

# Compensation for Ship-Source Oil Spills: Considerations for Modernizing Canada's Marine Liability Regime to Support Indigenous Communities

Report to WWF-Canada



Photo: Attempts to flush a contaminated beach during *Nathan E. Stewart* oil spill (Heiltsuk Nation)

Elise DeCola  
Nuka Research and Planning Group, LLC

**OCTOBER 2020**

## Acknowledgements

The author gratefully acknowledges the following individuals, who reviewed this report in various draft forms.

Stafford Reid, EnviroEmerg Consulting, Ltd.  
Andrew Dumbrille, WWF-Canada  
Diana Chan, Heiltsuk Integrated Resources Management Department  
Kimberley Dunn, WWF-Canada  
Layla Hughes

## Disclaimer

Any errors, omissions, or inaccuracies are the sole fault of the author. This report does not provide legal advice and should not be relied upon as such. Indigenous groups or others seeking legal advice should consult a qualified and credentialed professional.

10 Samoset Street, Plymouth, MA 02360  
PO Box 175, Seldovia, AK 99663  
[www.nukaresearch.com](http://www.nukaresearch.com)



## Executive Summary

This report was developed for WWF-Canada to provide research and analysis on Canada's ship-source oil spill liability regime as it relates to Indigenous communities. Transport Canada is currently reviewing the regime and seeking input from Indigenous communities and other stakeholders on non-economic losses that they may experience as the result of an oil spill. Non-economic losses may include environmental damage or cultural losses that are difficult to quantify because the impacted resources are not bought or sold.

The report includes a literature review, analysis of past claims to Canada's ship-source oil pollution fund, and information gathered from Indigenous community members. It evaluates the system in place today, identifies areas in which the existing regime may not be adequate to serve the interests of Indigenous claimants, and considers examples from other jurisdictions that compensate for non-economic losses.

### Marine Liability Regime

In January 2020, Transport Canada announced their intent to review the *Marine Liability Act* to "seek to understand what Canadians, notably Indigenous communities, see as potential improvements to the regime." The Canadian ship-source oil pollution liability and compensation regime is based on an international framework that creates a layered approach to ensure funding is available to supplement a shipowner's insurance to compensate for expenses and damages from ship-source oil spills. Canada's regime is implemented through the *Marine Liability Act*, which establishes liability limits and creates a national funding mechanism to supplement the payment of claims.

Transport Canada seeks to expand the *Marine Liability Act* to ensure that claims for non-economic losses are eligible for compensation. In order for these legislative changes to have meaning, they must be followed by enhanced guidance on how to submit claims for non-economic damages to Canada's Ship-Source Oil Pollution Fund (SOPF). The SOPF was established with industry funding in the 1970s, and has been replenished with interest paid from general tax revenues and cost recovery from polluters. It is administered independently at an arms-length from the government of Canada.

Any person, organization, company, community, or government can file a claim against the SOPF for the costs incurred in mitigating or cleaning up an oil spill. Claimants can also seek compensation for property damages or losses to fishing, tourism, subsistence, and other sectors. Historically, most SOPF claims have been from the Canadian Coast Guard (CCG) for spill response expenses. A stated goal of the SOPF administrators is to expand the claims process to better accommodate non-federal claimants, including Indigenous groups. This report recommends changes to both the Act and the SOPF, as any changes to the Act are only meaningful to Indigenous claimants if there is a clear pathway for establishing and documenting claims for non-economic losses.

### Literature Review

A selective literature review focused on publications generated by the SOPF, as well as professional and technical literature on marine liability and non-economic losses from oil spills.

SOPF claims guides and annual reports provide insight into how claims are handled and the types of claims and claimants that have been most successful. The percentage of claims paid over time has decreased from a historical average of 95-97% down to 77% in 2018-2019, the most recent year reported. At the same time, the number of claims and amount claimed has increased. While many historic claims have occurred near Indigenous communities, the SOPF has never paid a claim directly to an Indigenous group.

Categories of non-economic loss described in the technical and professional literature include: subsistence and non-commercial harvest losses; cultural losses; recreational losses; reinstatement or restoration of the environment; ecological damages, ecosystem impacts, and pure environmental loss; and human health and societal impacts. Commonly cited challenges in filing claims for non-economic losses include the administrative burden of documenting the loss, a lack of common approach to valuation of non-economic losses, and uncertainty on the part of potential claimants as to the types of non-economic losses that may be covered.

Subsistence impacts are a universal concern for Indigenous communities, and these concerns may exacerbate other community impacts such as human and community health. Claims for subsistence losses can be particularly difficult to justify, for the reasons previously cited, which may be further confounded in Indigenous communities by cultural or language barriers and concerns about sharing sensitive information.

### **Challenges Faced by Indigenous Claimants**

The current claims process applies a set of standards to determine whether claims are admissible and to justify a monetary payment offer. Claimants must provide detailed evidence to prove that the loss occurred and justify the associated expenses. Claims may be denied if the claimant attempts to recover for the same loss against both the Fund and the ship owner. The SOPF also applies a reasonableness test to determine whether the costs incurred are commensurate with the replacement or repair cost for injured resources. In evaluating prevention and response claims, the SOPF considers the proportionality of the measures taken against the potential damages that might have resulted if no mitigation occurred. Finally, the SOPF evaluates all claims for a single incident across all claimants to identify duplication of efforts. If multiple claimants are seeking compensation for the same or similar actions, the duplicate claims may be denied or reduced.

*The United Nations Declaration on the Rights of Indigenous Peoples affirms the fundamental rights of Indigenous peoples, including their right to compensation in the event that their lands, territories, and resources are damaged (Article 28), their right to secure their own means of subsistence and to “just and fair redress” if subsistence is interrupted (Article 20), and to conserve and protect the environment and productivity of their lands and resources (Article 29).*

The claims evaluation process is problematic for Indigenous claimants, because of the unique way that they use, value, and relate to the natural environment. The burden of evidence to prove a subsistence claim may be impossible to meet. Reasonableness and proportionality tests may not take into consideration the additional costs and burdens associated with accessing goods and services in remote communities. Actions taken by an Indigenous community in parallel to CCG or a response organization, such as deployment of protective boom in high value areas, may be viewed as duplicative and denied.

### **Harmonizing the SOPF Claims Process with Indigenous Laws and Governance**

Modernization of Canada's liability and compensation regime to better accommodate Indigenous groups will require an expanded viewpoint that includes the laws, customs, and practices of Indigenous communities as potential claimants. The claims process views losses at an individual or institutional level, yet subsistence losses in particular are often experienced communally, because of the way harvesters share and distribute food within a community. The claims process focuses on impacts to discrete receptors, which is fundamentally different to how Indigenous people view people, land, water, plants, and animals as interconnected and foundational to the communal, ceremonial, spiritual, and educational fabric of their communities.

The current regime focuses on “lawful” harvesting of resources but it is unclear whether this is inclusive of Indigenous laws. Indigenous governments may also take action under their own stewardship and self-governance authorities to limit access to harvesting marine resources that are impacted by a spill. Indigenous law may also apply stricter parameters for consumption of wild foods, leading them to restrict harvesting differently than federal or provincial health authorities.

There is a general lack of transparency to the Canadian marine liability claims and assessment process that may disincentivize Indigenous claims, in part because there is no way for future claimants to learn from experience. The August 2020 announcement that the SOPF will begin publishing decisions is a positive step toward enhancing transparency, and this may make the Fund more accessible to Indigenous communities and other claimants. For the claims process to fairly accommodate a non-economic loss claim by an Indigenous group, SOPF administrators must address the inherent conflicts between the SOPF claims assessment process and the asserted aboriginal rights to self-govern, inclusive of the rights to fish and hunt and to manage marine areas and resources.

### **Expanding the Marine Liability Regime to Support Indigenous Claims**

This report identifies a number of opportunities to expand the Canadian ship-source oil spill compensation regime in consideration of Indigenous community interests.

#### **Incorporate Indigenous Community Perspective**

Non-economic losses that Indigenous communities experience as the result of oil spills are fundamentally different than any other potential claimant, because Indigenous communities have a unique point of view on principles such as governance, stewardship, and community. There is no proxy for this viewpoint; the process of modernizing the marine liability regime to accommodate Indigenous communities will require “meaningful engagement” as it applies to reconciliation. Transport Canada and SOPF administrators will need to go beyond simple outreach to collaborate with Indigenous communities and explore how the SOPF can handle Indigenous non-economic loss claims in a manner that respects their rights, including their right to self-determination and self-governance, and their title, including their lands, territories and resources.

#### **Address Prevention and Preparedness**

The marine liability regime currently does not provide funding for preparedness or pre-impact studies. Other jurisdictions have taken a more expansive approach by allowing similar funds, derived from levies on shipping or other risk-bringing industries, to support spill preparedness. A proactive compensation regime might consider how capacity-building, both within Indigenous communities and more broadly across both government and industry, could mitigate spill damages and ultimately reduce the extent of post-spill claims.

#### **Include Restoration**

The Environmental Damages Fund (EDF) administered by ECCC is an example of how Canada utilizes funding from fines and penalties to engage in restoration projects, which are a critical to addressing non-economic losses. The U.S. Natural Resource Damage Assessment (NRDA) process has generated decades’ worth of assessment frameworks and restoration plans that could serve as a model for Canada. The EDF and NRDA frameworks both provide models for how to expand the marine liability regime to enable claimants to use damage awards for restoration and long-term monitoring and recovery projects.

#### **Increase SOPF Expenditures and Replenish through Levies**

The SOPF has yet to pay a claim directly to Indigenous communities for any kind of loss. Expanding the scope of allowable claims to address non-economic losses may facilitate future claims from Indigenous communities. It may also lead to increased annual expenditures and a need to replenish the fund. The SOPF Administrator has the authority to re-establish levies on the risk-bringing industry, which could supplement the Fund to support more proactive payouts to Indigenous communities along shipping corridors.

If Indigenous communities could rely on the SOPF as a remedy for their response costs and damages, the volume of claims paid by the Fund would increase over time. Rather than continue to replenish the Fund from general revenues, the SOPF should consider re-instating levies, since SOPF claims offset direct claims against the shipper, and historically the SOPF recovers less than one-third of claimed costs from shippers post-incident.

### **Reconciliation**

A more expansive view towards compensating Indigenous communities for oil spill preparedness, response, and recovery would be a step towards realizing Canada's commitments to reconciliation. The expansion of the marine liability regime presents an opportunity for Canada to balance the inequities that Indigenous communities face from shipping risks that are beyond their control.

If Canada can expand the regime's capacity to support Indigenous claims, this could also support community healing by allowing impacted communities to receive compensation more quickly and with fewer administrative and legal expenditures. This presents an opportunity to build resilience to ship-source oil spills and benefit both Indigenous communities and the Canadian marine spill response regime.

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October 2020

## 1 Introduction

### 1.1 Background

Transport Canada (TC) is undertaking a review of Canada's ship-source oil spill liability regime, which currently covers response costs (such as preventive measures and clean-up costs), costs for reinstatement of the environment, property damage, and economic losses (including fisheries, tourism, and loss of subsistence living).

The ongoing review<sup>1</sup> asks for public input on the non-economic losses that communities may experience as the result of a ship-source oil spill. Non-economic losses are defined as "those which can't regularly be bought or sold, making it hard to assign them a dollar value." (TC, n.d.-a) TC specifically points to "losses related to long-term environmental damage and/or cultural loss," asking for feedback on how such non-economic losses might be demonstrated and quantified (TC, n.d.-b).

### 1.2 Purpose and Organization of this Report

This report was developed with funding from WWF-Canada to include three components:

- (1) Conduct a literature review of relevant information on Canada's marine liability regime, focusing on the strengths and weaknesses that have been documented in the ship-source oil spill compensation regime and identifying models from other countries that might be adapted to enhance Canada's approach (Section 2).
- (2) Identify priorities and concerns of Indigenous communities regarding marine oil spill compensation through interviews and review of technical submissions to NEB and related processes (Sections 3 and 4).
- (3) Evaluate past claims against the Ship-source Oil Pollution Fund to identify trends in payment, with a focus on lost use and other functions that are identified as important to Indigenous communities through step 2 (Sections 3 and 4).

This report considers these issues as they may relate to all Canadian Indigenous communities (First Nations, Inuit, Metis). A secondary focus is BC First Nations communities, which are currently engaged in a range of co-governance activities related to marine oil spill prevention, preparedness, and response. The report evaluates the system in place today, identifies areas in which the existing marine liability regime may not be adequate to serve the interests of Indigenous claimants, and considers examples from other jurisdictions that could be considered in enhancing the Canadian compensation regime.

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<sup>1</sup> Originally scheduled to close June 30, 2020; extended to March 2021.

### 1.3 Liability for Ship-Source Oil Spills

The international legal framework for ship-source oil spill liability and compensation dates back to the late 1960s and early 1970s, and is primarily implemented through two agreements, the Civil Liabilities Convention (CLC) and the Fund Convention. Over the years, these instruments have been updated and augmented, and the current international framework is referred to as the CLC-IOPC (International Oil Pollution Compensation) Fund (Asariotis & Lavelle, 2012). The international regime provides a framework for a layered system designed to ensure funding is available to supplement the limits of shipowners' insurance policies for damages caused by oil spills (Marchand, 2017). Nations that are party to CLC-IOPC may also create national funds, typically funded through fees on oil cargo receivers, to which claimants may appeal as a primary or secondary source of compensation (Asariotis & Lavelle, 2012).

The Canadian ship-source oil pollution liability and compensation regime is based on these international conventions, which are implemented through the Marine Liability Act (Minister of Justice, 2001). Canada's "polluter pays" regime applies strict, limited liability to all shipowners for damages they cause. Strict liability means that a shipowner is liable regardless of fault (Asariotis & Lavelle, 2012). The shipowner's liability is limited<sup>2</sup> under international and Canadian law based on the ship's size and whether they are carrying oil as fuel or cargo. Canada does not limit the amount that can be claimed against the Fund (TC, 2020).

In Canada, any injured party can file a claim for damages directly against a shipowner, and the damages are typically decided through legal proceedings in federal courts (or negotiated settlements outside of court). Injured parties can claim against the Fund either directly as a "first resort" or after claims are filed against the shipowner as a "last resort." Filing a claim directly to the Fund allows the claimant the opportunity to avoid legal proceedings; instead, they ask the SOPF for compensation, and the Fund may opt to pay some or all of the claim, which the Fund may then attempt to recover from the polluter. If an injured party decides to claim directly against the polluter, they are required to also name the SOPF as a party to the claim and in the event that a court deems a polluter not liable (e.g., Act of God or Act of War), then the SOPF would pay the claim amount specified by the court. The SOPF is also responsible to pay qualified claim amounts that exceed the shipowner's liability (Ottawa: SOPF, 2019b).

### 1.4 Ship-Source Oil Pollution Fund (SOPF) Overview

The SOPF was originally created with industry-derived funding (levy on oil shipments in and out of Canada from 1974-1976). The Fund balance is replenished through interest paid on this original balance from Canada's Consolidated Revenue Fund (tax revenues) as well as costs recovered from polluters. The Fund balance has grown from \$27 million in 1975 to over \$408 million at the end of 2019. Figure 1 shows how the fund has grown in the past 30 years. Since 1989, \$358 million has been added through interest received through the Consolidated Revenue Fund, with \$5 million added through cost recovery from the polluter. There have not been any direct industry contributions. Expenditures from the fund include \$25 million paid in claims, \$57 paid to the IOPC, and \$22 million to cover SOPF operating expenses.

