

## **COST RECOVERY AND RECORD KEEPING**

- 1 This appendix contains information on how those who respond to, or are affected by, marine pollution incidents should best go about recovering the costs that they incur regardless of source.
- 2 It is essential that during any counter pollution or salvage operation all those involved keep records of what they did, when and why they did it and what resources they used. There is often pressure to neglect record keeping in order to deal with new issues and problems. However, the importance of records cannot be over emphasised. It is simply not realistic to rely on memory to reconstruct events in a fast moving and possibly lengthy incident. Responders must therefore arrange to keep adequate records. These records extend from minutes of meetings including all decisions made to beachmaster records of the number of personnel, plant and materials used on a particular beach on a particular day and who provided them. The compilation of a photographic library, with all photographs date and time stamped would be of great assistance as proof of activities.

### **Joint Claims**

- 3 For smaller incidents the MCA are prepared to lead on cost recovery action across the public sector and specifically for bodies identified in this NCP. However, it is still necessary for claimants to follow the advice provided in this document. The decision for the MCA to lead is taken on a case by case basis and subject to agreement by all parties at the time.
- 4 The MCA's extensive experience in claims suggests the following items of best practice:
  - any expense must actually have been incurred and third party invoices provided;
  - response measures must be reasonable, proportionate and justifiable;
  - there needs to be a summary of events – a description and justification of the work carried out at sea, in coastal waters and on shore – together with an explanation of why the various working methods were selected;
  - for chartered vessels, investigate the rates quoted and look at the SCOPIC tariff rates;
  - apply the industry standard of 100% of hire rate for in-use and 50% rate for stand-by;

- ensure MCA's contractors, or local authorities acting on behalf of the Agency, apply the MCA policy for equipment hire charges when acting on behalf of MCA in response to an incident;
- keep a record of the dates on which work was carried out at each site; in this context, date and time stamped photographs are extremely useful;
- keep a record of the number and categories of response personnel, regular or overtime rates of pay and who is paying them;
- keep a record of the travel, accommodation and living costs for response personnel;
- keep a record of the equipment costs for each site: types of equipment used, rate of hire or costs of purchase (bearing in mind residual values to be deducted), quantity used, period of use (in use or standby);
- ensure that any damaged equipment is photographed and assessed by an independent body prior to repair or replacement;
- during cleaning or restoration of equipment or vessels, they should not be brought to a state better than at the commencement of the hire/charter;
- keep a record of materials consumed in the response, for example, sorbent and dispersant;
- keep a record of the cost of temporary storage, transport, treatment and disposal of waste; and
- keep a record of any other incident specific cost relating to the response in any way, eg oil analysis, reinstatement, impact assessments, etc.

## **Record keeping**

- 5 For the purpose of financial record keeping, it is essential to appoint a financial controller at a very early stage in the incident to keep adequate records and control expenditure. Responders should not discard any relevant document (including status board information and maps used by the SCU, OCU, MRC and SRC). All data should be backed up and catalogued on a regular basis – at least daily.

- 6 It is not possible to specify the precise form of records, this varies with the circumstances. However, there are two points to keep in mind:
- records of any incident act as the source material for many incident related purposes; and
  - since responders cannot know the particular purpose that records will serve in advance, record keeping should err on the side of too much rather than too little detail.
- 7 The record should clearly show information received, decisions taken, orders given, and action taken. For example, responders may use aircraft for reconnaissance. In this case, there should be a record not only of when they called the aircraft out but of take-off times, landing times, details of any oil found, the area searched, who was on board the aircraft, who received the information and when. For dispersant spraying operations, records should specify the area of operations and indicate the duration of spraying, the amount, type, age, and efficacy of dispersant used, and the results obtained.
- 8 As a further indication of the level of records required one example would be for the hiring-in of an item of equipment, the hirer should seek to clarify the following items:
- member of staff that authorised and placed the order;
  - the reason for hiring the equipment;
  - date and time item actually hired;
  - organisation hired from;
  - evidence of any research relating to cost of hire
  - quantity of each item actually hired;
  - for larger pieces of equipment (particularly chartered vessels) it would be useful to take photographs of the condition of the item prior to use for response activities;
  - if more than one item of any type is hired, devise a system for unique identification;
  - how it was delivered / transported;
  - where it was actually delivered to;
  - who took delivery;

