USING THE OIL SPILL LIABILITY TRUST FUND

A Primer of Key Funding Eligibility Concepts and Procedures

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I. INTRODUCTION

The Coast Guard (CG) and the Environmental Protection Agency (EPA) are authorized under Section 311(c) of the Federal Water Pollution Control Act ("FWPCA") (as amended by the Oil Pollution Act of 1990), 33 U.S.C. § 1321(c), to remove a discharge, and to mitigate or prevent a substantial threat of a discharge, of oil to navigable waters or adjoining shorelines.[1] A principal purpose of the Oil Pollution Act of 1990, P.L. 101-380 ("OPA") is to ensure that federal responders have the financial resources readily available to support an immediate and effective response. Those resources are provided by a $50 million annual appropriation from the Oil Spill Liability Trust Fund ("OSLTF") as outlined under OPA section 6002.[2]

The three questions that must be answered to determine whether an oil response is authorized under Section 311(c) of the FWPCA are:

(1) Is the substance involved an oil?

(2) Is there a discharge or substantial threat of a discharge of oil?

(3) Is the discharge or substantial threat of discharge into navigable waters or adjoining shorelines?

If each of these elements is present, the Federal On-Scene Coordinator ("FOSC") is authorized to take oil response action under Section 311(c) of the FWPCA. Also, if each of these three elements is present, the OSLTF is available for use by the FOSC. Thus, it is important that each of these elements be documented by FOSCs when they access the OSLTF (or as soon thereafter as practical) so that the National Pollution Funds Center ("NPFC") can ensure that funds are being accessed appropriately.

This document provides funding eligibility guidance to FOSCs on these three threshold elements. In addition, guidance is provided on how to document these elements. Guidance is also provided on FOSC responsibilities with respect to documentation regarding the identification of responsible parties[3]

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[1]Pursuant to Executive Order 12777, 56 Fed. Reg. 54757 (October 22, 1991), the President's authority under Section 311(c) of the FWPCA has been delegated to EPA for the inland zone and the Secretary of the Department in which the Coast Guard is operating for the coastal zone. The authority to remove a discharge, and to mitigate or prevent a substantial threat of a discharge, of oil extends not only to navigable waters and adjoining shorelines, but also to the waters of the exclusive economic zone and to discharges or substantial threats of discharges of oil "that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States." 33 U.S.C. §1321(c). Simply for ease of reference, the remainder of the guidance refers solely to "navigable waters or adjoining shorelines," but is not to be construed as any limitation on the full scope of authority available under Section 311(c) of the FWPCA.

[2]Section 7 of Executive Order 12777 delegates authority for management of the Oil Spill Liability Trust Fund to the Secretary of the Department in which the Coast Guard is operating, and this authority is exercised within the Coast Guard by the National Pollution Funds Center.

[3] FOSCs also have responsibilities with respect to the documentation of removal costs. Guidance this topic may be found in the NPFC User Reference Guide.

II. THE FOSC HAS BROAD REMOVAL AUTHORITY

A fundamental public policy underlying the FWPCA is that there shall be no discharge of oil to navigable water or adjoining shorelines. 33 USC 1321(b)(1). Consistent with that policy the President may, in accordance with the National Contingency Plan (NCP), ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of discharge, of oil to navigable waters and adjoining shorelines. 33 USC 1321(c)(1). As noted above, the President's removal authority has been delegated to the Coast Guard for the coastal zone and to the Environmental Protection Agency for the inland zone. These authorities are also established in the NCP. See, e.g., 40 C.F.R. §§300.120(a) and 300.130. The OSLTF is available to pay the costs of federal oil removal. 33 USC 1321(s); 33 USC 2712(a)(1); 33 USC 2752(b).

"Remove or Removal" is defined as "containment and removal of the oil...from the water and shorelines or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches." 33 USC 1321(a)(8).

"Removal costs" are the "costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize or mitigate oil pollution from such an incident." 33 U.S.C. 2701(31).

