

TECHNICAL OPERATING PROCEDURES

STATE ACCESS TO OIL SPILL LIABILITY TRUST FUND

1. **INTRODUCTION.** Section 1012(d)(1) of the Oil Pollution Act of 1990 (Public Law 101-380, hereafter referred to as "OPA 90") provides that the President, upon request of the Governor of a State or his or her designated state official, may obligate the Oil Spill Liability Trust Fund (Fund) for payment in an amount not to exceed \$250,000 per incident for removal costs consistent with the National Contingency Plan (NCP) (40 CFR 300). The removal costs must be required for the immediate removal of a discharge, or the mitigation or prevention of a substantial threat of discharge, of oil. Pursuant to the authority delegated to the Coast Guard in Executive Order 12777, the Coast Guard has published an interim regulation (33 CFR Part 133) to implement the provisions of section 1012(d)(1) of OPA 90.

A. PURPOSE. The purpose of this document is to provide technical operating procedures concerning eligibility, communications, financial management, and recordkeeping for States requesting access to the Fund, Federal On-Scene Coordinators (FOSCs), and Coast Guard (USCG) District staffs.

B. SCOPE. The technical operating procedures described herein apply specifically to requests for funding under section 1012(d)(1) of OPA 90. Funding under section 1012(d)(1) will herein be referred to as "State Access." These technical operating procedures focus on information that is needed to support cost recovery efforts of the Coast Guard National Pollution Funds Center (NPFC). Refer to Figure 1 for a flowchart of the State Access process.

These procedures do not address the provisions of Section 1012(d)(2) of OPA 90 (e.g., advance agreements with individual States, advance payments from the Fund, or access to the Fund by political subdivisions of a State). These procedures are intended as a supplement to, and not as a substitute for, the regulations contained in 33 CFR Part 133. Compliance with 33 CFR 133 is required whenever utilizing State Access to the Fund. Nothing in this document supersedes the requirements of the NCP. Of particular note, the designated state official, in accordance with 33 CFR 133.5(b) and section 300.320(a)(6) of the NCP, assumes the responsibility for notifying the trustees of natural resources affected/potentially affected by the incident.

C. BACKGROUND. State Access to the Fund provides a new avenue for States to receive Federal funds for immediate removal costs resulting from their response to actual or threatened discharges of oil. State Access does not supersede or preclude the use of existing Federal payment regimes. The State should

not seek and will not receive payments for the same costs from more than one payment regime. Generally, there are two other payment regimes which the States may initiate to obtain Federal funding for oil spill incident removal actions:

1. **ACTING AS FOSC CONTRACTOR.** State agencies may perform removal actions under the direct supervision of the FOSC. In these situations, the FOSC issues an Oil Spill Response Authorization to the State to establish a contractual relationship and obligate the Fund. With this method of funding the State is not limited to \$250,000 per incident, and the FOSC is actively directing the State's response actions.

2. **CLAIMS.** Section 1012(a)(4) of OPA 90 authorizes use of the Fund for "the payment of claims in accordance with section 1013 for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages". Regulations describing claims procedures are found in 33 CFR Part 136. States may submit claims for uncompensated removal costs, which may include those salaries, equipment, and administrative costs directly related to a specific incident. A State may submit claims for removal costs directly to the Fund even if the responsible party is known. Claims other than for removal costs must first be submitted to the designated responsible party. Claims payments are not limited to \$250,000 per incident.

D. ADDITIONAL INFORMATION. For additional information regarding these procedures or related subjects, State representatives, FOSCs, Coast Guard district staffs, and other interested parties are urged to contact the NPFC (see paragraph 13).

2. REQUESTING FUNDS.

A. ELIGIBILITY CONSIDERATIONS. Pursuant to 33 CFR 133.5, 133.7, and 133.13, the following will be evaluated by the FOSC when contacted by the State requesting funds under section 1012(d)(1):

1. Is the incident eligible for immediate removal under the Clean Water Act, as amended by OPA 90?
2. Is the substance discharged/threatening discharge oil?
3. Did the incident occur after August 18, 1990?
4. Is the aggregate amount of the request equal to or less than \$250,000?
5. Are the proposed actions consistent with the NCP (including 40 CFR 300.305(c)'s requirement that a

reasonable effort is made to have the discharger voluntarily and promptly perform removal actions)?

6. Are the proposed level of response, proposed actions, and amounts requested appropriate for the circumstances?
7. Has the State the means to complete the immediate removal?

