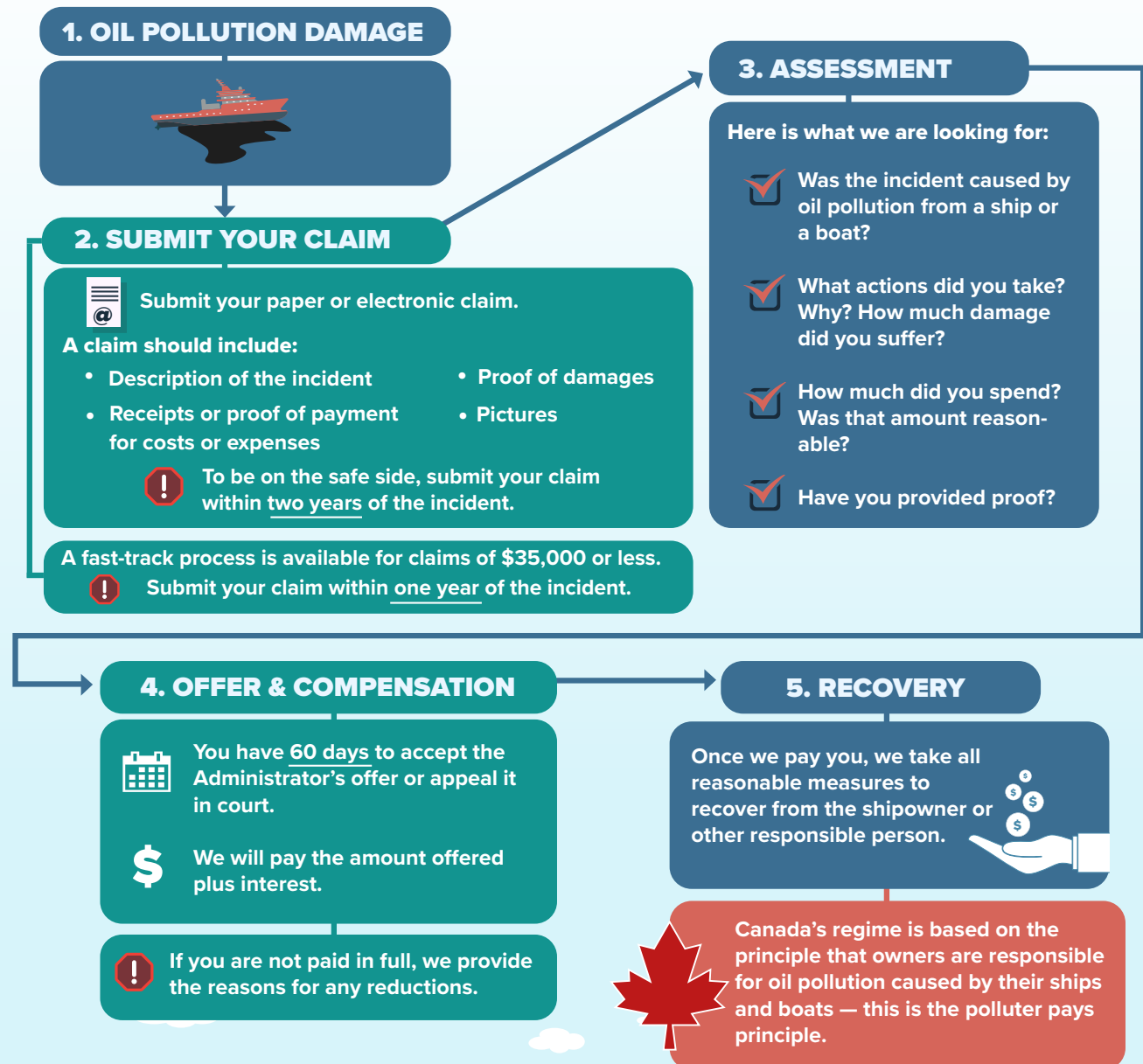
10. The maximum liability for a given ship is based on its size (tonnage) and type. Under Canadian law, non-tankers under 300 gross tonnage can limit their liability to \$500,000. Maximum liability for larger ships and tankers can be much higher, but it may not always be sufficient to satisfy all claims that stem from an oil pollution incident.

11. This may be a result of insolvency, bankruptcy, or corporate dissolution.

12. The Administrator is unlikely to settle without extensive documentation of damages from the claimant, as under the fund of first resort model.

# 3. SUBMITTING A CLAIM TO THE ADMINISTRATOR

On receiving a claim, the Administrator first considers its eligibility under the MLA. If the Administrator determines that the claim is eligible, the Administrator conducts an assessment before making a decision on whether and to what extent the claimant is entitled to compensation from the SOPF. Both steps are described in detail below.