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<sup>2</sup> While the shipowners' liability limit is salient to the claims process because it creates a ceiling for potential payments, it is not a focus of this report. The potential for non-economic claims from Indigenous communities to exceed a shipowner's liability limit may merit further evaluation.

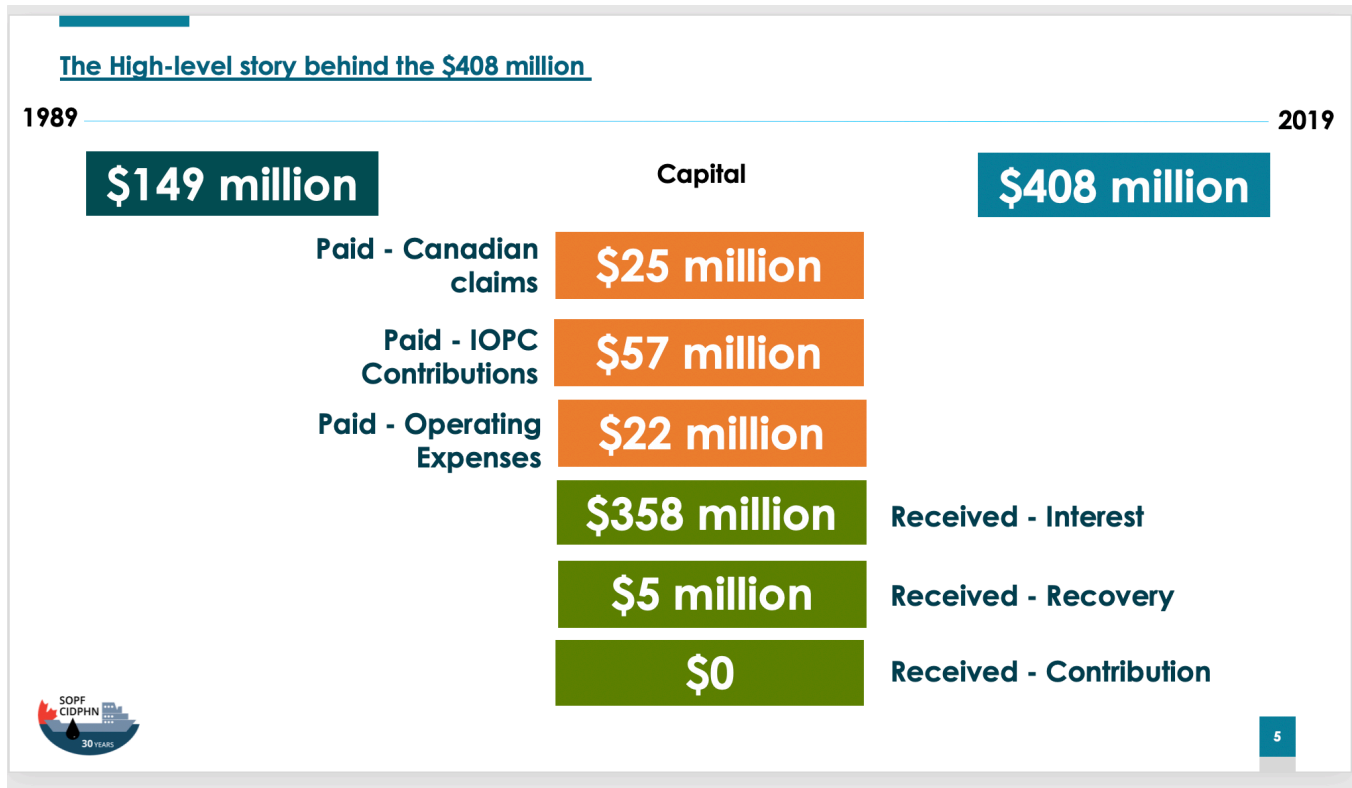


Figure 1-1. Balance of Ship-Source Oil Pollution Fund from 1989-2019 (SOPF, 2019a)

The SOPF operates at an arms-length from the government of Canada, run by an Administrator and Deputy Administrator, who are each appointed separately to 5-year terms. The Administrators manage the SOPF, assess claims, authorize payments to claimants, and pursue recovery from shipowners or their insurers. Administrators may rely on independent experts as they apply their discretion in evaluating and awarding claims.

Any person, organization, company, community or government<sup>3</sup> can file a claim against the SOPF for response costs, property damage, costs for reinstatement of the environment, and economic losses to fishing, tourism, subsistence, or other sectors. Historically, the Canadian Coast Guard (CCG)<sup>4</sup> has been the largest claimant against the SOPF, submitting the majority of claims and recovering the majority of damages. With rare exception, CCG claims to the SOPF are to recover response costs, which include both clean-up costs and other measures taken to prevent or mitigate ship-source oil pollution. The SOPF has evolved over time, and recent publications indicate that the Fund Administrator is interested in making the Fund more accessible to non-federal claimants (Ottawa: SOPF, 2018-2019).

<sup>3</sup> Exceptions include the polluter and Response Organizations, though the latter can claim against the Fund as a last resort if unable to recover costs from the shipowner.

<sup>4</sup> SOPF documents use DFO/CCG to describe claims from CCG. For the purpose of this report, CCG is used alone for brevity, with the understanding that CCG claims to the SOPF are submitted on behalf of the Department of Fisheries and Oceans.

## 2 Literature Review

A selective literature review focused on two topic areas: (1) publications generated by the SOPF (excluding claims manuals, which are discussed in Section 3); and (2) professional and technical literature on non-economic losses from oil spills (not specific to Canada).

### 2.1 SOPF Annual Reports

The SOPF Administrator files annual reports on the Fund that include case summaries and financial information going back to 1974.<sup>5</sup>

#### 2.1.1 30<sup>th</sup> Annual Report (2018-2019)

The 2018-2019 Annual Report (Ottawa: SOPF, 2018-2019) is the most recently published annual compendium of SOPF activities. It marked the 30<sup>th</sup> anniversary of the Fund's existence in its current form (1989-2019) and highlighted recent legislative amendments that changed several aspects of the Fund, including:

- Elimination of the per-incident liability limit as of December 13, 2018. Until that date, an annual liability limit was established by the Minister. The 2018 limit was approximately \$174.6 million.<sup>6</sup>
- Authorization to temporarily transfer funds from the Government of Canada Consolidated Revenue Fund (tax revenues) to the SOPF in the event it is depleted.
- Alignment with international conventions for claims related to economic loss (loss of revenue) caused by oil pollution.
- Additional liability for reasonable cost for expenses incurred by the Minister of Fisheries and Oceans for preventive measures taken even if there is no grave and imminent threat of oil pollution damage.
- Up-front emergency funding for the Minister of Fisheries and Oceans for significant pollution incidents.
- Expedited small claims process for claims up to \$35,000.

The 2018-2019 Annual Report indicates that more claims come from BC than other provinces or territories. Other trends noted in 2018-2019 SOPF report include:

- Majority of claims are below \$50,000;
- CCG is the predominant claimant;
- Fishing vessel spills<sup>7</sup> generated the highest number of claims in 2018-2019, but claims from tugs and barges accounted for the highest total expenditures;

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<sup>5</sup> Available at: [http://sopf.gc.ca/?page\\_id=331](http://sopf.gc.ca/?page_id=331)

<sup>6</sup> This does not change the shipowners' liability limits. It removes a previous per-incident claim that limited the total amount that the SOPF could payout for a single incident (across all claims filed) based on an annually adjusted limit.

<sup>7</sup> Spills originating from fishing vessels. While fishing vessels may be claimants against the Fund for spills that impact them, they are not allowed to file claims if they are the polluter.

- Claimants are taking longer to file claims, with more than half of 2018-2019 claims filed in the final six months of the filing period;
- Three-quarters of the claims filed in 2018-2019 were completed (offers made by SOPF) within six months, with more expensive claims tending to take longer for the SOPF to assess;
- The percentage of claims paid out has been declining over time; historically, the Fund paid 95-97% of claims; in 2018-2019 that percentage dropped to an all-time low of 77%;
- There has been an upward trend in recent years in both the number of claims and the amount claimed;
- The largest single payment ever made by the Fund was \$4.2 million paid to CCG in September 2018 for cleanup costs associated with a sunken tug in Quebec; and
- The amount recovered by the SOPF from shipowners increased in 2018-2019 compared to past years.

The 2018-2019 report observed that, while a “notable proportion” of SOPF claims are generated by incidents that occurred near Indigenous communities, the Fund has “not yet paid any claims to claimants from Indigenous communities.” (Ottawa: SOPF, 2018-2019). This resulted in work initiated in 2019 to conduct more targeted outreach to Indigenous communities and develop webinars<sup>8</sup> on how to file a claim.

In May 2020, the SOPF published a compendium of incident summaries from 1989 to 2019.<sup>9</sup>

### 2.1.2 Annual Report Incident Summaries

Beginning in 2017-2018, the SOPF added a supplement to the annual report by including narrative synopses of each claim filed, and a table of incidents that summarizes the claims and provides information on settled amounts. These summaries date back to 2007 but primarily reflect incidents from 2014-2018, and the SOPF website<sup>10</sup> provide summary tables and brief narratives of open and recently closed cases (See Appendix A). Of the 82 claims reported Canada-wide across the 2017-2018 and 2018-2019 incident summaries (and online), 69 claims (84%) were filed by CCG, seven were filed by port authorities (9%), four (6%) were filed by local governments, and one (1%) was filed by a corporate entity.

Twelve of the claims identified in the SOPF incident summaries are still in process, which means that no offer has been made to the claimant. Of the 70 claims that resulted in an offer to the claimant, the SOPF reports having recovered funds from the shipper for 13 claims (about 19%). Recovered funds sometimes exceed the total claim amount. Claims account for about one-quarter of average annual Fund expenditures (\$25M of \$104M expended to date). More than half of the Fund revenue is contributed to the IOPC Fund, and the other 20% covers administrative costs.

The SOPF reports having paid claims at rates ranging from 6% to 100%; claimants were reimbursed for the full claim amount in about 40% of the cases summarized. The average percentage of the original claim that

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<sup>8</sup> There is a “Fund 101” webinar online at <https://register.gotowebinar.com/recording/3327999999075672333>

<sup>9</sup> This report is available online at [http://sopf.gc.ca/wp-content/uploads/2020/05/30-Years-of-Decisions\\_Incident-compilation-May-2020.pdf](http://sopf.gc.ca/wp-content/uploads/2020/05/30-Years-of-Decisions_Incident-compilation-May-2020.pdf)

<sup>10</sup> [http://sopf.gc.ca/?page\\_id=7353](http://sopf.gc.ca/?page_id=7353)

SOPF has paid out across this sub-set of claims is 88%. By claimant type, port authorities have the highest percentage of claims paid, with the Fund reimbursing them for \$341,332 of the \$385,981 claimed (95%). Local governments have the lowest average payout, with \$490,552 offered on \$888,950 in claims (73%). CCG claims track with the overall average, with \$10,965,466 paid on \$13,856,072 in claims filled (88%). Figure 2-1 shows the makeup of claims in this sub-set of SOPF claims. The Incident Summaries in this date range does not include any claims from Indigenous communities.

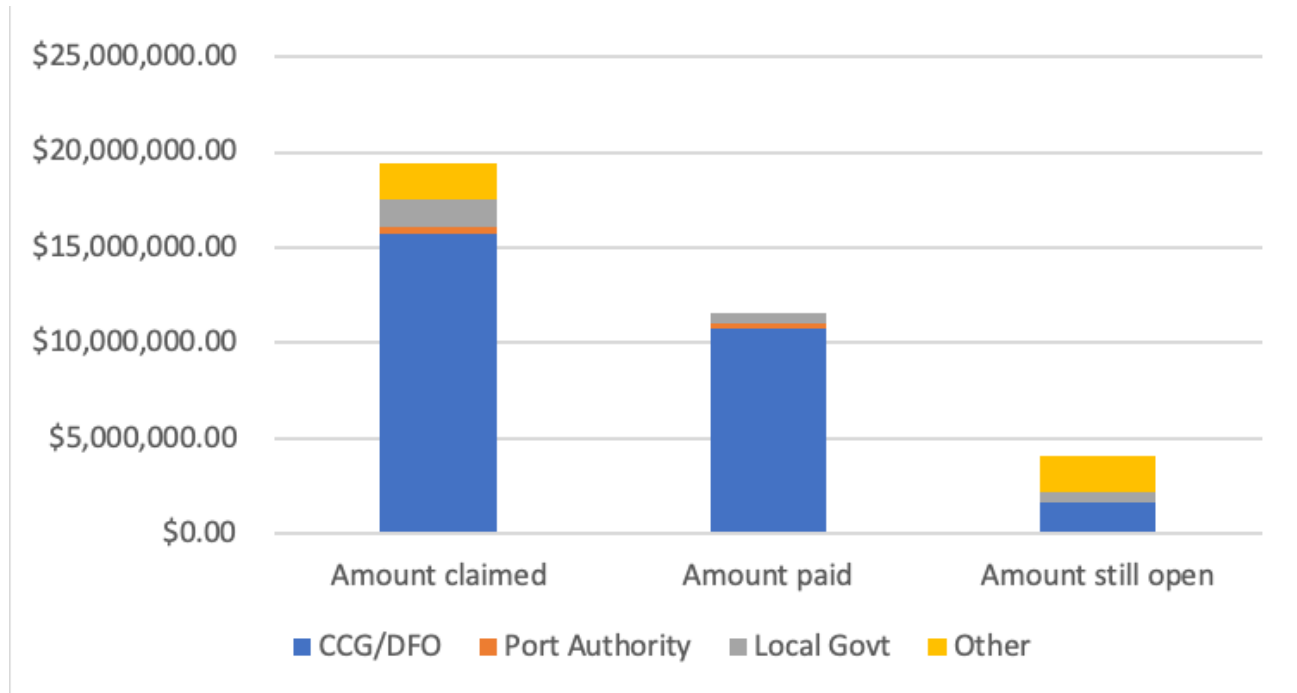


Figure 2-1. Summary of recent SOPF claims information made publicly available

### 2.1.3 Statistical Report on Derelict and Abandoned Vessels

In 2017, SOPF published a report to present information from SOPF claims regarding derelict and abandoned vessels from 2006-2015 (Engh, 2017). The report documents the challenges presented by such cases, which include:

- Difficulty finding and contacting the shipowner;
- Lack of financial assets in the event shipowner can be found;
- Uncertainty regarding when an incident triggers the two-year SOPF filing window to open; and
- Lack of funding for wreck removal (which is not covered by the SOPF).

The SOPF issued a follow-up whitepaper that dives more deeply into the constraints for applying the SOPF for vessel deconstruction (Ottawa: SOPF, 2019c).

### 2.1.4 History of Incidents Involving Indigenous Peoples

In 2018, the SOPF published a report on the interactions between Indigenous groups and the Fund. It included a preface by the Fund Administrator presenting this study as “a first step in trying to identify what is at stake with the presence of indigenous [sic] groups in the Fund’s incident files, and to set the stage for the Fund’s outreach to – and engagement with – indigenous communities.” (Dick, 2018)

The report reviews past cases involving Indigenous Peoples based on the SOPF claims database, case files on record at the Fund, and annual reports. The author reports consulting the Department of Indigenous and Northern Affairs, but no direct outreach to Indigenous communities. The author concludes that additional outreach is needed to make Indigenous groups aware of the SOPF.