- a daily activity record of what the item was used for, including the location of use;
  - if item is damaged – photograph damage;
  - brief description of how the damage occurred;
  - do not repair until approval or advice has been reached with an insurance representative on site (i.e. the SCR or a surveyor appointed by the insurers);
  - dates actually used for the response;
  - dates the item was on standby at the scene of the incident;
  - date off-hired;
  - condition of the item when returned to owner; and
  - no betterment of equipment on return to owners.
- 9 Record keeping requires a heavy commitment in terms of minute takers, message takers, procurement specialists and financial experts. There are specialist firms that offer tracking and recording services for clean up operations and the appointment of such a firm may be justifiable following a major spill from an oil tanker. In such a case it should be possible to recover the cost of using such firms, or temporary agency staff, from the shipowner, insurer and/or the IOPC Fund.
- 10 It is important to record decisions and the opinions of all the parties involved in addition to agreements or points of disagreement. This applies equally to ITOPF who report to ship owners, P&I Clubs and the IOPC Fund and are likely to offer advice to all parties involved in the response on counter pollution operations. It applies also to others such as cargo owners, local authorities and the Environment Group. The records should show whether they agree or express no opinion. If they disagree, the records should identify the reasons, if possible. Records should distinguish criticism made at the time of an incident from criticism made with the benefit of hindsight.
- 11 Like any operation involving the expenditure of large sums of money, the usual rules of proprietary, accountability and the need for a fully detailed audit trail apply.

### **Time limits for claims arising from pollution from tankers**

- 12 Claimants should aim to produce their claim at the earliest opportunity – if need be in draft form initially. Claimants should be aware that there are

time limits for claims under the 1992 Civil Liability Convention, the Fund Convention and the 2001 Bunkers Convention. The conventions provide that claimants must secure their claims by taking legal action against the shipowners within three years of the date on which loss or damage occurred and in any case within six years of the date of the incident.

- 13 Wherever possible, claimants should seek to have their claims settled within these periods. If this is not possible, claimants may protect their claims by taking legal action against the tanker owner, the owner's insurer and the IOPC Fund. Should this be necessary, claimants should seek legal advice.
- 14 Formal legal action to enforce a claim is usually the last resort. In most cases, informal negotiations result in a settlement. Given the time limits for legal enforcement of claims, it is in everybody's interest for claimants to submit claims as soon as possible after the incident. Often, considerable time is required to compile a claim and all the substantiating evidence. If claimants anticipate delays, they should notify the tanker owner's insurers and the IOPC Fund at an early date of the intention to submit a claim at a later stage.

#### **Time limits for claims arising from pollution by persistent oil carried in ships other than tankers**

- 15 Again, claimants should aim to produce their claim at the earliest opportunity as there are time limits for claims under the 2001 Bunker Convention. Claimants must secure their claims by taking legal action against the shipowners within three years of the date on which the loss or damage occurred and in any case within six years of the date of the incident. Where the incident consists of a series of occurrences, the six-years' period shall run from the date of the first such occurrence.

#### **Submitting a claim**

- 16 Claimants should initially submit claims for clean up costs to the ship owner and/or to the relevant P&I Club. If claimants have any difficulty obtaining this information, they should seek advice from MCA's CPS Branch (telephone 023 8032 9482 or DfT's Maritime Safety and Environment Division (telephone: 0207 944 5452).
- 17 The P&I Clubs do not publish formal guidance on their requirements for submitting claims, but the guidance in this appendix and the IOPC Fund's claims manual should generally be appropriate. Claimants may also find the EU Claims Management Guidelines useful. This document can be accessed here <http://emsa.europa.eu/publications/guidelines-manuals->

[and-inventories/item/720-eu-states-claims-management-guidelines-claims-arising-due-to-maritime-pollution-incidents.html](https://www.iopcfund.org/and-inventories/item/720-eu-states-claims-management-guidelines-claims-arising-due-to-maritime-pollution-incidents.html)