### 3.1 ELIGIBILITY

The Administrator can only assess and ultimately compensate a claim if specific requirements are satisfied.

#### 3.1.1 *Who can submit a claim and under what circumstances?*

The “triggering circumstances” that engage the possibility of compensation from the SOPF are set out in detail in **section 2.1**. The following list summarizes these circumstances, adding one additional item, all of which are considered at the eligibility stage:

- The claimant is a person in Canada who is entitled to claim;<sup>13</sup>
- Oil contamination occurred or threatened to occur in Canadian waters;
- The cause of the contamination or threatened contamination was a ship; and
- The claim was submitted before the appropriate deadline (see below).

#### 3.1.2 *What are the deadlines to submit a claim under the general regime?*<sup>14</sup>

It is extremely important that claims be submitted to the Administrator within the timeframe required by the MLA. **The Administrator cannot consider or compensate claims submitted outside the required timeframes.**



**Submit your claim as soon as possible.** Claimants are advised to submit their claims to the Administrator as soon as possible after an incident. Claimants who cannot submit a formal claim soon after an incident occurs should notify the Administrator that a claim is forthcoming, providing as much information as possible.

#### **Oil pollution damage deadlines for first resort claims**

When oil pollution damage results from an incident (see **section 2.2.1**),<sup>15</sup> claimants have two years from the date on which they suffered the damage to submit a claim to the Administrator. For the purposes of determining the appropriate deadline to file a claim, any damage to the environment requiring reinstatement measures (see **section 2.2.3**) should be considered oil pollution damage.



**To be safe, assume a deadline of two years.** Usually, damage occurs on or about the date of a discharge of oil. Consequently, prospective claimants should assume that when there is a discharge of oil from a ship, they have two years from the date of that discharge to submit a claim directly to the Administrator.

In cases where oil pollution damage does not occur immediately after an incident, an absolute deadline of five years to submit claims directly to the Administrator applies. It is important to remember that in such a situation, the two-year deadline engages as soon as damage occurs.

13. The only exception stipulated in the MLA is a “response organization” certified by Transport Canada.

14. Note that a one-year deadline applies to claims under the Expedited Process for Small Claims. See the **Expedited Process for Small Claims: Guidelines & Form** for more information.

15. Note that where an incident consists of a series of occurrences, the relevant date for determining the appropriate deadline for submitting a claim is the date of the first occurrence in the series.

The following five hypothetical scenarios illustrate the application of the deadlines discussed above for submitting a claim of first resort to the Administrator.

**Example A: incident and damage on same day.** A ship sinks and discharges oil on 20 June 2018. A person who suffers damage as a result of the discharge that same day has until 20 June 2020 to submit a claim to the Administrator.

**Example B: incident and damage several days apart.** A ship sinks and discharges oil on 20 June 2018. A person who suffers damage as a result of the discharge on 27 June 2018 has until 27 June 2020 to submit a claim to the Administrator.

**Example C: incident and damage one year apart.** A ship sinks on 20 June 2018 but no oil is discharged until 20 June 2019. A person who suffers damage that same day has until 20 June 2021 to submit a claim to the Administrator.

**Example D: incident and damage four years apart.** A ship sinks on 20 June 2018 but no oil is discharged until 20 June 2022. A person who suffers damage that same day has until 20 June 2023 to submit a claim to the Administrator.

**Example E: incident and damage over five years apart.** A ship sinks on 20 June 2018 but no oil is discharged until 21 June 2023. A person who suffers damage that same day cannot submit a first resort claim to the Administrator. Such a person will have until 20 June 2024 to sue the owner of the polluting vessel, however (see “Deadlines for last resort claims”, below for more details).

#### Preventive or clean-up measures deadlines for first resort claims

Where there is a discharge of oil and preventive or clean-up measures are taken in response, the two-year deadline to submit a claim runs from the date of the discharge. The absolute deadline of five years from the date of the incident still applies in cases where the discharge is not immediate (see **Examples C, D, and E** for an illustration of the absolute deadline in operation).

Sometimes preventive measures are taken in response to an incident that does not involve a discharge of oil. In such cases, a claim for the costs and expenses of anticipatory preventive measures should be made within two years of the date on which the preventive measures were first taken. The absolute deadline of five years from the date of the incident still applies.

#### Deadlines for last resort claims

Prospective claimants who miss the deadline to submit a claim directly to the Administrator have an additional year to sue a shipowner.<sup>16</sup> If this is done, the Administrator will become a party to the proceedings,<sup>17</sup> liable to compensate claimants as a last resort (see **section 2.3**). Anyone considering commencing a lawsuit should seek professional legal advice.