### 2.1.5 30<sup>th</sup> Anniversary Conference

In 2019, the SOPF held a conference to commemorate its 30 years of operation (SOPF, 2019a). It included a series of panel discussions focused on various aspects of liability and compensation. A panel discussion entitled “Equality, Diversity, and Inclusion: How to Advance Access to Justice for Victims of Oil Pollution?” included Indigenous community leaders, and identified several opportunities to enhance the SOPF and broader regime in support of indigenous claimants (Iskedjian, 2019):<sup>11</sup>

- Indigenous communities must protect land and waters for future generations;
- Indigenous communities should have direct representation within the SOPF administration;
- First responders from Indigenous communities need access to immediate funding so that they can try to mitigate the incident while waiting for Coast Guard and other responders – otherwise, they must divert their own annual budgets from education and other community support activities to fund response;
- In the past, the SOPF has not provided indemnity for response actions that communities consider to be reasonable;
- Indigenous communities would like more information about new policies for compensating losses related to resource use for spiritual and cultural practices;
- The new expedited claims process has such a low cap (\$35,000) that it would not be applicable to the level of impact an oil spill would have to high value resources; and
- Funding should be made available for prevention – up front spending to reduce risks is more impactful than waiting until damages have been incurred.

## 2.2 Professional and Technical Literature on Non-Economic Loss

The professional and technical literature on oil spill liability and compensation is extensive. A focused review of publications and case files addressing non-economic losses<sup>12</sup> provides context for how these issues have been addressed on both a legal and practical level in past spills, and on common challenges in quantifying these types of losses. The literature reviewed spans multiple jurisdictions and includes spills that are not ship-source since some countries do not limit their compensation scheme to ship-source spills. Some of the

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<sup>11</sup> The SOPF website includes copies of presentation materials and video recordings of each panel, with the exception of the panel that addressed “Equality, Diversity, and Inclusion: How to Advance Access to Justice for Victims of Oil Pollution?” Upon request, SOPF outreach personnel provided a transcript of this panel discussion.

<sup>12</sup> The term “non-economic loss” as applied in this report refers to injuries or damages that do not have a direct monetary proxy.

cases presented were resolved through court actions against polluters and did not directly involve national or international compensation funds.

### 2.2.1 Challenges in Claiming for Non-Economic Losses

Case studies documenting oil spill damage claims vary based on the incident, the impacted parties, and the legal context for claims. Commonly cited challenges include (Quimby, 2011; Glynn, 2016):

- The administrative burden of documenting non-economic losses;
- Lack of common approach to valuing loss of use;
- Lack of baseline data to support claims and assessments;
- Lack of framework to comprehensively assess ecosystem goods, services, and function; and
- Uncertainty about the types of non-economic losses that may be covered.

When claimants are attempting to recover these types of losses from a consolidated fund, there is a difficult balance to be struck to fairly allocate compensation. This section discusses these challenges generally and reviews claims have been presented through court proceedings as well as administrative cases against national and international pollution funds.

### 2.2.2 Subsistence and Non-Commercial Harvest Losses

Subsistence losses can be extremely difficult to document, but they can create an urgent need for compensation to ensure food security (IOPC Funds, 2018). Subsistence impacts are a universal concern for Indigenous communities, and past incidents have shown that these concerns may define community impacts well beyond the immediate loss of food sources (NOAA, 2012a; NOAA, 2012b).

#### ***Exxon Valdez Oil Spill and Long-Term Impacts***

Studies conducted in *Exxon Valdez* impacted communities at long time intervals following the 1989 spill found that while many of the subsistence species impacted from the spill had recovered, confidence in eating certain species (clams) remained low 15 years after the oil spill. The level of confidence in consuming subsistence foods has increased over time, and at 25 years post-spill, most subsistence harvesters expressed overall confidence in food safety, again with the exception of Pacific herring, which had not recovered, and clams, which had recovered (Fall and Zimpelman, 2016). This work shows that oil spill impact subsistence not simply through contamination of traditional foods, but through perception of taint that may linger far longer than the actual oil. From a compensation perspective, anticipating and monetizing these types of impacts may be challenging.

#### ***Subsistence Claims from the Gulf of Mexico Well Blowout***

The 2010 Macondo spill in the Gulf of Mexico impacted a vast area of water, coastline, and subsea resources, resulting in over 250,000 claims (Public Statistics, 2020) and giving rise to a \$20 billion USD fund to compensate claimants for damages. Categories of damages included seafood compensation, individual and business economic losses, real property damages, and subsistence losses.

A U.S. Senate hearing conducted in early 2011 included testimony that of 16,000 subsistence claims submitted to the fund, only a single \$3,000 claim had been paid. A representative of subsistence claimants recommended immediate changes to the claims process, which included an expansion of the definition of subsistence use under U.S. law, “fully acknowledging and recognizing the local non-taxable practice of

bartering community gifts and family consumption of commercial fishing communities of all ethnic backgrounds.” (U.S. Government of Publishing Office, 2011).

Of the \$12.1 billion USD in settlements paid through July 2020, \$529 million went to subsistence claimants. Subsistence claims represented 17.4% of the total number of claims submitted, while the value of claims settled to date represent only 4.3% of total monies disbursed. By comparison, seafood compensation accounted for 6.4% of claims, with \$2.2 billion in paid settlements (18.5% of total settlements to date). Business economic losses, which represented 38.2% of total claims submitted resulted in \$8.4 billion in settled claims payments (69.6% of total monies disbursed). These discrepancies suggest that the U.S. system also had a higher success rate rewarding economic loss claims when compared to non-economic losses. (Public Statistics, 2020)

### ***Non-Commercial Harvest Impacts to Herring Roe, Fish and Shellfish in Alaska***

An ongoing damage assessment for a spill from a tugboat in Sitka, Alaska includes “non-commercial harvest” damages that includes both Indigenous subsistence harvesting by the Sitka Tribe and recreational/personal use harvesting by residents of Southeast Alaska (NOAA, n.d.-a). In this case, household survey data on wild food consumption compiled by the Alaska Department of Fish and Game provided baseline levels of non-commercial harvest of fish, herring eggs and shellfish. Sampling data was used to determine the exposure of key non-commercial harvest species to the oil spill, and the damage assessment then estimated the impacts based on exposure during the time that sheens were present. For example, the assessment estimated that the spill killed the equivalent of 25.5 billion Pacific herring eggs, which provides a quantitative starting point for assigning damages and developing restoration priorities (U.S. Department of Commerce, 2019).

### ***Non-Commercial Fisheries and Aquaculture Losses***

Some fisheries and aquaculture impacts are purely economic losses, such as replacement costs for damaged gear or lost income to fishers, fishing vessel owners, and processors. Fishing and aquaculture interests may also be damaged in ways that are not as straightforward to compensate, such as the contamination of fishing stocks that impact future yield, loss of market confidence in seafood safety, or supply shortages that result from fishing bans (IOPC Funds, 2006). There may be a ripple effect associated with fisheries and aquaculture impacts, such as impacts on industries that supply commercial fisheries (Chang et al., 2014).

Non-economic fisheries losses may overlap with other types of non-economic loss, such as community or human health impacts. Research on fishing communities impacted by the Macondo spill found that individuals involved in the fishing industry suffered more negative health impacts than any other industry impacted by the spill (Cope et al., 2013). Follow-up research found that some of these adverse health impacts increased over time, due in part to lingering contamination and food safety concerns (Parks et al., 2018).

### ***Long-Term Impacts to Subsistence Resources following the Selendang Ayu Oil Spill***

The 2004 grounding of the *Selendang Ayu* freighter in Unalaska, Alaska was the second largest marine oil spill in the state, after the *Exxon Valdez*. The Qawalangin Tribe submitted a claim to the U.S. National Pollution Fund Center for lost subsistence opportunities and related cultural losses. Although the \$1 million USD claim

was rejected by the U.S. Coast Guard (Director, 2009),<sup>13</sup> the spill spurred a major ethnographic study of the human effects of the spill, including subsistence impacts to local Alaska Native communities (Pettersen and Glazier, 2011).

Wild food impacts were a high priority for the Unangan communities impacted by the spill, both in terms of the lost access to food and as a result of uncertainty regarding whether current and future generations would have the opportunity to pursue and use subsistence resources. As this was the second oil spill to impact the region (the first being the *M/V Kuroshima* in 1997), some subsistence users were concerned about cumulative impacts on traditional foods. Researchers documented that subsistence users avoided oil impacted areas well beyond the regulatory closures by Alaska and U.S. fishery managers in the year following the spill. This reinforces the concept that subsistence practices are governed by traditional knowledge and what the researchers described as “common sense,” rendering formal regulatory closures and reopenings irrelevant to the interruption and resumption of harvesting by Indigenous communities. The researchers (Pettersen and Glazier, 2011) note:

“Differential perspectives on contamination are in this case rooted in historical social context. Native and non-Native subsistence practitioners, sport fishing enthusiasts, and guides who would have used the affected areas on Unalaska Island had the spill not occurred, each possess the discretion needed to avoid such areas or the resources found there. But significantly, *Native* residents *also* possess a direct understanding of how contamination and lost subsistence opportunities relate to the long history, contemporary life ways, and future of the Unangan.”

### ***Data Sharing, Trust, and Communications***

Crisis communications are challenging during any type of emergency, and oil spill response operations often create tension between government regulators, the polluter, and impacted communities. For Indigenous groups faced with subsistence impacts, there may be sensitivities to sharing information about harvesting activities. It can be challenging to balance the requirement for documentation to support claims with concerns about divulging sensitive information (NOAA, 2012a).

#### **2.2.3 Cultural Losses**

Claims for passive losses, or lost opportunities to engage in recreational or cultural activities, can be particularly difficult to substantiate and compensate. Still, these made up a significant proportion of claims after the *Exxon Valdez* oil spill (Chang et al., 2014).

A series of workshops with Indigenous communities along Alaska's North Slope identified a number of concerns regarding social and cultural impacts, including: loss of language proficiency; disruption to generational sharing of fishing and hunting practices; disruptions to education of youth on traditions; loss of employment opportunities; impacts to sales of arts and crafts made from harvested resources; disrupted access to traditional art and clothing materials; maintenance of celebrations and traditional dances; and disturbance of archaeological sites (NOAA, 2012a; NOAA, 2012b).

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<sup>13</sup> The rejection was due in part to a disconnect between the NRDA Trustee designation for U.S. Tribes and the treatment of Alaska Natives under the Alaska Native Claims Land Settlement Act, which does not necessarily qualify Alaska tribes as trustees.

In the U.S., there are a few examples of settlements that attempt to compensate Indigenous communities for losses experienced as a result of pollution impacts. For example, in 2013 the St. Regis Mohawk Tribe received a settlement for chronic pollution impacts to:

- Water, fishing, and their use of the St. Lawrence River;
- Horticulture and basketmaking;
- Medicinal plants and healing; and
- Hunting and trapping.

This case was settled under the U.S. Natural Resource Damage Assessment process (see Section 2.3.1), with the St. Regis Mohawk Tribe Trustees taking a lead role in identifying preferred cultural restoration projects to compensate for these cultural losses by promoting the restoration of land-based cultural practices and traditional economic activities within the community. Restoration projects accounted for \$8.4 million USD of a \$20.3 million restoration budget. Cultural restoration funding included an immersive apprenticeship program that introduced younger community members to traditional practices, as well as an institutional funding initiative to support projects that the Tribe viewed as essential to the survival and regeneration of the cultural practices in the community. This approach shows how funding can be applied to restoration programs that do not directly pay individuals for the losses they have suffered, but instead provide programmatic funding and support to enhance cultural resource use by future generations. (Office, n.d.)

#### 2.2.4 Recreational Losses

Human recreational use of beaches and coastal waters may be disrupted by pollution impacts. There are several U.S. examples of oil spills where recreational use impacts were included in the damage assessment and compensation. For example, the damage assessment for the *Cosco Busan* oil spill (ship-source release into San Francisco Bay in 2007) estimated the damages to shoreline recreation by considering the extent to which the spill limited or changed how local residents were able to use recreational beaches. The assessment considered a range of shoreline impacts including sunbathing, swimming, surfing, strolling, sightseeing, exercise, and wildlife viewing. Surveys of local residents, combined with analytic methods to estimate the number and value of lost trips, were used to estimate a lost recreational value of \$17.9 million (in 2007 USD) for the approximately 8 months following the spill (Stratus Consulting, 2010).

A more recent California oil spill, the 2015 Refugio pipeline leak near Santa Barbara, also included an assessment of recreational losses as part of the damage claim. The damage assessment considered human use values as broadly inclusive of lost public use and enjoyment for shore-based recreation, coastal camping, boat-based recreation, and education and outreach (Zafonte, n.d.; (NOAA, n.d.-b)). Numeric estimates of lost human use values were derived using a range of economic valuation models, resulting in a total loss estimate of \$4.4 million (2018 USD). (Curry *et. al*, 2018a-c)

#### 2.2.5 Reinstatement or Restoration of the Environment

The costs associated with restoring or reinstating damaged resources and environments may be compensable, depending upon the legal context. Unlike damage claims, claims for reinstatement or restoration seek monetary funding to pay for actions aimed at improving the natural environment over time.

Reinstatement of the environment typically includes measures that aim to enhance natural recovery, and under the international compensation regime (CLC-IOPC), the standard is that measures should have a realistic chance of accelerating natural recovery without having undue environmental or economic impacts (Parker and Mauseth, 2009).

Restoration, as established in the U.S. compensation regime (see Section 2.3.1), incorporates reinstatement and expands that concept to also include compensatory measures meant to offset the loss of environmental services during the time that the environment was damaged through the completion of reinstatement (Alexander, 2010). For example, if a marsh were damaged by an oil spill, reinstatement activities would involve actions that aim to remove the oil and help the oiled marsh recover, such as cutting away oiled grass or replanting areas. Restoration would go a step further and attempt to make up for the loss of ecological services from the damaged marsh (e.g., juvenile fish habitat, coastal erosion protection), perhaps by planting a new marsh elsewhere in the waterbody (Parker and Mauseth, 2009).

Reinstatement and reimbursement costs may also cover studies or monitoring associated with assessing natural resource recovery. Mathematical models of varying complexity are sometimes used to approximate a monetary value for reinstatement or restoration, if direct methods are not feasible. The international compensation funds typically do not allow models to justify reinstatement costs, though some national regimes do embrace numerical modeling, including the U.S. (Dicks, 2006).

### 2.2.6 Ecological Damages, Ecosystem Impacts, and Pure Environmental Loss

Ecological damages result from oil pollution and from the clean-up operations that follow. Beyond the direct costs of paying for remediation and wildlife rehabilitation, compensation for ecological damages, can be extremely complex (IOPC Funds, 2006).

Ecosystem impacts may involve the interactions between species and between marine life and the physical environment. Ecosystem-level impacts may reflect differences in vulnerability, abundance, and recovery timeframes for impacted species and habitat. These impacts may not be readily identified at the time of the spill; they may unfold over time and space. Examples from past spills include an increased abundance of sea urchins following the *Exxon Valdez* spill due to the high mortality of sea otters, which prey on urchins (Chang et al., 2014).

The international ship-source oil spill compensation regime (IOPC Fund) does not recognize the pure environmental loss, which further confounds the claims process in jurisdictions where national regimes do acknowledge ecological damages. For example, the claims process following the *Erika* spill was complicated by the fact that French law allowed for ecological damage claims, while the international regime does not. French courts awarded damages that would not have been approved had the claim gone against the IOPC (Marchand, 2017).