- 18 Where relevant the IOPC Fund co-operates closely with the relevant P&I Club in assessing and settling claims. In an incident involving the IOPC Fund, claimants should submit full supporting documentation to the tanker owner, the P&I Club or the IOPC Fund. Claimants should notify the IOPC Fund of any claim they have submitted to the owner or P&I Club.
- 19 When an incident gives rise to a large number of claims, the P&I Club and the IOPC Fund may jointly set up a local claims office to process claims more easily. If such a claims office is established at the scene of an incident, claimants should submit their claims to that office. The local press should carry details of how to submit claims. The designated surveyor and the joint claims office refer claims to the P&I Club and to the IOPC Fund for decisions on their admissibility.
- 20 The IOPC Fund Claims manual can be accessed at <http://www.iopcfund.org/publications.htm>

## **PROCEDURE IN OTHER CASES – NON TANKERS**

- 21 Most of the above guidance is just as relevant to claims for compensation arising from all types of marine pollution. However, as the liability and compensation arrangements in such cases are different, such as time limits and requirements for evidence, the claims procedures are likely to vary. Claimants should therefore seek early guidance from the polluter (ship owner or operator) or the relevant insurer, as well as from their own legal advisers.

## **GENERAL – ALL CLAIMS**

- 22 Claims should be in writing and must contain the following particulars:
  - the name and address of the claimant, and of any representative;
  - the identity of the ship or offshore installation involved in the incident;
  - the date, place and specific details of the incident if known;
  - the type of pollution damage sustained
  - the nature of the operations, or response measures, for which the claimant is seeking compensation; and
  - the amount of compensation sought.
- 23 Supporting documentation should link all the expenses (including disposal) to the actions taken at specific sites.

## **FINANCIAL SECURITY**

- 24 When an incident occurs, the accident and all details available, are given promptly to the insurers and owners of the casualty. The MCA Resource and Claims Manager informs the insurer at this early stage that the MCA's intention is to make a claim and requests financial security for the money that the MCA is committing. From experience, this is generally achieved verbally by telephone from the scene of an incident. If it is subsequently found that the financial security requested was inappropriate or unnecessary, the security would be returned to the insurer, i.e. Bunkers Convention or Civil Liability Convention applies.
- 25 This financial security can take several forms but in most cases is a Protection and Indemnity (P&I) insurer's Letter of Undertaking (LOU). The wording of this Letter needs to be amended according to the type of charter / ownership of the vessel and legal advice should be sought if necessary. This document makes the MCA's position clear to the insurers and shipowners. If the MCA are not provided with financial security during the incident, as a last resort, legal action would be taken to underwrite the financial exposure by arrest of the casualty or freezing of the hull assets. In certain circumstances it is also possible that a harbour authority or similar body involved in an incident may request an LOU.
- 26 Two possible forms of financial security are a Letter of Undertaking and a Bank Draft, each of which require an amount of money to be included in the document. The MCA estimates a figure based on previous incidents, the estimated length of response and a figure for refurbishment and return of resources to the appropriate site. Generally, at this stage an uplift is included in the level of financial security requested from the P&I for unforeseen costs. Most P&I personnel are experienced and are well aware that the estimation of costs at this stage is not an exact science but it helps later settlement discussions if the figure given here is as close as possible to the quantum of the final claim.
- 27 This procedure is followed as a matter of routine for MCA personnel for incidents that fall outside the scope of application of the Civil Liability Convention as they are adequately covered by International Conventions (see [Liability & Compensation for Pollution Damage](#)). Depending on the provider of the financial security, the preferred form of security might be a bank draft.
- 28 The LOU also clarifies the jurisdiction for any subsequent legal action to recover costs, and the MCA's preference for any such action would be the UK.
- 29 When the MCA response team return to headquarters it is necessary, to back up the financial security provided, by forwarding a letter to the ship

owners, with a copy to the relevant P&I Club, informing them that a claim under the Merchant Shipping Act will follow in due course.

### **Claims arising from Oil Pollution from Offshore Installations and Pipelines**

- 30 Initially claimants should submit their claim to the operator involved. Following this all claims are subject to the OPOL Agreement and in particular to the OPOL guidelines for claimants brochure which can be found on the OPOL website [www.opol.org.uk](http://www.opol.org.uk).

### **Claims arising from an unidentified source**

- 31 Generally, claimants can only obtain compensation if they know its precise source. However, there is one exception to this. The IOPC Fund pays compensation for pollution damage if the claimant can prove (for example, by sophisticated chemical analysis) that the pollution resulted from a spill of persistent oil from an unidentified tanker. In most cases the MCA would commission a chemical analysis in an attempt to determine the source of the pollution.