16. For incidents involving large ships, it may be possible to sue the ship's insurer directly.

17. For incidents involving tankers, the International Oil Pollution Compensation (IOPC) Funds will also become party to the proceedings. More information on the IOPC Funds can be found here: <https://www.iopcfunds.org>.



### 3.2 ASSESSMENT CRITERIA FOR THE DIFFERENT KINDS OF COMPENSABLE DAMAGES

A person who has submitted an eligible claim on time is not guaranteed compensation from the Administrator. In order to be successful, claims must be for a compensable kind of damage. Successful claims must also be well-documented, and any damages claimed must have a causal link to the oil pollution incident in question, which must be caused by a ship (see **section 2.1**). The different kinds of compensable damages are briefly described in **section 2.2**. This section expands on those descriptions by explaining how the Administrator assesses claims for each kind of compensable damages.

The Administrator assesses each claim on its merits, taking into account the particular circumstances presented by the claimant. With this in mind, claimants are encouraged to present the best evidence possible. Claimants should be careful to preserve all documentary evidence of damages (including evidence of any measures taken) during and after an oil pollution incident. Photographs are helpful, provided they are dated, time-stamped, and captioned.

Claimants are also expected to make efforts to minimize their damages during and after an incident. If the Administrator finds that a claimant was wholly or partially responsible for the damages claimed, the Administrator may reduce or nullify any compensation that would otherwise have been paid accordingly.

**Example.** Commercial fishers who stop fishing altogether because their usual fishing areas are polluted should only expect to receive compensation for the extra fuel and working hours that would have been required to reach alternate fishing areas if the Administrator finds such viable alternatives were available.

Before going into further detail, it should be noted here that the Administrator's assessment of claims is largely premised on three core principles.

**First, claimants can only be compensated once for damages suffered.** There can be no overlap between compensation already paid to a claimant by a liable party (or its insurer) and compensation paid by the Administrator. Volunteer labour or efforts funded by charitable contributions are not compensable, though any costs associated with coordinating volunteers may be compensable. Finally, if recovered oil or other recovered materials are sold by a claimant after a response, the Administrator will deduct from an offer of compensation the proceeds of any such sale. These examples are all extensions of the legal principle against double recovery.

**Second, claimants must present evidence that demonstrates and supports all claimed damages.** Generally, only damages actually suffered can be compensated by the Administrator. One exception to this general rule against compensation for future damages is environmental reinstatement, discussed in detail in **section 3.2.3** below. A further exception is the Special Claims Process under sections 107 and 108 of the MLA that covers otherwise unrecoverable fisheries, aquaculture, and hunting losses of income suffered by certain limited classes of claimant. A dedicated **Manual for Special Loss of Income Claims** has been developed to explain this special process and guide prospective claimants.

**Third, any measures taken by a claimant are only compensable to the extent that they are reasonable.** The concept of reasonableness is covered in more detail below.

### 3.2.1 *Oil pollution damage*

As described in **section 2.2.1**, there are two broad categories of compensable oil pollution damage.

**Property damage** includes reasonable costs of cleaning, repairing, or replacing physical property that has been contaminated by oil. In the property damage context, the requirement that compensable costs be reasonable means that the Administrator considers the age, condition, ordinary life-expectancy, and value of the property in question before it was contaminated by oil: compensation will not be paid for measures that improve such property. Replacement of contaminated property is only reasonable where cleaning or repair are either not possible or uneconomical.

**Economic loss** is also compensable, whether it takes the form of a loss of wages, earnings, or otherwise. Multiple industries may be affected, particularly the fishing and tourism sectors. Those who fish or hunt on a subsistence basis might see reduced yields, and these too qualify as economic loss. Economic loss might occur during the process of cleaning, repairing, or replacing contaminated physical property. In such a case, the timeline for cleaning, repair, or replacement must be reasonable. Economic loss may also occur when physical property has not been contaminated. In both cases, claimants must:

- Present evidence of a loss; and
- Demonstrate that the loss claimed was actually caused by the oil pollution incident in question.

Because economic loss may be mitigated by measures such as a promotional marketing campaign in the wake of a business downturn, the Administrator will consider such measures for compensation to the extent that they have a reasonable prospect of success and their cost is proportionate to a demonstrated business downturn experienced by the claimant.