An ongoing lawsuit by two Amazonian indigenous organizations, supported by church and human rights organizations, seeks damages from the Ecuadorian government and several oil companies for damages caused by major oil pipeline spills in their territory. The lawsuit seeks damages to compensate Indigenous communities for the violation of their constitutional rights to territory, health, information, water and food sovereignty, a clean and ecologically balanced environment, and the rights of nature (Amazon Watch, 2020).

### 2.2.7 Human Health and Societal Impacts

Oil spills impact human society through individual health impacts and community well-being. These impacts are driven, to an extent, by the physical and economic damages that human beings experience as a result of the spill, but are more complex to measure and compensate. Oil spills can directly impact human health through exposure to oil and vapors or through consumption of tainted seafoods. These impacts may be immediate (nausea from oil vapors) or long-term (bioaccumulated toxicity, cancers, reproductive impacts). (Chang et al., 2014). A recent study of the impact of pipeline spills to Indigenous communities in Canada

noted that contaminated drinking water from inland oil spills can have short- and long-term health impacts (Datta and Hurlbert, 2020).

Studies have shown that technological disasters like oil spills may be more stressful to human psychology than natural disasters. Human-caused disasters, like oil spills, can create psychosocial stress, defined as “the interrelation between social factors and individual thought and behavior.” Human beings react not only to the harm caused by the disaster, but by a sense that they have lost control over the ability to control their own safety (Gray, 2019). Individual mental health impacts may be driven by a loss of income, food insecurity, lost recreational use, and other stressors. After the *Exxon Valdez* spill, high rates of substance abuse and domestic violence were documented in many coastal communities and were particularly high for Indigenous communities (Chang et al., 2014). A series of workshops in northern Alaska Indigenous communities revealed high levels of concern that future oil spills might cause social disruption, domestic violence, and result in people leaving communities (NOAA, 2012a).

Societal impacts occur at different levels. Macro-level impacts are those that affect social structures and dynamics, ranging from local economic and political systems to social services to fiscal revenue and community infrastructure. Middle-level impacts describe those that affect stakeholder groups, families, and other groups. Individual or micro-level impacts affect a person’s mental or physical health, such as substance abuse, dysfunctional behaviors, physical anxiety, or suicide (Ritchie, Gill, & Farnham, 2012).

In the wake of the 2010 Macondo well blowout in the Gulf of Mexico, U.S. legislative hearings highlighted the mental health impacts to communities and individuals. These types of impacts are not contemplated under U.S. law, and while the spiller (BP) made contributions to various social service providers, local mental health advocates observe a hesitance to take responsibility for the breadth of social impacts that occurred (U.S. Government of Publishing Office, 2011).

Oil spills may disrupt the “social fabric” of communities, through the influx of responders from outside the community. The *Selendang Ayu* oil spill in Unalaska created tensions within the community as the influx of responders competed for scarce supplies in the remote island community (Kohout and Meade, 2008). The loss of access to recreational or cultural sites may negatively impact the sense of community connectedness. Some community members may opt to work for the polluter on cleanup operations, which can be perceived as a betrayal by their neighbors or family members who have been injured by the spill (Ritchie, Gill, & Farnham, 2012). Studies have shown that proactive attention to social impacts may alleviate their severity. For example, following the *Hebei-Spirit* spill in Korea, the central government mediated between the IOPC and affected communities to expedite damage claims, while communities set up compensation committees to assist individuals and organizations with filing claims (Cheong, 2012).

Individuals and communities often report that the administrative burden and lag time involved in claims and compensation can exacerbate the trauma, because they are forced to relive the experience while documenting past events (Gray, 2019).

There are few case studies that report successful claims for human health and societal impacts. Five indigenous communities in Peru were successful in recovering damages from a U.S. oil company, after six years of legal proceedings in the U.S. court system. The settlement reached in 2013 between the Achuar communities, supported by the environmental group Amazon Watch, compensated the communities for premature deaths, birth defects, and other health problems caused by three decades of oil spills from drilling activities. The undisclosed amount was intended for community restoration projects (Los Angeles Times, 2015).

## 2.3 Pollution Funds and Non-Economic Losses in Other Jurisdictions

### 2.3.1 U.S. Oil Spill Liability Trust Fund (OSLTF) and Natural Resource Damage Assessment and Recovery (NRDAR)

The current U.S. system emerged from sweeping legal and regulatory changes after the 1989 *Exxon Valdez* oil spill in Alaska. The U.S. Oil Spill Liability Trust Fund (OSLTF) is comparable to the SOPF, though there are key differences in how they can be used. The U.S. Fund consists of a response fund – monies that are immediately available to fund response activities by federal agencies and to fund federal trustee agencies<sup>14</sup> natural resource damage assessments, which are conducted concurrently with (but separate from) response operations. The principal fund is the remainder of the U.S. Fund, which is used for cost recovery and to pay for damages that are not covered by the polluter.

The types of claims that the U.S. OSLTF will cover are broader than those described in SOPF claims guidance, and addresses costs associated with lost use beyond simple replacement costs. The U.S. process has a stronger focus on restoring the injured resources, beyond simply compensating injured parties. It reflects the intent of U.S. law to “make the environment and the public whole,” which is a more expansive view of compensation than the international compensation funds (Parker and Mauseth, 2009). The process contemplates services that natural resources provide, such as recreational fishing, boating, and shoreline recreation (Alexander, 2010). The U.S. Fund can also be used for damages not directly tied to an oil spill, such as damages to reefs or seabed from a ship grounding.

The U.S. Natural Resource Damage Assessment and Restoration (NRDAR) process is codified in federal law and some state laws. NRDAR can be implemented for an oil spill, substantial threat of an oil spill (such as a ship grounding), or other pollution event. Important elements of the NRDAR process include:

- Damage assessment and restoration and recovery planning begin immediately during spill response
- Multi-jurisdictional, inclusive of federal, state, local, tribal governments
- Cooperative process includes polluter, but government trustees have ultimate authority
- Considers a broad range of impacts to resources and their use
- Covers direct costs but also has process for compensatory damages
- Includes public input and comment opportunities

There are two kinds of restoration projects under the U.S. NRDAR: primary restoration aims to accelerate the return of conditions to the way they were before the spill, while compensatory restoration seeks to compensate for losses before resources return to their pre-spill baseline. Multiple restoration projects may result from a single incident.

The life cycle of NRDAR extends beyond the timeframes contemplated in the SOPF claims guidance. NRDAR is implemented in three phases. During pre-assessment, trustees representing all levels of government will determine whether to pursue restoration based on the nature and extent of impacts. The restoration planning phase comes next, where the trustees review the pre-assessment data to determine the level of restoration required and plan for its implementation. Finally, restoration activities are implemented and monitored until they achieve their goal.

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<sup>14</sup> Federal trustee agencies come from different departments and have mandates related to wildlife, ecology, habitat, fisheries, natural resources, and human health.

In the event of a trans-boundary spill impacting both Canada and U.S. waters, the U.S. NRDAR process would create a different framework for assessing and awarding damages than the current Canadian regime (Marchand, 2017).

### **2.3.2 New Zealand Oil Pollution Fund**

Maritime New Zealand administers a fund, established in the 1990s, which operates under three core principles:

1. Industry pays for and provides Tier 1 (immediate, on-scene) readiness capability and response activities;
2. The Oil Pollution Fund, derived from direct levies on industry, pays for Tier 2 (regional) and Tier 3 (national) readiness activities (planning and preparedness) as well as response to un-sourced (mystery) spills; and
3. The polluter pays for Tier 2 and Tier 3 responses directly.

New Zealand's national preparedness is almost entirely industry-funded, and supports not only Maritime New Zealand's activities but also regional councils that oversee preparedness and response across the country. The Oil Pollution Fund is sustained through levies on domestic and foreign vessels over 100 gross tonnes, oil exploration and production facilities, pipelines, and oil storage and handling facilities. The levies are assigned based on the proportionate risk created by the activities and sector. Levies are adjusted on a multi-year review schedule with the goal of maintaining a sufficient balance to fund oil spill preparedness and response activities. This includes:

- Purchasing and maintaining equipment and infrastructure to support Tier 2 (regional) and Tier 3 (national) response capacity for marine oil spills; and
- Supporting Maritime NZ and regional authorities by:
  - Reimbursing expenditures for marine oil spill response;
  - Funding their work to develop plans and build preparedness; and
  - Funding prevention measures to reduce the likelihood of marine spills.

In the event that the fund runs out during a response, it can be replenished through emergency action (Maritime New Zealand, 2018).

### **2.3.3 Norwegian Compensation Formula**

Like the U.S., Norway has a clearly established process for damage assessment and compensation for damages. The Norwegian system also allows claimants to establish claims for pure ecological loss, such as loss of non-commercial use of commons. This concept, which is also present to a degree in other European Nations, recognizes the value of ecosystem services and the potential for loss of value from oil spills and other environmental incidents.

Unlike the U.S., Norway's compensation system foregoes detailed impact assessments and instead applies a simple formula to assess damages for environmental restoration, based on the size of the spill and the sensitivity of the impacted resources. Other nations in Asia and the Middle East have adopted similar approaches (Parker and Mauseth, 2009).

Chapter 8 of Norway's Petroleum Activities Act provides specific compensation guidelines for Norse fisherman should a petroleum spill affect their livelihood. If fishing becomes severely affected or even impossible, compensation is due as complete payments or in part as a lump sum or as a fixed annual

payment, for any resultant financial losses. Additionally, compensation can be claimed for fishing time lost due to clean up and associated activities, such as locating, marking, and retrieving objects to authorities (Zeldin & Wendy, 2010).

#### **2.3.4 EU Environmental Liability Directive**

The EU Environmental Liability Directive (ELD) is not a fund; it is a principle that enhances the “polluter pays” principle in Europe by adding a framework for compensating for pure ecological damages under National compensation regimes (European Commission, n.d.). This is in addition to the more traditional liability established elsewhere in EU and national laws, covering direct damages such as property damage, ecological loss, or personal injury (Lawrence, 2006).

The EU ELD establishes three categories of damage: (1) damage to protected species and natural habitats, which covers any damage with adverse effects on “reaching or maintaining the favourable conservation status of such habitats or species”; (2) damage that adversely affects the ecological, chemical, and/or quantitative status and/or ecological potential; and (3) contamination to lands that creates a significant risk of adversely impacting human health. European nations that participate in the CLC-IOPC face an inherent conflict between the ELD and the international compensation regime, similar to the conflict following the *Erika* spill in France where the French courts awarded claims for ecological loss. Like the *Erika*, future ship-source spills in an ELD member state could result in claims that are compensable by the national regime and non-compensable under the international funds (Marchand, 2017). This still allows for cost recovery, but limits the opportunity for a claimant to access the international fund to supplement the claim, if needed.

## 3 Considerations for Indigenous Communities Seeking to File Non-Economic Loss Claims in Canada

As Transport Canada considers how to amend the *Marine Liability Act* to support Indigenous claims, it is important to consider the experience from the perspective of the end user who seeks to access compensation within the established regime. Expanding the scope of eligible claims is a critical first step; however, it will not translate into meaningful changes in compensating Indigenous communities until the claims process administered by the SOPF provides a framework for establishing, documenting, and evaluating claims for non-economic losses.

This section explores how the SOPF guidance for assessing eligible claims could be enhanced to accommodate potential Indigenous claimants.

### 3.1 SOPF Claims Manuals and Guidance

The SOPF publishes and periodically updates claims manuals for various types of claims:

- General Claims Manual – summarizes the claims process for a variety of claims, excluding expedited claims or “special” circumstances (Ottawa: SOPF, 2019b);
- Expedited Small Claims Manual – provides an expedited process where claims under \$35,000 can be paid more quickly and with less initial documentation (Ottawa: SOPF, 2019a);
- Special Loss Claims Manual – addresses “exceptional and residual remedies” available to a limited class of claimants, including fishing, aquaculture, marine harvesting, hunting, subsistence living, ceremonial and cultural uses. May include projected future damages, and claims may be submitted up to three years from spill event (Ottawa: SOPF, 2020).

SOPF also offers more detailed step-by-step examples of how to assemble a claim. These include a Sample Individual Small Claim that shows how an individual might prepare a claim under the expedited process (SOPF, 2019b), and a similar publication focused on Governments (which may include First Nations) filing expedited small claims (SOPF, 2019c). In March 2020, a new guidebook was added, focusing specifically on Fisheries and Aquaculture claims (Ottawa: SOPF, 2020). The contents of the fisheries claim manual largely repeats other manuals. It contains a summary of past fisheries claims, which are discussed in Section 3.4.

#### 3.1.1 Determining Admissibility

SOPF Claims Guidance lists the following categories of compensable damages:

- Preventive measures;
- Clean-up costs;
- Costs for reinstatement of the environment;
- Economic loss;
- Fisheries loss;
- Tourism loss; and
- Loss of subsistence living.

Several parameters come into play when determining whether a claim would be eligible for compensation under the SOPF; these are summarized in Table 3-1 based on a synthesis of information from SOPF claims guidance.

*Table 3-1. Summary of SOPF Claims Guidance*

Consideration in SOPF Claims Process	Claim Eligible under SOPF <sup>15</sup>	Claim Likely Not Eligible under SOPF
<b>Source of spill or spill threat</b>	Any type of vessel (tanker, tug, barge, freighter, fishing vessel, pleasure craft, ferry).  "Mystery" spill if claimant can provide evidence/documentation that the source is likely a vessel (e.g., pictures of vessels in the area, a sample of the oil that shows it is marine fuel).	Non-vessel source (truck or rail car rollover, oil storage tank, pipeline, natural seep, well blowout, plane crash).  "Mystery" spill if SOPF Administrator does not support that spill is from a vessel.
<b>Preventive Measures</b>	"Reasonable" preventive measures taken to prevent or minimize impacts, even if no spill occurs, assuming that there is a "credible" risk of a spill occurring.	The Fund very explicitly does not cover any preparedness costs associated with purchasing or maintaining equipment, developing response plans, or training responders.
<b>Clean-up Costs</b>	Costs associated with responding to and cleaning up a spill, as long as they meet the standard of "reasonable."  Includes reasonable costs of cleaning and rehabilitating wildlife.	Any costs that do not pass the "reasonableness" test, which may include actions that are not commensurate with the potential damages or actions that are duplicated by more than one responding party.
<b>Type of Oil</b>	Petroleum products and mineral oil.	Vegetable oil or other non-petroleum oils.
<b>Location</b>	Spill impacts waters within 200nm of coast (Canadian EEZ) and all inland waters (rivers/lakes)	Spill does not enter Canadian waters.
<b>Party Filing the Claim</b>	Any person, organization, company, community, or government can file a claim.  SOPF does seem to take into consideration an organizations' "mandate" for spill response when evaluating claims for clean-up costs.  Claimants falling into one of the "special" categories (fishing, aquaculture, marine harvesting, hunting, subsistence living, ceremonial and cultural) would follow the same process. Still they should self-identify as being a potential "special" case for additional consideration.	Response Organizations (RO) cannot file a claim; they are required to go directly to shipowner, though could claim against SOPF as "last resort."  Shipowners cannot claim directly to the Fund for spills from their vessels except under very limited circumstances (i.e., spill caused by sabotage and ship takes actions to clean it up).
<b>Timing of Damages</b>	Claims for losses incurred during or after the spill event.  Claims for projected future claims (special claims).	Expedited claims if more than one year has elapsed since spill occurred.  General claims if more than two years has elapsed since spill occurred.  Special claims if more than three years has elapsed since spill occurred.