B. COSTS INCURRED BEFORE FOSC CONTACT. Immediate removal costs involving a specific oil discharge incident which, due to exigent circumstances, were incurred by the State prior to the initial request to the FOSC for State Access, are allowable under State Access if the FOSC determines that: 1) notification is timely; 2) the response was consistent with the magnitude of the incident; and 3) costs incurred were otherwise reasonable under the circumstances and in all other respects were allowable.

C. CONTACTING THE FOSC. In accordance with 33 CFR 133.9, the Governor or designated State official (henceforth referred to as the State official) shall request access to the Fund from the FOSC who is pre-designated for the area of the incident. The best method for contacting the FOSC is the telephone, because it allows for discussions and conference-calling.

D. EVALUATION BY FOSC. Considering the NCP, 33 CFR 133.15, and the criteria in paragraph 2.A. above, the FOSC determines whether or not the proposed removal actions are eligible for funding. The FOSC may contact the NPFC case officer whenever questions arise. The decision by the FOSC is final. The FOSC may respond as follows:

1. If the FOSC concludes that the incident is not eligible for Federal removal under the NCP, that any of the criteria in paragraph 2.A. above are not met, or otherwise does not find State Access to be the appropriate removal mechanism for the incident, he/she will deny the request for State Access. The FOSC may conclude that the incident is eligible for removal under the NCP, but that a Federally led response is more appropriate to the situation. In this event, the FOSC may decide to utilize State resources through contract (see paragraph 1.C.1.). Whenever a request for State Access is denied for any reason (including a decision for a Federally led response or a decision for no Federal response), the FOSC will, by the next business day following his/her decision, notify the NPFC Case Management Division (NPFC (cm)) and District (m) office, as appropriate, of the request and the specific reason(s) for denial.

2. If the FOSC concludes that all of the criteria in paragraph 2.A. above are fulfilled and that State Access to the Fund is the best method to address the incident, he/she may then approve the request for State Access and contact the cognizant Coast Guard District for assignment of a case-specific Federal

Project Number (FPN) and a removal action funding ceiling (ceiling). The FOSC is responsible for ensuring that the State official is expeditiously informed of the FPN/ceiling.

E. OBLIGATION OF THE FUND AND ASSIGNMENT OF THE FEDERAL PROJECT NUMBER AND FUNDING CEILING.

1. The FOSC will pass the same information to the Coast Guard district representative that he/she would pass for other types of oil discharge responses when accessing the Fund. The FOSC identifies this as a State Access removal which he/she has approved, requests assignment of an FPN/ceiling, and provides the name and telephonic/electronic/postal mail contact information of the requesting State official. With the issuance of an FPN/ceiling for the incident, the Coast Guard has obligated the Fund for payment. All further communications by all parties regarding the oil discharge incident should include the FPN and ceiling.

2. The Fund is obligated for payment to the State and a cooperative agreement between the Coast Guard and the State is in effect when the Coast Guard district assigns the FPN and ceiling to the FOSC. At this point the State may begin incurring costs against the FPN/ceiling.

3. Not later than the next business day following the assignment of the FPN/ceiling to the FOSC, the Coast Guard district transmits an official Coast Guard message that announces the assignment of the FPN/ceiling. This message should include the NPFC, the FOSC, and the cognizant Regional Response Team (RRT) members as addressees, and should also be faxed to the cognizant State official. In addition to the information which is usually included in this type of notification, this message includes as a reference the telephone conference between the FOSC and the Coast Guard district representative in which the FPN and ceiling were assigned, specifically notes that the funds were provided for State Access, and includes the telephonic, electronic, and mail contact information of the State official.

F. RAISING THE CEILING. Requests for raising the amount of the FPN's ceiling are made to the cognizant FOSC. The procedure is identical to that outlined in subparagraphs 2.A-E. above. Requests for a higher ceiling shall not raise the overall ceiling above the \$250,000/incident limit.

G. OIL DISCHARGE REMOVAL AUTHORIZATION. An "Oil Discharge Removal Authorization" (see Appendix A) documents the cooperative agreement between the State and the Coast Guard. Upon receipt from the cognizant Coast Guard district of the notification of the assignment of the FPN/ceiling, the NPFC case officer forwards the Oil Discharge Removal Authorization and a certifications package (see paragraph 7.D. below) to the State official. The State official should contact the NPFC case officer listed in the Authorization if any questions arise.