When there is a discharge or substantial threat of discharge of oil to navigable waters or adjoining shorelines, the FOSC determines the response actions appropriate under the NCP. The FOSC has broad authority to remove or arrange for the removal of a discharge and to mitigate or prevent a substantial threat of a discharge, and to direct or monitor all federal, state and private actions to remove a discharge or to mitigate or prevent a substantial threat of a discharge. 33 U.S.C. §1321(c); 40 C.F.R §§ 300.130 and 300.305(d). Containment, countermeasures and cleanup of the oil include a wide range of activities including controlling the source of a spill. 40 C.F.R. 300.310(a).

Removal authority should be construed broadly to achieve the policy enunciated by Congress – that there shall be no discharge of oil to navigable waters. The NCP recognizes that removal authority necessarily includes authority to address a discharge at its source, consistent with the no discharge policy. 40 C.F.R. 300.310(a). However, once the discharge to the water is stopped, the oil is removed from the navigable waters and shorelines, and all steps have been completed to prevent, minimize or mitigate any substantial threat of discharge to the water, NPFC removal funding typically ends.

The NPFC is responsible for making funds available for removal, but does not exercise oil removal authority under the FWPCA. Amounts appropriated annually from the OSLTF are made available by the NPFC to CG or EPA FOSCs for oil removal projects that are authorized under FWPCA 311(c) and consistent with the NCP. The NPFC has a fiduciary responsibility to ensure proper use of the OSLTF. Therefore, availability of funding is subject to NPFC policies and guidelines. In cases where it is unclear that the three FWPCA threshold elements have been met, the NPFC will work with the FOSC to ensure that the OSLTF will be used appropriately.

III. THRESHOLD ELEMENTS AND DOCUMENTATION REQUIREMENTS

A. Is it Oil?

1. FWPCA and OPA definitions of "oil"

Section 311(a) of the FWPCA defines "oil" as "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil." 33 U.S.C. § 1321(a)(1). OPA Title I, 33 U.S.C. §§2701-2720 creates a liability and compensation regime for oil discharges that is complementary to the provisions of Section 311 of the FWPCA. OPA Title I adopts the FWPCA definition of oil but adds an express exclusion for "any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. 9601) and which is subject to the provisions of that Act." 33 U.S.C. §2701(23). Thus, FWPCA oils are also OPA Title I oils except for any FWPCA oil that is specifically listed or designated as a CERCLA hazardous substance. See CERCLA Table of Hazardous Substances at 40 C.F.R. 302.4.

2. NPFC Policy on OSLTF Funding with Respect to Certain Substances

As a matter of policy, the NPFC and EPA have agreed that the NPFC will not generally provide funding from the OSLTF for responses with respect to the substances identified below, for which funding is generally available from the Hazardous Substance Superfund established under CERCLA.

a. Hexane. Hexane is specifically listed as a CERCLA hazardous substance. As a matter of policy, the NPFC will not generally provide funding from the OSLTF for response to the discharge or substantial threat of a discharge of hexane. FOSCs that are contemplating accessing the OSLTF to fund removal activities in response to the discharge or substantial threat of discharge of hexane should consult with their NPFC Regional Manager prior to accessing the OSLTF.

b. Creosote. Creosote is not widely used today, but historically was widely used as a wood preservative by wood treatment facilities. Creosote is specifically listed as a CERCLA hazardous substance. As a matter of policy, the NPFC will not generally provide funding from the OSLTF for responses to the discharge or substantial threat of a discharge of creosote. FOSCs that are contemplating accessing the OSLTF to fund removal activities in response to the discharge or a substantial threat of discharge of creosote–related contaminants should consult with their NPFC Regional Manager prior to accessing the OSLTF.