<sup>15</sup> Once a claim is made, the SOPF Administrator still has the discretion to pay some, all or none of the claimed costs.

Consideration in SOPF Claims Process	Claim Eligible under SOPF <sup>15</sup>	Claim Likely Not Eligible under SOPF
<b>Incident type</b>	Response costs or damages from vessel incident where oil spills or is at risk of spilling.	Vessel incident where no oil spill or credible risk of oil spill.  Response actions or damages not related to oil spill.
<b>Property damage</b>	Physical property that may need cleaning, repair or replacement.	Replacement costs are higher than costs of cleaning; or claimant opts for replacement when cleaning or repair would have been less expensive.  If you didn't take reasonable measures to prevent damage to your property.
<b>Economic loss</b>	Loss of earnings, even if property wasn't damaged. Can cover wages for individuals or corporate losses (lost revenue).	Economic losses such as lost revenue that is incurred by a business that is not directly contaminated by the spill (e.g., hotel or restaurant closes) are not compensated.
<b>Fisheries, hunting or aquaculture loss (special claim)</b>	Loss of wages or revenue from not being able to fish (individual or business such as processor).  Expenses associated with traveling to a different spot to fish, hunt, or set up aquaculture.  Damages to fishing gear or aquaculture equipment.	Would not compensate fishermen or hunters for lost catch if they had the opportunity to catch fish or hunt elsewhere.
<b>Subsistence loss (special claim)</b>	Costs associated with purchasing food to replace subsistence foods for food, social or ceremonial purchases.  Costs incurred to travel to different spots for subsistence harvesting.  Costs associated with loss of cultural practice, if methodology can be shown for how calculated.	Non-economic losses such as cultural impacts, disruption of traditional activities if claimant cannot provide methodology to justify claim amount.  Replacement costs that are deemed "unreasonable" (e.g. if the market price to replace is high or product isn't widely available, claimant is expected to find a comparable replacement).
<b>Tourism loss</b>	Economic losses at individual or business level, such as a hotel closing because it is on an oily beach.	Non-economic losses such as damage to "brand."  Closures of businesses that are not directly contaminated by spill.
<b>Future losses (special claim)</b>	Expected future losses if justified by evidence of past earnings or yield, and supported by evidence such as environmental assessment.	Unclear how far into the future such claims could be filed.
<b>Environmental Reinstatement</b>	Measures taken (or to be taken) to accelerate the natural recovery of the environment.  May include cost of environmental impact assessments.	Any measures deemed "not reasonable."
<b>Claim compilation costs</b>	Professional services to assist with compiling claim may be compensable.	Simple claims.  Costs deemed "not reasonable."

Consideration in SOPF Claims Process	Claim Eligible under SOPF <sup>15</sup>	Claim Likely Not Eligible under SOPF
<b>Time elapsed</b>	<p>SOPF suggests filing claims as soon as possible.</p> <p>Oil spill claims must be submitted within 2 years of spill.</p> <p>If no spill, the 2-year timeframe may be expanded if there is a spill later.</p> <p>Absolute maximum window is 5 years.</p>	<p>Any claim filed after 2 years will likely be denied.</p> <p>In the instance of no initial spill and then later spill, may accept claim after 2 years.</p> <p>Can file court claim against vessel owner up to 1 year after SOPF deadline.</p>

### 3.1.2 SOPF Assessment

Once a claim is submitted to the Fund, it is assessed by the Administrator.<sup>16</sup> Based on the evidence and narrative presented by the claimant, the Administrator will make an offer to pay for some, all, or none of the claimed amount.

SOPF applies several core principles to its assessments:

- Claimants can only be compensated once for damages (no “double recovery”);
- Claimants must provide evidence that demonstrates and supports all claimed damages; and
- Any measures taken by the claimant are only compensable to the extent that they are determined to be “reasonable” and not “duplicative” of other efforts.

In 2017, the process of making an offer was changed to allow feedback from claimants when there is a significant discrepancy between the amount claimed and the amount allowed. The offer from the Fund to the claimant is considered “draft” to provide this opportunity for back and forth. The Fund Administrator still has ultimate discretion over the offer. Once the offer is made, the claimant has 60 days to accept the offer or appeal it in court.

In addition to the process described above, the SOPF recently introduced an expedited process for claims under \$35,000. This process excludes claims for economic loss with no property damage (e.g., a hotel that has to close during an oil spill if it isn’t directly oiled). Expedited claims must be filed within one year of the incident. A narrative is required at the time of the claim, but supplemental evidence is not required until later in the process. If the Fund offers to pay some or all of the claim, they may then request evidence and documentation. The Administrator also has the right to re-assess the claim any time within three years of the incident. If the reassessment shows overpayments, the claimant will be required to pay this money back.

### 3.1.3 Cost Recovery from Polluter

The final step in the claims process is recovery, through which the Administrator may seek reimbursement from the shipowner to recover costs associated with the claim(s) for a certain incident. This typically involves filing a court case. Claimants may be required to participate in these hearings (making a written statement or providing testimony in court).

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<sup>16</sup> Deputy Administrator, SOPF staff (primarily attorneys), and contracted experts all contribute to this process.

## 3.2 Applying SOPF Claims Guidance to Indigenous Claims

SOPF assessment parameters, which have historically been applied primarily to claims from CCG for preventive measures and clean-up costs and to commercial fishers for economic losses, may confound the claims process for Indigenous communities, because of the unique way that they use and value the natural environment. This holds true for currently eligible claims (e.g. economic damages or losses) as well as potential future non-economic loss claims.

### 3.2.1 Double Recovery

The SOPF Administrator applies the double recovery principle to ensure that claimants aren't getting compensated more than once for the same loss. The key consideration for Indigenous groups is that a claim may be filed against the shipper **or** against the SOPF, but not against both simultaneously. This principle also applies to volunteers – the Fund will not compensate a claimant for volunteer labour or charitable contributions, though efforts to coordinate volunteers may be compensable (Ottawa: SOPF, 2019b).

A claimant must decide whether to file directly against the shipper or against the Fund. Since the SOPF is required under Canadian law to be named as a party to claims against the shipper, they are automatically alerted to these claims and would not simultaneously admit a claim directly to the Fund. There is still a potential remedy for a claimant to go to the Fund after a claim against the shipper is rejected or not paid in full (Ottawa: SOPF, 2019b). The decision of which avenue to pursue is complex, and Indigenous groups, like any claimant, should rely on legal counsel to advise this decision.

### 3.2.2 Evidence

Evidence is required to demonstrate and support all claims. The SOPF claims guidance suggests that evidence includes a narrative, which can be a paragraph or bullet points. It should explain what happened, what actions were taken, the rationale for making decisions in real-time, and any damages that were suffered. Photographs that have a time and date are recommended to corroborate the narrative. Evidence may also include correspondences that were generated, and any contemporaneous notes taken during the incident.

With the exception of "special" claims, the SOPF will only reimburse for damages that are actually suffered. Acceptable evidence or damages includes proof in the form of paid invoices, receipts, and surveys or reports that support the need for expenditures. Special claims, such as fisheries or subsistence, must include proof that the individual or company has the legal right to fish, harvest, hunt, or participate in the activity they are claiming a loss from. This could include documentation that demonstrates the individual has traditionally held rights to substance or cultural use (Ottawa: SOPF, 2020). For non-economic losses such as spiritual or cultural use, the claimant must assign a monetary value to these losses and provide justification of the methods used to come up with these values.

Claims for loss of income must include documentation of income and/or yields over at least three years prior to the incident, as well as post-incident documentation or records. For loss of use claims, evidence is required to show actual costs of purchasing replacement food, medicine, or skins, along with evidence or statements affirming prior use of subsistence resources.

The burden of evidence, and the framework for evaluating damages, may create significant challenges for Indigenous groups or individuals. For example, a claimant in a remote community that usually catches salmon to feed their family for the year could reasonably lose a year's worth of fish that would ordinarily be canned, smoked, stored, and shared with others. If an oil spill cut off access to a major salmon run, the

claimant would need to substantiate their claim about how much salmon they typically harvest, which could be quite difficult.

### 3.2.3 Reasonableness

The reasonableness test gives the Administrator broad discretion to assess whether an action or expenditure was reasonable and, therefore, compensable. This concept is applied in different ways to evaluate claims for property damage, economic loss, preventive measures and clean-up, environmental reinstatement, and reimbursement for costs associated with compiling a claim.

Property damage claims may be submitted for the reasonable costs of cleaning, repairing, or replacing physical property that was contaminated by oil. For a property damage claim to be considered reasonable, the Administrator will evaluate the “age, condition, ordinary life-expectancy, and value” of the property before it was contaminated, and will only cover costs that bring the property back to its pre-spill condition. Any costs interpreted as improving the property beyond its pre-spill condition would be considered unreasonable, as would claims for replacement costs if the Administrator finds that the property could have been cleaned or repaired (Ottawa: SOPF, 2019b). Indigenous communities, particularly in remote areas, may face challenges in justifying costs associated with cleaning or replacing damaged property because of the high cost of goods and the supply chain limits to accessing “reasonable” repairs or replacement.

Economic losses, in the form of lost wages or business earnings, must be documented in a manner that clearly ties them to the oil contamination. Economic loss does not have to include direct property damage; it could cover other expenses incurred, such as promotional marketing aimed at restoring a downturned business. In this case, reasonableness would tie to whether the Administrator finds that the measures taken had a reasonable prospect for success and that the costs are proportionate to the business losses. Indigenous communities and individuals may be vulnerable to a range of economic losses; for this category of losses, strong documentation and record-keeping are critical.

For fisheries or subsistence losses, the SOPF claims process is predicated on the idea that the individual or community would replace the lost fish with other store-bought protein, and that they would make a reasonable substitution for the lost food. The Fund may also pay for costs, such as additional fuel required to access alternative fishing sites. A similar standard is suggested for loss of ceremonial use of items like skins – the costs associated with purchasing an alternative could be claimed (Ottawa: SOPF, 2020).

For Indigenous communities, the reasonableness test for fisheries or subsistence losses may not fully consider how these losses impact individuals, families, and communities. Because cost is a consideration for whether a claim is reasonable, an individual who is unable to harvest fish that has a high market cost may be expected to replace that fish with lower-cost alternatives (e.g., if a person typically harvests 50 kg of sockeye, it might be unreasonable to buy 50 kg of fresh sockeye at market costs; the claim may limit reimbursement to less expensive options such as canned salmon or another lower-cost protein). For individuals in remote communities without grocery stores, replacement may not even be possible. The claims process has no proxy for the non-economic components of this loss, such as the stress of food insecurity, the loss to other families or elders who the harvester may share their catch with, or the loss of opportunity to participate in harvesting.

Preventive measures and clean-up costs are subject to a number of reasonableness checks. The first is *proportionality*, which considers whether the measures taken and costs incurred are proportionate to the damage that would have occurred if those measures had not been taken. 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.” (Ottawa: SOPF, 2019b).

The proportionality concept - that every action taken should be weighed against a calculus of whether or not it is commensurate with the possible damages - is not realistic for Indigenous communities. At its core, proportionality presumes that values can be quantified and weighted. This is an inherently western concept and is misaligned with Indigenous governance and stewardship principles. It seems unlikely that an Indigenous community member or leader faced with an emerging incident in their territory would temper their prevention or response actions in consideration of whether the SOPF Administrator would view them as proportionate in hindsight of an incident. While application of this principle may be straightforward for CCG and other agencies that regularly respond to pollution incidents, it does not consider that such an incident in an Indigenous community may be a singular or very infrequent occurrence which the community would likely attempt to mitigate with all available resources.

Several aspects of how the SOPF assesses reasonableness ties to the expected outcome for the actions taken. The actions taken or expenses incurred must tie to a *clearly defined and justifiable goal*. The measures taken must then have a *high likelihood of success* in achieving the stated goals. Finally, the decision to take specific measures should be based on *best information available* and should reflect *adaptation and reassessment* if a situation should change.

These elements of reasonableness that tie to the expected outcome may also create challenges for Indigenous communities, particularly for initial response actions, which may be undertaken based on limited information and may involve *ad hoc* use of whatever resources are available. SOPF claims guidance specifies that actions taken using “inappropriate or inadequate” equipment may not be compensable (Ottawa: SOPF, 2019b); for many Indigenous communities that lack major equipment caches, this could be an impossible standard. To maximize the opportunity for successful claims, Indigenous groups or individuals should document their rationale for all expenses, as this will be critical to passing the reasonableness test.

#### 3.2.4 Duplicated Efforts

SOPF claims guidance identifies *duplication of effort* as the final component of the reasonableness test. It is described separately here because it presents unique challenges to Indigenous claimants that go beyond the other aspects of reasonableness.

The SOPF Administrator may reduce or reject claims if they assess that efforts were duplicated across responding agencies. The SOPF claims guidance suggests that actions taken as a part of an organized ICS structure, where multiple agencies are coordinating, are less likely to be considered “duplicative” than actions that are taken outside of the ICS and Incident Action Planning. The challenge here for Indigenous communities is that many of the actions they might take as first responders could pre-date the formal establishment of an ICS organization, and there may be some duplication as initial actions are taken by community first responders, the shipowner, CCG, and others on-scene during the short window of opportunity before oil begins to spread. Indigenous communities may also be taking actions such as deploying boom for GRS that may seem duplicative to booming around the source, but which are actually providing a separate layer of mitigation.

The interpretation of whether actions taken in the moment were duplicative is subjective, as is determining which party’s actions take primacy over others. This could create problems for Indigenous communities that take initial response actions such as booming around a vessel or conducting sampling or observation. If CCG

or another responder engages in similar actions, these two activities could be considered duplicative by the Fund.

Since CCG has a federal mandate for pollution response, the double recovery standard seems to favor paying CCG response expenses over other responders. This seems to have borne out with the compensation during the *Marathassa* spill, where the Fund paid 76% of the CCG claim, 80% of Port Metro Vancouver's claim, and offered to cover only 41% of the City of Vancouver's claim, which has not been accepted by the City (See summary in Appendix B). Stronger agreements and multi-lateral planning could be one avenue to better define the expectations for the types of First Nations response activities that would be compensated regardless of what other partners are doing during the initial response.

### 3.3 SOPF Cases Involving Indigenous Groups

The SOPF Indigenous Groups report (Dick, 2018) presents a summary of claims that may have impacted Indigenous communities or reserves.<sup>17</sup> The report observes that only 32 of 365 incidents with claims to the Fund (8.8%) involved Indigenous Peoples. Of those 32 cases, Indigenous parties were claimants only six times.

#### 3.3.1 Claims Involving BC First Nations

In BC, where the majority of cases near Indigenous communities occurred (22 of 32), only two First Nations claimed directly against the Fund (Heiltsuk for *Nathan E. Stewart* and Toquaht for *Black Dragon*). The report identifies Squamish as a claimant for *Marathassa*, but this case was against the shipowner with the SOPF as a party, so Squamish did not go through an actual SOPF claim.

While BC First Nations had some level of involvement in 22 cases, the report found that over 130 claims filed in BC involved incidents where a First Nations community was within 15km "downstream"<sup>18</sup> of an incident (which probably underestimates the total, since First Nations territories are generally much larger than the reserves that were used as the basis for the 15 km measurement). The key takeaway is that, while most SOPF claims for BC incidents arise from incidents in or near First Nations territories, Nations are not claiming against the SOPF to recover costs or damages.