### 3.2.2 *Preventive measures and clean-up*

As set out in **section 2.2.2**, measures taken to prevent, repair, remedy, or minimize oil pollution damage qualify as compensable preventive measures. These include measures that are taken in anticipation of an oil spill, measures taken during a spill, and the clean-up in the aftermath of a spill. Monitoring costs and the mobilization and demobilization of resources used in a response are compensable as preventive measures. Finally, any damage caused by preventive measures is also compensable.

The Canadian Coast Guard is the lead federal agency mandated to respond to oil pollution incidents. Other federal, provincial, or local organizations may also respond, within their respective mandates, and sometimes first responders are non-governmental entities. Any of the foregoing may be eligible for compensation for preventive or clean-up measures. It is important that claimants identify for the Administrator the specific capacity in which they responded to a given incident.

In order to be compensable, preventive and clean-up measures must be reasonable in the circumstances, making the Administrator's assessment highly contextual and sometimes technical. Costs associated with any measures taken by a claimant must also be reasonable. The Administrator considers the following factors when assessing the reasonableness of preventive and clean-up measures:

- **Proportionality.** The measures and their associated costs must be proportionate to the specific damage that would occur if lesser measures or no measures at all were taken. For this reason, the Administrator gives significant weight to the degree of the threat and the sensitivity of the local area, whether from an environmental perspective, an economic perspective, or both.
- **Clearly defined and justifiable goal.** The measures must have a clear purpose that is justified in the circumstances. Measures taken purely for public perception purposes are not eligible for compensation.
- **Likelihood of success.** The measures must be likely, in the circumstances, to succeed in achieving their goal. For example, if inappropriate or inadequate equipment is used for a specific measure, that measure may not be compensable.
- **Real-time decision-making and adaptability.** The decision to take specific measures should be based on the best information available at the time the decision was made, and regular reassessments of the situation should be undertaken.
- **Minimal duplication of efforts.** A degree of coordination is expected if multiple entities are responding to an incident. If an Incident Action Plan<sup>18</sup> has been adopted, the Administrator will be unlikely to compensate any measures that clearly contradict it.

The Administrator is cognizant of the fact that responses are often conducted in high-pressure, emergency situations. The reasonableness standard acknowledges that there is no single "correct" response: a variety of different preventive or clean-up measures may be reasonable in the context of a given incident.

### 3.2.3 *Environmental reinstatement*

As discussed in **section 2.2.3**, reasonable measures taken to accelerate the natural recovery of the environment in the aftermath of an oil spill are compensable. In Canada, such measures usually fall within the purview of a government department or agency, but they may be delegated to other persons in certain circumstances. Anyone claiming for environmental reinstatement measures should make clear to the Administrator the authority under which such measures were taken.



**Measures to be taken in the future.** Because the environment is often slow to recover when contaminated with oil, compensation may also be available for reinstatement measures that have not yet been taken, provided a claimant can show they will definitely be taken in the future. Such measures must be reasonable in the circumstances, and focused environmental assessment studies are generally the best evidence of this.

18. For example, the Canadian Coast Guard may use an Incident Action Plan (IAP) in a large-scale, coordinated response involving several entities.

In determining whether environmental reinstatement measures are reasonable, the Administrator first ensures that the evidence submitted by a claimant shows a causal link between oil pollution damage and the measures taken.

Next, the goal of the measure is considered. It is not always possible to fully restore a damaged site to its pre-spill condition, but the goal of reinstatement measures should be to restore and balance the local ecosystem. Usually, this is shown with the aid of studies, the costs of which may be compensable.

In summary, the following criteria, which are partially informed by the factors set out in **section 3.2.2**, are considered by the Administrator when assessing a claim for environmental reinstatement or related studies:

- The measures should be likely to succeed in accelerating recovery;
- The measures should seek to prevent further damage;
- The measures should not have incidentally detrimental effects;
- The measures should be technically feasible; and
- The costs of the measures should be proportionate to the damage sustained and the benefits likely to be achieved.

#### **3.2.4 Claim compilation costs**

As set out in **section 2.2.4**, compiling the documentation necessary to submit a claim to the Administrator may come at a cost to claimants, particularly when professional advice and assistance is sought. Claim compilation costs are compensable to the extent that they are reasonable.

In assessing the reasonableness of costs of professional advice or assistance, the Administrator looks to the substance of the claim in question. It is unlikely, for example, that a small, uncomplicated claim will justify such costs. For larger, more complex claims, the following questions are considered by the Administrator in context:

- Was it necessary for the claimant to retain professional assistance?
- Was the work of the professional useful to the claimant?
- Was the amount of time spent by the professional reasonable?
- Did the professional charge a reasonable market rate?