The report also highlights several cases, including a 2003 spill where the Toquaht Nation claimed for fishery damages from a leaking vessel that was towed through their territorial waters as part of the pollution response; the SOPF dismissed this claim entirely due to a "lack of documentation."<sup>19</sup> The only incident where the SOPF appears to have paid a claim to an Indigenous Group directly is the 1999 *Gordon C. Leitch* spill, after which the Conseil des Innus de Ekuanitshit filed a claim against the shipowner, which was later dismissed by a judge. The Ekuanitshit later settled with the shipowner and its insurers, and the SOPF contributed \$10,000 towards the settlement.

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<sup>17</sup> The analysis filtered claims based on their proximity to a recognized reserve or village. Many Indigenous communities have significantly more expansive territories.

<sup>18</sup> It is unclear how the "downstream" parameter applied to coastal areas where there is tidal exchange in multiple directions.

<sup>19</sup> The 2007-2008 SOPF Annual Report states that the Administrator received a claim from the Toquaht First Nation in January 2005. The SOPF requested additional information from the Toquaht Nation and federal agencies as part of the claims investigation. In February 2007, the Administrator notified the Toquaht that "he is unable to find that this claim has been established," directing the Nation that the claim might be reopened if additional information was provided. SOPF closed the claim in 2008.

Two of the other case studies presented in the report are *Marathassa* and *Nathan E. Stewart*, and the author characterizes the latter as an event that “has led to increased participation of Indigenous Peoples in protecting the coasts from oil spills” and “an example of the shipowner paying out the cost for damages.”<sup>20</sup> The International Oil Pollution Compensation Fund (IOPC) report on the *Nathan E. Stewart* indicates that while the claims process for this spill is not yet settled, the shipowner has paid approximately \$3.5million to “a First Nation community.” Civil liability proceedings involving the Heiltsuk Nation and the shipowner are ongoing in the federal Courts (IOPC Funds, 2019).

### 3.4 SOPF Claims Involving Fisheries Impacts

The Fisheries and Aquaculture Claims Manual presents a summary of past fisheries claims, which is shown in Figure 3-1. The three most recent incidents – *Gordon C. Leitch* (1999), *Black Dragon* (2003), and *Nathan E. Stewart* (2016) involved First Nations.

Of the six fisheries cases where the SOPF paid part or all of a claim, all but one (*Gordon C. Leitch*) involved lobster fisheries, and all claimants were either commercial lobster fishers or processing plants. The claims involved lobsters being directly contaminated.

The SOPF Fisheries Claims Manual acknowledges that there have been few cases involving fisheries losses, noting:

“Over the past 30 years, the Fund has received very few claims from the fishing sectors: less than 1% of the total amount paid from the Fund. We are therefore increasing our outreach efforts!”

SOPF Fisheries Claims Manual includes a feedback form that invites stakeholders to bring issues and questions to the attention of the Fund Administrator. This feedback tool (Appendix C) provides an avenue for Indigenous communities to communicate their concerns and priorities about marine liability and compensation.<sup>21</sup>

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<sup>20</sup> In 2020, the SOPF Indigenous Report (Dick, 2018) was updated with the following clarification: “On page 34 of this report, it is mentioned that the claim was paid out by the shipowner to the Heiltsuk First Nation. However, following the publication of this report, the claimants initiated a lawsuit for damages against the owners. In 2019, the Heiltsuk First Nation also submitted a claim to the Fund for damages under Article 107 of the *Marine Liability Act*.”

<sup>21</sup> There is no deadline for submitting comments.

## APPENDIX: SUMMARY OF CLAIMS FROM THE FISHING SECTORS

Year	Incident and File	Location	Claimant(s)	Description of Damages	Claimed (\$)	Paid (\$)
1989	<b>Mystery Spill</b> (120-028)	Gabarus, NS	Lobster fisher	Approximately 4,000 lb of live lobsters in crates contaminated and ordered released	—	18,976
1989	<b>Mystery Spill</b> (120-028)	Gabarus, NS	Seafood processing companies	Loss of over 12,000 lb of live lobsters; costs of cleaning 430 contaminated lobster crates	—	48,000
1990	<b>Mystery Spill</b> (120-046)	St. John's, NL	Small group of lobster fishers	Delayed preparations for lobster season	—	0 <sup>1</sup>
1990	<b>Amy &amp; Sisters</b> (120-050)	Gabarus, NS	Two lobster fishers and a seafood processing company	6,100 lb of live lobsters in crates contaminated and ordered released	23,413.83	23,413.83
1992	<b>Mystery Spill</b> (120-066)	Lockeport, NS	Seafood processing company	3,400 lb of live lobsters in crates contaminated and ordered released; loss of income; loss of future income	100,940.35	59,350
1993	<b>Mystery Spill</b> (120-077)	Lockeport, NS	Seafood processing company	437 lb of live lobsters contaminated, and ordered destroyed	2,294.25	2,294.25
1993	<b>Mystery Spill</b> (120-84)	Wedgeport, NS	Lobster fishers	Contaminated lobster crates prior to lobster season	No claim <sup>2</sup>	—
1995	<b>Mystery Spill</b> (120-147)	Neil's Harbour, NS	Seafood processing company	1,260 lb of live lobsters contaminated and ordered destroyed	6,856.00	5,922.00
1999	<b>Gordon C. Leitch</b> (120-193)	Havre-Saint-Pierre, QC	First Nation council and all members	Loss of subsistence living source	No claim <sup>3</sup>	10,000 <sup>4</sup>
2003	<b>Black Dragon</b> (120-382)	Barkley Sound, BC	First Nation	Damaged clam beds caused by towage of polluting vessel	—	\$0 <sup>5</sup>
2016	<b>Nathan E. Stewart</b> (120-697)	Seaforth Channel, BC	First Nation hereditary chiefs, council, and all members	Lost aboriginal resources	Pending <sup>6</sup>	Ongoing

### Did you know?

About one out of four claims received by the Fund was caused by the threat of a spill, and not by an actual spill.



However, all past claims from the fishing sectors have involved a discharge of oil from a ship or boat.

1. The file was closed due to a lack of documentation from the claimants.
2. The responsible owner ended up assisting the local fishers and paid \$15,486.00 in damages.
3. The claimants sued the shipowner, and the Fund was a party to that lawsuit.
4. The claimants reached a settlement with the shipowner and the Fund, with the Fund ultimately contributing \$10,000.
5. The file was closed due to a lack of documentation from the claimant.
6. The matter is currently in court, and the Fund has also received a direct submission.

Figure 3-1. Summary of SOPF claims involving fisheries losses (SOPF, 2020)

### 3.5 Losses Not Contemplated in Current Marine Liability Regime

Table 3-1 indicates the types of claims that the SOPF is currently designed to handle. Indigenous communities may have interest<sup>22</sup> in accessing funding, through the SOPF or other sources, to cover a range of activities not explicitly addressed in the current claims process, including:

- Planning and preparedness for marine oil spills and other marine emergencies;
- Protective booming of high-value resources that may be impacted by the spill;
- Compensation for damages to ecological and cultural resources and resource use;
- Damage assessments to evaluate impacts to wildlife, ecosystems, and First Nations communities (socio-cultural impacts);
- Restoration of injured wildlife, habitat, and ecosystems;
- Community healing;
- Research and development of new technologies to enhance oil spill prevention and response; and
- Prevention measures that aim to reduce the potential for future accidents.

Some of these activities fall into a gray area because the Fund has no history of addressing such claims. Others go well beyond the boundaries articulated in SOPF claims manuals and other publications, which preclude the use of SOPF funds for prevention, preparedness, research and development, and many types of damages that do not have a clear monetary value.

#### 3.5.1 Feedback on “Let’s Talk Transportation”

The ongoing marine liability review has been presented to Indigenous communities and other stakeholders as focused on the types of damages that Indigenous groups and coastal communities could suffer in the event of a ship-source oil spill. Three discussion questions are presented on the “Let’s Talk Transportation” portal, with an online comment option for public responses (Government of Canada, n.d.-a). Many of the responses posted to date reflect common themes that Indigenous leaders, community members, and technical advisors have voiced through various past and ongoing dialogues, and particularly through the many Oceans Protection Plan (OPP) initiatives, multi-agency planning, and internal marine response planning activities that BC First Nations have undertaken.

- Question 1: If a ship spills oil in Canadian waters, what possible losses to your community, that are currently ineligible for compensation, concern you most? (Government of Canada, 2020b)
- Question 2: If a ship spills oil in Canadian waters, what potential longer-term, non-economic impacts (e.g., those that may last longer than two years) most concern you? (Government of Canada, 2020c)
- Question 3: How can compensation be used to reduce the impact of the potential losses that you described? (Government of Canada, 2020a)

Several themes are repeated in the public comments posted to the portal.

#### ***Connectedness of Human and Natural Environment***

Commenters emphasized that any impacts to the natural world extend to communities on multiple levels, such as impacting foods, spiritual use, and general well-being. Community health impacts are a reflection of

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<sup>22</sup> This section reflects the author’s professional opinion based on firsthand participation in planning, preparedness, and response initiatives alongside Indigenous leaders, technical advisors, and community members in BC and Nunavut. Nothing in this report should be considered as direct input or commentary from Indigenous communities.

these deep connections, and oil spills can have lingering impacts to individuals, families, and communities, such as mental health, substance abuse, and suicide. The compensation regime has to include a community health impact assessment and funding to support community healing.

### ***Replacement Cost is not a Fair Proxy for Value***

Commenters emphasized that any of the most important impacts do not have a price tag. They noted that the value of First Nations' harvesting goes beyond what the food is worth, it has cultural value and interrupting it costs more to a community and family than just having to buy food. It is difficult to monetize values that are linked to human and community experience or to "buy back" what is damaged by a spill. It is impossible to put a value on a healthy ecosystem.

### ***Prevention is the Best Mitigation***

Comments ranged from suggesting a complete abandonment of fossil fuels to focusing on making the shipping industry take more responsibility for preventing spills. They suggested the compensation regime should create an incentive for ships to operate more safely to avoid having to pay high damages.

### ***Claims Process Unfair to Communities***

Several comments stated that the administrative burden of filing claims creates an unfair playing field. While federal agencies like CCG are experienced filing claims and dealing with the Fund, the system creates too high a burden on communities and individuals, who may not be thinking about documentation in the heat of an incident. The time delays in paying for damages can destroy small businesses that rely on tourism or sport fishing.

### ***Claims Process Must Look Well Beyond Two Years***

Commenters also noted that habitat and ecosystem-level oil spill impacts can go on indefinitely. People and communities may also suffer for much longer. Even economic impacts (e.g., to fisheries) can go on for much longer than the two years that define the current SOPF claims process. Some of the species damaged by the *Exxon Valdez* oil spill over 30 years ago still have not recovered (killer whales, orcas). The herring fishery never came back.

## **3.6 Harmonizing SOPF Claims Process with Indigenous Laws and Governance**

Transport Canada's ongoing review of the SOPF and Canadian liability and compensation regime seeks input regarding how "losses related to long-term environmental damage and/or cultural loss" may be better addressed through the claims process, and how the SOPF may be modernized to address Indigenous community concerns more directly. To do so will require an expansion of the fundamental viewpoint of the claims and compensation regime to include the laws, customs, and practices of Indigenous communities as potential claimants.

### **3.6.1 Address Communal Losses**

The Canadian liability and compensation regime, like many western systems, focuses on loss as an economic experience at an individual or institutional level. For example, the SOPF Special Claims Loss manual (Ottawa: SOPF, 2020) considers subsistence and cultural losses, but from the perspective of a claimant as an

individual<sup>23</sup> who fishes or hunts for personal or family consumption and cultural or ceremonial use. This very narrow view of cultural or subsistence loss does not account for communal fishing and is inconsistent with how Indigenous communities value and use fish, plants and animals. Small groups of harvesters may work collectively to gather food for sharing and distribution within the community, and in such a case the loss cannot be allocated to a single person or family.

The burden of establishing an SOPF claim is high for individual community members, and the framework for evaluating loss is too narrowly focused on direct consumption or use. Many Indigenous peoples view people, land, water, plants, and animals as interconnected and foundational to the communal, ceremonial, spiritual, and educational fabric of Indigenous communities. Resources and receptors that may be damaged by pollution have inherent, non-use value that goes far beyond their economic value as food.

### **3.6.2 Recognize that Direct Replacement Costs are Inadequate**

The International conventions that underlie the Marine Liability Act apply a narrow interpretation of pollution damage, specifying that “impairment of the environment other than loss of profit from such an impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken” (Minister of Justice, 2001). This functionally limits the opportunity for Indigenous communities to claim for non-economic impacts such as harm to important food resources or habitat, because the lens through which these losses are assessed is tied to actual reinstatement of the injured resource. The presumption that “reasonable measures” taken to repair an injured resource would offset an Indigenous community’s loss belies a lack of understanding of how Indigenous communities are impacted by pollution damages.

Even if an individual or group is able to adequately document the extent of loss based on past harvesting, the nature of the loss cannot be compensated through a direct replacement (either tangible or monetary) of the fish, plant or animal, because there are unique non-economic elements to the loss, such as the inability to share food with elders or the broader community, or the lost cultural value of the harvesting activity itself, which has inherent value in preserving traditional practice. To fully compensate Indigenous communities for oil spill losses, the claims process must include these intangible components of the broader communal loss.

### **3.6.3 Acknowledge Indigenous Laws and Customs**

Claimants who experience a loss of food source and seek compensation under the current regime must demonstrate that they are “lawfully” carrying on an activity (Minister of Justice, 2001). SOPF special claims guidance offers that evidence of lawful harvest could include documentation that demonstrates the individual has traditionally held rights to substance or cultural use (Ottawa: SOPF, 2020). Setting apart the issue of individual vs. communal harvest, discussed above, this interpretation of lawful access to fish and hunt may still be too narrow. This is an area where “legal” harvesting limits established in Canadian law may contradict asserted aboriginal fishing rights, particularly if those rights are not explicitly recognized by the Crown. For this and many aspects of non-economic loss claim under the current SOPF regime, it is unclear exactly how the Fund Administrators might apply their Special Claims guidance to an actual Indigenous loss claim, since there have been no successful claims to date and details on rejected claims are not published for review.

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<sup>23</sup> Section 107(2)(d) of the Marine Liability Act defines a “claimant” as including “an *individual* who fishes or hunts for food or animal skins *for their own consumption or use*”.

The current viewpoint of the SOPF does not consider that Indigenous governments may also take action under their own stewardship and self-governance authorities to limit access to harvesting marine resources that are impacted by a spill. These may be informed by a desire to protect stocks or populations, or to allow habitat to recover, to support future generations' opportunity to harvest resources. Indigenous law may also apply stricter parameters for consumption of wild foods, leading them to restrict harvesting regardless of "safe consumption" standards based on contaminant data derived from western seafood consumption patterns. In the event that fishery closures are issued both by Indigenous and Crown authorities, they may not have the same time scale. Either scenario would result in interruption to individual and community access to resources for both subsistence and cultural use; however, it is unclear how or whether the SOPF might assess a communal or individual loss claim that results from Indigenous laws and aboriginal rights and title.

### 3.6.4 Add Transparency and Build Trust

Claims processes are challenging by nature, and community members may abandon their opportunity for compensation because of the administrative burdens associated with claims (Holen, 2019). The lack of transparency inherent to the current SOPF claims assessment adds to this burden.