### 3.3 NOTE ON RESOURCES FOR CLAIM COMPILATION

In the course of compiling a claim for submission to the Administrator, claimants are encouraged to use the **Guide for General Claims Preparation & Submission**, which provides directions and recommendations for claimants and includes examples of admissible damages in each category.



The second-largest payout from the SOPF, almost \$2.5 million, went to three claimants who responded to the 2015 spill caused by the bulk carrier *Marathassa* in Vancouver Harbour, BC. One of those claimants, the City of Vancouver, received the second-largest payment to a municipality in SOPF history.

## 4. AFTER SUBMISSION OF A CLAIM TO THE ADMINISTRATOR

### 4.1 THE ASSESSMENT PROCESS

The amount of time required to assess a claim depends on its complexity and size, and on the volume of other claims under assessment by the Administrator at a given time. Throughout the assessment process, the Administrator is assisted by marine consultants, other subject matter experts where technical complexity requires, and legal counsel. The ultimate decision always lies with the Administrator alone.

#### 4.1.1 *Requests from the Administrator and further submissions by claimants*

The Office of the Administrator may reach out to claimants or other witnesses with clarifying questions during the assessment process. Sometimes, the Office of the Administrator requests additional documentation if there are gaps in claimant submissions.<sup>19</sup> Historically, claimants have benefited from such supplemental submissions.

Claimants are encouraged to submit to the Administrator any additional documentation or information that becomes available or known to them during the assessment process. Claimants are also encouraged to revise their claims if they discover that an error or omission was made in their initial submission to the Administrator.

### 4.2 THE ADMINISTRATOR'S DECISION

Once the Administrator reaches a decision, the claimant receives notification in the form of written reasons. A claim found to be ineligible or insufficiently supported by evidence may be disallowed outright, but this is rare. Usually, the Administrator makes an offer of compensation to the claimant for whatever portion of the claimed amount has been found established based on the law, the facts, and the evidence submitted.

#### 4.2.1 *Claimant options on receiving offer of compensation or disallowance*

On receipt of an offer of compensation from the Administrator, a claimant has 60 days to accept it. Instructions on accepting an offer of compensation are included in the written reasons provided by the Administrator. It is necessary for a claimant to accept an offer of compensation in writing, whether via email or post.

An unsatisfied claimant may, within 60 days after receiving an offer of compensation or a notification of disallowance, appeal its adequacy to the Federal Court. Claimants considering appeal are advised to seek independent professional legal advice before proceeding.

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19. Claimants should be advised that during the assessment of a claim, the Administrator has extensive powers under the *Inquiries Act*, a federal statute, to compel evidence and testimony. It is usually not necessary for the Administrator to use these powers. The *Inquiries Act* is available here: <https://laws-lois.justice.gc.ca/eng/acts/i-11/>.

If a claimant neither accepts nor appeals an offer within 60 days, the offer is automatically revoked and deemed to have been refused.



**The 60-day period cannot be extended.**

#### 4.2.2 *Claimant entitlement to interest*

Claim compilation takes time, and so does the Administrator's assessment process. As some measure of compensation for delayed indemnification, successful claimants are entitled to interest from the SOPF on claimed damages that the Administrator finds established.<sup>20</sup> Interest is calculated by the Office of the Administrator. It runs from the date of the particular damages suffered by the claimant to the date of the Administrator's offer of compensation. The amount of interest payable on a given claim is included in the Administrator's written reasons.

### 4.3 PAYMENT, SUBROGATION, AND RECOVERY

If a claimant accepts an offer of compensation, the Administrator directs payment from the SOPF to the claimant without delay. It is necessary for first-time claimants to provide their up-to-date banking information to the Administrator in order to facilitate a transfer of funds.<sup>21</sup>

On payment, the Administrator becomes subrogated to the extent of the amount paid, inheriting the claimant's legal rights. The Administrator is then obligated by law to take all reasonable measures to recover the amount paid from the liable party or parties. This is the polluter pays principle at work, and it may entail litigation, which can be commenced by the Administrator in either the claimant's name or the Administrator's. The costs of litigation are borne by the Administrator, and any amounts recovered are paid into the SOPF. During the recovery process, claimants may be called upon by the Administrator to make a formal legal statement.



In early 2019, the Administrator obtained a judgment in the Federal Court for over \$800,000 against the owner of the derelict vessel *Farley Mowat*. The vessel had caused three separate oil pollution incidents at Shelburne, NS, resulting in four claims.

20. Applicable interest rates are determined by the Government of Canada Prescribed Interest Rates for income tax purposes, found here: <https://www.canada.ca/en/revenue-agency/services/tax/prescribed-interest-rates.html>.

21. A form for this purpose is usually provided to the claimant by the Office of the Administrator during the assessment process.