The SOPF assessment process assigns a tribunal to assess claims, with very little opportunity for two-way communications or dialogues. Based on the tone and content of the recent SOPF report on Indigenous claims (Dick, 2018), there is a fundamental lack of expertise within the SOPF regarding Indigenous laws, culture, and practice.<sup>24</sup> For the past 30 years, the claims process has focused largely on reimbursing Canada for costs associated with responding to pollution incidents, with other types of claimants as a very small component of overall claims, and a disproportionate record of compensating Indigenous and local government/community claimants compared to Canadian agencies, port authorities, individuals, and businesses. Whether intentional or incidental, the SOPF is biased towards processing straightforward economic claims through the lens of the Crown.

While the Marine Liability Act gives the SOPF Administrator flexible authority to establish claims procedures, the recently released Special Claims guidance (Ottawa: SOPF, 2020) makes no accommodation for Indigenous perspectives and does not reflect any direct input or consultation with Indigenous governments. For the claims process to fairly accommodate a non-economic loss claim by an Indigenous group, the SOPF must address the inherent conflicts between the SOPF claims assessment process and the asserted aboriginal rights to self-govern, inclusive of the rights to fish and hunt and to manage marine areas and resources.

The lack of transparency in how the Administer assesses claims creates a disadvantage because future claimants from Indigenous communities cannot apply lessons learned through past claims to enhance their opportunity for successful claim preparation. Recent correspondence from the SOPF Administrator (August 2020 e-mail announcement) indicates that the Fund will begin publishing decisions, which is a positive step

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<sup>24</sup> There is an ongoing call, published on the SOPF website, for a pool of National Experts on Indigenous Matters that seeks the following qualifications: Knowledge of the modern and historic practices of affected community or communities; knowledge of accounting and audit procedures; advanced academic credentials; and general knowledge of Indigenous communities in Canada, together with training or academic credentials in communications. The call for experts does not specify whether they are required to be Indigenous peoples. [http://sopf.gc.ca/?page\\_id=429](http://sopf.gc.ca/?page_id=429)

towards enhancing transparency and making the Fund more accessible to Indigenous claimants (Legars, 2020).

Building trust and improving transparency will not happen overnight; it will require a concerted long-term commitment to change current practices. During a review of liability and compensation in the U.S., indigenous communities in Alaska suggested a number of actions to enhance transparency and build trust around oil spill damage assessments and compensation. Recommendations to build trust and understanding between Indigenous communities and government assessors include: spending more time in communities to build relationships; holding informal conversations over food; visiting Indigenous hunting and fishing camps; structuring conversations around maps; improving listening skills; going hunting or fishing with locals (including offering to pay for gas and supplies); gathering perspectives across gender and age groups; providing information in native languages; and synthesizing and sharing relevant information (NOAA, 2012a; NOAA, 2012b).

## 4 Discussion

This report blends a review of SOPF claims guidance and case summaries, professional and technical literature, and case studies from pollution claims in other jurisdictions. This information is synthesized to inform Canada's ongoing review and to encourage a direct dialogue among SOPF Administrators, TC, and Indigenous communities.

### 4.1 Reconciliation

Canada's ship-source oil spill compensation regime generally tracks with the international CLC-IOPC regime, and this is fundamental to its insufficiency to support Indigenous communities. For example, the IOPC fisheries claims process provides a strictly economic model for evaluating fisheries claims (IOPC Funds, 2018). This does not adequately address the complexities in how Indigenous communities experience loss and damage from oil spills. The International Maritime Organization, which is the international policy body responsible for the IOPC regime, lacks Indigenous participation.

A more expansive view towards compensating Indigenous communities for oil spill preparedness, response, and recovery would be a step towards realizing Canada's commitments under Reconciliation. Neither the SOPF claims process nor the *Marine Liability Act* which establishes the Canadian system of liability and compensation adequately incorporate the key principles of reconciliation, derived from the United Nations Declaration on the Rights of Indigenous Peoples (UN, 2007). Canada's ten principles for respecting the relationship with Indigenous peoples are (Minister of Justice, 2018):

1. All relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.
2. Reconciliation is a fundamental purpose of section 35 of the Constitution Act, 1982.
3. The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.
4. Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.

5. Treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.
6. Meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.
7. Respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.
8. Reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.
9. Reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.
10. A distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.

A comprehensive review of the *Marine Liability Act* and SOPF guidance to align them with these fundamental principles on the rights of Indigenous peoples is a critical first step to modernizing the SOPF to reflect Canada's commitments to reconciliation.

## 4.2 Considerations

This report identifies a number of opportunities to expand the Canadian ship-source oil spill compensation regime in consideration of Indigenous community interests and consistent with the principles of reconciliation.

### 4.2.1 Incorporate Indigenous Community Perspective

The 2018 SOPF report about Indigenous communities and oil spills makes a compelling case for outreach and information gathering in order to expand the Fund in support of the types of losses these communities may face. Still, the report was developed without direct input from Indigenous communities. Non-economic losses that Indigenous communities experience as the result of oil spills are fundamentally different than any other potential claimant, because Indigenous communities have a unique point of view on principles such as governance, stewardship, and interconnectedness. There is no proxy for this viewpoint (including this report), and the process of modernizing the SOPF to accommodate Indigenous communities will require collaboration over outreach.

A recent study on pipeline impacts to Canadian Indigenous communities also underscores the importance of connecting researchers and bureaucrats directly to Indigenous leaders and community members, noting that a "lack of cultural understanding among government and NGO researchers" broadly confounds the field of Indigenous sustainability research. The researchers point to the need for sustained funding to support

Indigenous communities as active risk managers to understand, prepare for, and mitigate potential oil spills (Datta and Hurlbert, 2020). Another research states, in the context of Arctic oil spills and Indigenous communities, that there “...must be a wholistic approach that views damage as far greater than monetary. The worldview of Indigenous peoples must be at the center...” (Ovall, 2019).

The SOPF claims process for cultural losses focuses on the individual fisher or hunter, and specifies that claims must be “tied to consumption or use.” Limiting cultural use claims to direct use or consumption by an individual claimant creates a bias against Indigenous communities. On a practical level, the focus on individual claims creates a significant administrative burden to individual community members. On a functional level, this approach ignores the interconnectedness of Indigenous communities, where individual hunters and fishers often share within the community, feeding more than just their immediate families. While the SOPF views claims and losses as discrete, measurable sums, Indigenous groups experience many such losses communally. The focus on consumption or use is not sufficient to the interests of Indigenous communities, where cultural losses are not exclusively tied to use or consumption.

The critical first step to modernizing the Fund is to apply the principle of “meaningful engagement” to collaborate with Indigenous communities and explore how the SOPF can handle Indigenous non-economic loss claims in a manner that respects their rights, including their right to self-determination and self-governance, and their title, including their lands, territories and resources. (Minister of Justice, 2018). An ethnographic study published by U.S. government researchers following the 2004 *Selendang Ayu* spill recommend that Indigenous voices and subsistence users take a more active role across all aspects of marine spill preparedness and response, concluding:

“...many Unalaska- based subsistence practitioners possess extensive and detailed knowledge of the spill-affected environment and natural resources. Again, such persons have the potential to make significant contributions to contingency planning and real-time response to maritime accidents and spills affecting the Aleutian Islands. This is true in other coastal zones of Alaska and the remainder of the nation: certain persons use and understand localized environments and natural resources in ways that render them ideal consultants for maritime oil spill planning and response.” (Petterson and Glazier, 2011)

#### 4.2.2 Address Prevention and Preparedness

The SOPF currently does not provide funding for preparedness or pre-impact studies. Other jurisdictions have taken a more expansive approach by allowing similar funds, derived from levies on shipping or other risk-bringing industries, to support spill preparedness. A proactive compensation regime might consider how capacity-building, both within Indigenous communities and more broadly across both government and industry, could mitigate spill damages and ultimately reduce the extent of post-spill claims. Proactive spending from the SOPF to reduce risks and enhance preparedness might offset future disbursements for oil spill damages by preventing their occurrence altogether or minimizing adverse impacts when accidents do occur.

The *Selendang Ayu* spill response in remote Unalaska was expensive both in financial expenditures and in human impacts. Researchers cite the more than \$100 million USD in direct expenditures as justification for enhanced prevention measures (Petterson and Glazier, 2011), noting:

**“Significant maritime oil spills are in various ways socially disruptive and costly throughout their lifespan. This underscores the value of programs and policies designed to prevent such accidents along the nation’s coastline.”**

A collaborative risk assessment conducted after the Unalaska spill resulted in a number of enhanced prevention measures for the Aleutian Islands, including emergency towing vessels, the designation of Areas to be Avoided, and eventually to the establishment of a multi-stakeholder Waterway Safety Committee. Allocation of SOPF funds to prevention initiatives could ultimately reduce claims against the fund, and also avoid many of the non-economic impacts that are so challenging to assess and compensate.

#### **4.2.3 Include Restoration**

In the U.S., restoration and recovery are embedded in the overall response regime, requiring a polluter to fund long-term monitoring and restoration activities to compensate for damages to ecological and cultural resources. The *Marine Liability Act* states that a ship owner is “liable for the costs of reasonable measures of reinstatement undertaken or to be undertaken.” (Minister of Justice, 2001). This is fairly broad language and certainly does not preclude restoration funding.

The Environmental Damages Fund (EDF) administered by ECCC utilizes funding from fines and penalties to fund restoration and other projects, and this mechanism was used recently to direct fines paid by a polluter to support restoration projects for a BC First Nation.<sup>25</sup> While the EDF is not connected to the marine liability and compensation system, it provides an example of how the SOPF could be expanded to compensate for non-economic losses beyond direct reimbursement.

The very nature of non-economic losses (cannot be replaced or fixed with money) requires a compensation regime that includes restoration projects to address ecological and even socio-cultural impacts, since these are closely linked for most Indigenous groups. Expanding SOPF claims to include restoration may also require a more expansive consideration of “reasonableness,” when a spill impacts harvesting and cultural heritage. Restoration projects in Indigenous territories should be identified and prioritized by Indigenous communities based on their longstanding reliance on the ecosystem, and their laws and governance systems, which often create a responsibility to protect resources for future generations.

#### **4.2.4 Increase SOPF Expenditures and Replenish through Levies**

The Fund has yet to pay a claim directly to Indigenous communities. While SOPF claims data is not publicly available for analysis, a review of Annual Reports and case summaries indicates that the Fund has been used primarily to cover response costs and property damages.

Expanding the scope of allowable claims to address non-economic losses may facilitate future claims from Indigenous communities. It may also lead to increased annual expenditures and a need to replenish the fund. The SOPF Administrator has the authority to re-establish levies on the risk-bringing industry, which

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<sup>25</sup> Criminal court proceedings following the *Nathan E. Stewart* spill directed that the shipowner pay fines to the EDF, and specified that the funds be administered for the benefit of the Heiltsuk Nation “for the purposes of restoration of the habitat affected by the environmental damage.” (R. v. Kirby Offshore Marine Operating LLC., 2019). The Heiltsuk Nation is required to work with the formal EDF application process (Government of Canada, n.d.-a).

could supplement the Fund to support more proactive payouts to support Indigenous communities along shipping corridors.

Shipping companies and oil cargo owners contribute very little to the current compensation regime, a fact which is starkly contrasted by the example of the New Zealand Marine Pollution fund, which places the burden on the risk-bearing industry to fund both preparedness and response activities for both national and regional governments and the communities they support. While the SOPF was created from a 15-cent per tonne fee on oil cargos received, it is predominantly funded by taxpayers. In 2019, the Fund expended \$10.7 million, closing with a balance of \$402 million. It continues to grow year-over-year, through interest paid from Canadian tax revenues (\$472 million) and cost recovery (\$7.7 million). Outside of cost recovery from polluters, the shipping industry has not directly contributed to the SOPF since 1976.

The SOPF claims guidance acknowledges that the claims process can be cumbersome for all claimants, and this is particularly true for Indigenous communities. The stresses associated with protracted legal proceedings can exacerbate oil spill damages. If Indigenous communities could rely on the SOPF as a remedy for their response costs and damages, the volume of claims paid by the Fund would increase over time. Rather than continue to replenish the Fund from general revenues, the SOPF should consider re-instating levies, since SOPF claims offset direct claims against the shipper, and historically the SOPF recovers less than one-third of claimed costs.

### 4.3 Next Steps

Modernizing the Canadian marine oil spill liability regime to accommodate Indigenous groups and their interests will likely require changes to both the *Marine Liability Act* and the claims processes for non-economic loss. The *Act* does not reflect the principles of reconciliation nor does it acknowledge or address Aboriginal rights and title. Indigenous voices must lead the conversation, not react to it. The National Call for Indigenous Experts to support SOPF assessments may be a step in the right direction, if it provides a pathway to re-imagine the liability and compensation regime through the lens of Indigenous knowledge and governance.

The ongoing review of the ship-source marine liability regime presents an opportunity for Canada to balance the inequities that Indigenous communities face from shipping risks that are beyond their control. If Canada can expand the Fund's ability to support Indigenous claims, this could also support community healing by allowing impacted communities to receive compensation more quickly and with fewer administrative and legal expenditures. This presents an opportunity to build resilience to ship-source oil spills and benefit both Indigenous communities and the Canadian marine spill preparedness and response regime.

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## Appendix A: SOPF Claims Data Available through Public Reports and Website

Ship Name	Province	Year of incident	Claimant	Amount Claimed	Amount Offered	Percentage of claim paid	Amount Recovered	Percentage of offered amount recovered
Malecite	BC	2017	CCG	\$48,230.18	\$48,230.18	100%		
No Name Ship	BC	2017	CCG	\$7,650.03	\$7,650.03	100%		
Persephone II	BC	2017	CCG	\$11,345.17	\$11,345.17	100%		
SeaMee II	BC	2017	CCG	\$10,184.69	\$10,184.69	100%		
Alaskan	BC	2016	CCG	\$37,723.18	\$37,723.18	100%		
Dawn Marie	BC	2016	CCG	\$11,372.23	\$11,372.23	100%		
Elva M II	BC	2016	Stevenson Harbor Authority	\$7,649.63	\$7,649.63	100%	\$462.53	6%
Elva M II	BC	2016	CCG	\$46,351.57	\$46,351.57	100%	\$2,803.93	6%
Norob	BC	2016	CCG	\$12,930.15	\$12,930.15	100%		
Sea-Que	BC	2016	CCG	\$18,730.67	\$18,730.67	100%		
Viking I	BC	2016	CCG	\$128,246.91	\$128,246.91	100%		
Chilcotin Princess	BC	2015	CCG	\$137,680.88	\$137,680.88	100%		
Sea C Strider	BC	2015	CCG	\$35,972.56	\$35,972.56	100%		
South Wind	BC	2015	CCG	\$14,300.21	\$14,300.21	100%		
Crown Forest 84-6	BC	2014	CCG	\$67,348.81	\$67,348.81	100%		
Elf	BC	2014	CCG	\$82,512.70	\$82,512.70	100%		
Windago	BC	2014	CCG	\$41,506.93	\$41,506.93	100%		
Floyd II	NL	2017	CCG	\$10,471.05	\$10,471.05	100%	\$5,250.00	50%
Lucas & Rebecca	NL	2017	CCG	\$17,744.64	\$17,744.64	100%		
Joyce's Journey	NL	2016	CCG	\$11,373.42	\$11,373.42	100%		
Baffin Sound	NL	2015	CCG	\$22,185.86	\$22,185.86	100%		
Matterhorn	NL	2014	CCG	\$172,751.64	\$172,751.64	100%		
Mystery Spill	NS	2018	CCG	\$1,406.75	\$1,406.75	100%		

Ship Name	Province	Year of incident	Claimant	Amount Claimed	Amount Offered	Percentage of claim paid	Amount Recovered	Percentage of offered amount recovered
No name	NS	2018	CCG	\$33,606.49	\$33,606.49	100%		
No name	NS	2018	CCG	\$1,157.98	\$1,157.98	100%		
Stephanie & Darrel	NS	2007	CCG	\$13,627.73	\$13,627.73	100%		
Maccoa	QC	2017	Quebec Port Authority	\$43,806.19	\$43,806.19	100%		
MSC Monica	QC	2016	CCG	\$13,121.81	\$13,121.81	100%	\$14,192.33	108%
Mystery Spill	QC	2016	Quebec Port Authority	\$12,298.09	\$12,298.09	100%		
BBC Maple Lea	QC	2015	CCG	\$1,329.54	\$1,329.54	100%		
Bayliner 2655	QC	2013	CCG	\$14,286.40	\$14,286.40	100%		
Pursepa	BC	2015	CCG	\$24,504.93	\$24,473.92	100%		
Farley Mowat	NS	2015	CCG	\$814,815.05	\$813,316.15	100%		
Lady Young	NS	2016	CCG	\$25,747.66	\$25,598.67	99%		
Barges King Arthur & SL 104	BC	2015	CCG	\$819,134.67	\$814,012.78	99%		
Dispatch II	ON	2017	CCG	\$49,123.47	\$48,716.67	99%		
Ryan Atlantic II	NS	2014	CCG	\$362,575.38	\$358,117.79	99%		
Chaulk Determination	QC	2015	Trois-Rivières Port Authority	\$71,909.71	\$70,632.58	98%		
Ryan Atlantic II	NS	2017	CCG	\$17,975.67	\$17,645.78	98%		
Baccalieu Endeavour	NL	2017	CCG	\$5,146.31	\$5,045.49	98%	\$5,345.75	106%

Ship Name	Province	Year of incident	Claimant	Amount Claimed	Amount Offered	Percentage of claim paid	Amount Recovered	Percentage of offered amount recovered
Baccalieu Endeavour	NL	2017	CCG	\$5,146.31	\$5,045.49	98%		
Command Performance	BC	2016	CCG	\$116,433.70	\$114,047.53	98%		
Michipicoten	ON	2015	CCG	\$4,845.89	\$4,745.46	98%	\$4,745.46	100%
Central Isle	BC	2016	CCG	\$25,032.02	\$24,108.07	96%		
EM-AN-L	NS	2016	CCG	\$4,808.25	\$4,605.94	96%		
Tempest	BC	2015	CCG	\$15,136.08	\$14,242.58	94%		
Miss Universe	BC	2016	Port Edward Harbour Authority	\$19,911.85	\$18,711.85	94%		
Cormorant	NS	2015	CCG	\$549,581.18	\$515,267.25	94%		
Viking I	BC	2016	Nanaimo Port Authority	\$31,458.19	\$29,432.92	94%		
Farley Mowat	NS	2015	Town of Shelburne	\$47,598.78	43641.94	92%		
Chaulk Determination	QC	2014	CCG	\$4,585,963.68	\$4,200,576.18	92%		
Maryjack	BC	2014	CCG	\$94,689.51	\$86,228.70	91%		
Warren L II	ON	2015	CCG	\$30,999.97	\$28,059.11	91%	\$26,550.00	95%
Mistann	BC	2011	CCG	\$113,787.48	\$100,462.51	88%	\$18,080.42	18%
Spudnik	BC	2014	CCG	\$149,043.60	\$131,064.45	88%		
Blue Pacific No.1	BC	2016	CCG	\$132,339.05	\$114,129.56	86%		

Ship Name	Province	Year of incident	Claimant	Amount Claimed	Amount Offered	Percentage of claim paid	Amount Recovered	Percentage of offered amount recovered
Marathassa	BC	2015	Vancouver Fraser Port Authority	\$198,947.22	\$158,800.49	80%	\$172,935.87	109%
Mystery Spill	BC	2016	City of Vernon	\$2,011.56	\$1,586.62	79%		
Warren L II	ON	2015	Municipality of Killarney	\$270,286.31	\$209,575.43	78%	\$198,450.00	95%
Marathassa	BC	2015	CCG	\$2,431,746.57	\$1,855,627.75	76%	\$1,951,689.51	105%
Laurier II	BC	2014	CCG	\$384,365.01	\$265,768.99	69%		
Kokanee	BC	2016	CCG	\$4,109.75	\$2,501.35	61%		
Arca	NS	2017	CCG	\$100,649.50	\$54,998.13	55%	\$57,000.00	104%
Pitts Carillon	ON	2017	CCG	\$77,347.18	\$32,694.66	42%		
Marathassa	BC	2015	City of Vancouver	\$569,053.13	\$235,748.23	41%		
Ocean Eagle	BC	2016	CCG	\$156,632.65	\$61,597.45	39%		
Silver King	BC	2014	CCG	\$338,379.18	\$107,941.32	32%		
Drifter	BC	2015	CCG	\$24,076.66	\$3,349.04	14%		
Viki Lynn II	BC	2012	CCG	\$1,267,926.71	\$100,373.14	8%	\$20,000.00	20%
Ronda	NL	2016	CCG	\$98,858.83	\$5,953.87	6%		
West Island 395	BC	2018	Haida Tourism Ltd Partnership	\$1,857,314.06		0%		
Feelin' Free	BC	2017	CCG	\$37,731.13		0%		
Lady M II	BC	2017	CCG	\$32,388.76		0%		
Nika	BC	2017	CCG	\$23,646.38		0%		

Ship Name	Province	Year of incident	Claimant	Amount Claimed	Amount Offered	Percentage of claim paid	Amount Recovered	Percentage of offered amount recovered
Salerosa	BC	2017	CCG	\$62,673.20		0%		
No Name Sailboat	BC	2016	CCG	\$53,954.45		0%		
Sikuk	NL	2017	CCG	\$195,109.00		0%		
Farley Mowat	NS	2017	CCG	\$1,176,126.41		0%		
Clipper Adventurer	NU	2010	CCG	\$468,801.72		0%		
Pitts Carillon	ON	2017	Prince Edward County	\$597,396.70		0%		
Mystery Spill	QC	2017	CCG	\$11,139.48		0%		
Sea Gypsy	QC	2017	CCG	\$7,278.30		0%		

## Appendix B: BC Spills Identified in SOPF Indigenous Groups Report as Potentially Impacting First Nations

First Nation & Case #	FN Claim to SOPF?	Incident Summary	SOPF Claim Status	Disallowed Claims
<b>Ahousat Namgis</b> 710-C1	No	Command Performance (July 2016); old fishing vessel sinking at dock in Ahousat	CCG claimed \$116k Fund paid 98%	- Damage Survey & Condition Assessment Report -Meals, travel, GST
<b>Ehattesaht</b> 663-C1	No	Crown Forest 84-6 (Sept 2016); old barge sinking in Zeballos Inlet	CCG claimed \$67k Fund paid 100%	N/A
<b>Gitga'at</b> 487-C1	No	Tempest (Dec 2010); fishing vessel ran aground in Grenville Channel	CCG claimed \$15k Fund paid 94%	-Cost of trailering the Tempest to a different location for repairs
<b>Haida</b> 242-C1	No	Texada (Aug 2000); fishing vessel grounded in Dolomite Narrows	No SOPF claim (CCG claimed directly to owner)	N/A
<b>Haida</b> 624-R	No	Simushir (Oct 2014); cargo ship adrift 19 nm west of Haida Gwaii	No SOPF claims (all claims paid by insurer)	N/A
<b>Heiltsuk</b> 732-R		Jake Shearer (Nov 2017); tug and barge separated and barge was adrift	As of March 31, 2019, no claims filled with SOPF nor settled with shipowner	N/A
<b>Heiltsuk</b> 697-C1	Yes	Nathan E. Stewart (Oct 2016); tug ran aground & spilled approx. 59k gallons diesel and 2,700 gallons oil in Seaforth Channel	SOPF reports that "As of 3/31/2019, no claim had been filed with	Case still open

First Nation & Case #	FN Claim to SOPF?	Incident Summary	SOPF Claim Status	Disallowed Claims
			Administrator"; Heiltsuk filed claim in Oct 2019 <sup>26</sup>	
<b>Heiltsuk 669-C1</b>	No	Chilcotin Princess (Jan 2015); vessel listing, at risk of capsizing while moored alongside abandoned Namu cannery	CCG claimed \$137k Fund paid 100%	N/A
<b>Hesquiaht 418-R</b>	No	Innchanter (Nov 2004); spilled diesel at Hot Springs Cove (Vancouver Island) <sup>27</sup>	No claim to SOPF; owner paid for clean up	N/A
<b>K'omoks 680-C1</b>	No	Gale Force (Oct 2013); derelict fishing vessel aground in Comox, oil spill resulted	CCG claimed \$51k, Fund paid 100%	N/A
<b>Nanoose 393A-C1</b>	No	Beaufort Spirit (May 2003); reported leaking at Nanoose First Nations Marina	CCG claimed \$132k; Fund paid 83%	- "Unreasonable" contracting costs related to a fixed price contract
<b>Nuu-Chah-Nulth 022-C1</b>	Unknown	Nestucca (1988); barge spill in US waters that migrated into Canada, pre-dated US and Canadian modern spill response & compensation regimes	SOPF received 15 claims for loss of fishing income; directed claimants to recover directly from spiller	Unsure whether actual claims went through SOPF
<b>Nuxalk 691-C1</b>	No	Pacific Grizzly (Aug 2015); sunken fishing vessel alongside dock in Bella Coola	CCG claimed \$23k, Fund paid 100%, Fund recovered half this amount from owner	N/A

<sup>26</sup> Personal communication with Heiltsuk Nation representative (anonymity requested).

<sup>27</sup> Interesting note in 2004-2005 Annual Report stating that "CCG ER received a call from the Hesquit Band office requesting more boom to be flown to them. CCG advised the band that the owner was responding with contractors."

First Nation & Case #	FN Claim to SOPF?	Incident Summary	SOPF Claim Status	Disallowed Claims
<b>Penelakut 623-C1</b>	No	Lady Mary III (Nov 2012); derelict fishing vessel grounded in Lamalchie Bay	CCG claimed \$31k, Fund paid 100%	N/A
<b>Squamish 646-C1</b>	No	Elf (Jan 2014); wooden tug sank near Passage Island while under tow from Squamish to Fraser River	CCG claimed \$82k, Fund paid 100%	N/A
<b>Squamish<sup>28</sup> 673-C1</b>	No	Marathassa (Apr 2015); cargo ship at anchor in English Bay spilled bunker oil	CCG claimed \$2.4M, Fund paid 76%.  VFPA (port authority) claimed \$198k, Fund paid 80%  City of Vancouver claimed \$569k, Fund offered 41% (not accepted)  SOPF recovered ~\$2.1M from ship owner	3 claims submitted, SOPF evaluated them together and identified "overlap" that led to certain costs being covered for only 1 claimant based on reasonableness.  -Reductions to CCG claim were due to duplication of effort, ineligible communications costs, and subcontractor payments  -Reductions to VFPA claim were due to duplication of effort and ineligible meal/hospitality costs  -Claim summary does not identify rationale for reduction to City of Vancouver claim beyond noting the need to harmonize the 3 claims. As of 3/31/2019, City of Vancouver had not accepted SOPF offer.
<b>Stz'uminus 657-C1</b>	No	Maryjack (May 2014); former fishing vessel sank in Sibell Bay, spilling oil.	CCG claimed \$94k; Fund paid 91%	-No reason given in SOPF annual report (2015-2016)

<sup>28</sup> While SOPF report identifies Squamish as the only First Nation within 15km downstream of the Marathassa spill, the Unified Command also included representatives from Musquem and Tseil-Waututh; both Nations have territory in the impacted area. In fact, the Nations did file a claim against the polluter for fishery damages, which was rejected.

First Nation & Case #	FN Claim to SOPF?	Incident Summary	SOPF Claim Status	Disallowed Claims
<b>Stz'uminus 664-C1</b>	No	Bertha G (November 2012); fishing vessel aground near Dunsmuir Island.	CCG claimed \$63k; Fund paid 100%	N/A
<b>Tlowitsis 647-C1</b>	No	Baltic II (Jan 2014); abandoned fishing vessel leaking oil while moored in Deep Bay.	CCG claimed \$9k; Fund paid 100%	N/A
<b>Toquaht 382-C-1-2</b>	Yes	Black Dragon (Oct 2003); Derelict vessel sank in Mayne Bay.	CCG claimed \$728k; Fund paid 78%  Toquaht Nation claimed undisclosed amount for pollution damages to clams as a result of Black Dragon being towed through waterway; SOPF dismissed claim in Feb 2007	The Black Dragon is included in multiple annual SOPF reports, through 2007-2008 which notes that as a result of the investigation, the Administrator is "unable to find that this claim has been established" and that "if claimant provides further evidence to address the shortcomings described, he would reopen the investigation and examine new evidence."
<b>Toquaht 556-C1</b>	No	Ganges I (July 2008); grounded pleasure craft in Ucluelet Harbour.	CCG filed \$47k claim; Fund paid ~58%.	-SOPF questioned reasonableness and pricing of some of the contracted services and reduced offer on this basis

## Appendix C: Feedback Form on SOPF Claims Related to Fisheries and Aquaculture

This form is reprinted from its source in the SOPF 2020 Fisheries Claims Manual.<sup>29</sup>

### FEEDBACK FORM

Please provide us with your feedback. Your questions and comments will help us develop the next edition of this Handbook.

Once completed, please email this Form to [info@sopf-cidphn.gc.ca](mailto:info@sopf-cidphn.gc.ca), fax it to (613) 990-5423, or mail it to:

**Ship-source Oil Pollution Fund**  
Suite 830, 180 Kent Street  
Ottawa, Ontario K1A 0N5

#### 1. Contact Information

Name	
Name of organization, if applicable	
Telephone	
Email	
Address	

#### 2. In the event of a ship-source oil pollution incident in your area, do you feel that you have the information necessary to assess your options for obtaining compensation?

- Yes  
 No    If not, what's missing?

#### 3. If you are a boat owner or shipowner, would you like to have more information on the polluter pays principle and your potential liability in the event of an oil pollution incident caused by your vessel?

- I am not a boat owner or shipowner.  
 I have enough information.  
 I would like more information on:

#### 4. Do you work or volunteer with any of the following organizations? If so, please identify it below.

- A business in the fishing sectors  
 An environmental response organization  
 An insurance company or law firm  
 A local government  
 A provincial or territorial government  
 The federal government  
 A First Nations, Inuit, or Métis community  
 Other (please identify): \_\_\_\_\_

#### 5. Where are you located?

- Atlantic (Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador)  
 Territories (Yukon, Northwest Territories, Nunavut)  
 Central (Ontario, Quebec)  
 Prairies (Alberta, Saskatchewan, Manitoba)  
 Pacific (British Columbia)  
 Outside Canada (please specify): \_\_\_\_\_

#### 6. How likely are you to submit a claim to the Fund?

- Likely  
 Somewhat likely  
 Not likely

#### 7. Was there something not addressed in this Handbook that you would like to learn more about? Do you have any additional questions or comments?

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<sup>29</sup> Manual available online at <http://sopf.gc.ca/wp-content/uploads/pdf/EN-COMPENSATION-HANDBOOK-Fishers-Aquaculturists-All-March2020.pdf>