c. "Coal Tar" Wastes From Former Manufactured Gas Plants (MGPs). The term "coal tar" is often loosely used to refer to several types of substances derived from the distillation of coal, some of which are products, or by-products, and others which are wastes. With respect to funding, responses to discharges of "coal tar" wastes from former Manufactured Gas Plants ("MGPs") that contain constituents that are hazardous substances under CERCLA have typically been funded from the Hazardous Substance Superfund. As a matter of policy, the NPFC will not generally provide funding from the OSLTF for responses to the discharge or substantial threat of a discharge of "coal tar" wastes from MGPs. FOSCs that are contemplating accessing the OSLTF to fund removal activities in response to the discharge or substantial threat of discharge of "coal tar" wastes from a MGP should consult with their NPFC Regional Manager prior to accessing the OSLTF.

3. Natural Gas

Natural gas is not an oil. Response to a discharge or substantial threat of discharge of natural gas is not an oil response under FWPCA and is not funded from the OSLTF. However, oil may be present in some amounts when there is a natural gas incident, such as a leak, fire, or explosion from certain natural gas wells. Such oil may discharge to navigable waters or adjoining shorelines or there may be a substantial threat of such a discharge. Therefore, while a response to a natural gas incident will in general not be a response under the FWPCA for which OSLTF funding is available, FOSC response to the discharge of oil to navigable waters or adjoining shorelines, or the substantial threat of such a discharge, may be funded from the OSLTF. When confronted with a natural gas incident, FOSCs should explain and document how the response for which OSLTF funding will be used is for the primary purpose of removing a discharge of oil to navigable waters, or adjoining shorelines or mitigating or preventing the substantial threat of such a discharge.

4. Tire Fires

Oil may be produced in some amounts when there is a tire fire. Such oil may discharge to navigable waters or adjoining shorelines or there may be a substantial threat of such a discharge. Therefore, while a response to a tire fire in general will not be a response under the FWPCA for which OSLTF funding is available, FOSC response to the discharge of oil to navigable waters or adjoining shorelines, or the substantial threat of such a discharge, may be funded from the OSLTF. When confronted with a tire fire incident, FOSCs should explain and document how the response for which OSLTF funding will be used is for the primary purpose of removing a discharge of oil to navigable waters, or adjoining shorelines or mitigating or preventing the substantial threat of such a discharge.

5. Responses Potentially Involving Both FWPCA Oil and a CERCLA Hazardous Substance

a. The CERCLA "Petroleum Exclusion". The CERCLA definition of "hazardous substances" does not include, "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of [section 101(14)] and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas)." 42 U.S.C. §9601(14).

EPA has interpreted the petroleum exclusion to only apply to: crude oil that naturally contains hazardous substances; and refined product containing hazardous substances or constituents that normally are added during the refining process. See Memorandum from Francis S. Blake, General Counsel, "Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)," July 31, 1987. Hazardous substances that are added to petroleum during use, or increased in concentration as a result of use, are not subject to the petroleum exclusion and are subject to regulation under CERCLA. Courts generally have accepted this interpretation.

If the facts and circumstances indicate that the CERCLA petroleum exclusion is not applicable to substances subject to the response action, the FOSC should closely coordinate with the NPFC and EPA Headquarters regarding funding.

b. Mixes of Oil and Hazardous Substances. When a discharge to navigable waters or adjoining shorelines is discovered or reported, the FOSC must be able to make a swift, field decision about whether the discharging material is oil, a hazardous substance, or a mix or combination of both in order to determine response authority and funding. These field determinations will take into account any readily available information from the RP or other informed source (e.g., state or local agencies). If the circumstances indicate that the substance is likely to be a mix or combination of oil and a specifically listed or designated CERCLA hazardous substance, the FOSC should closely coordinate with the NPFC and EPA Headquarters before funding is provided.

Even after deciding to conduct an oil response under the FWPCA and accessing the OSLTF, the FOSC should test the substance as soon as practical in order to confirm the nature of the substance. If the source of the discharge is not known, testing of the substance may also be useful in identifying the source and the responsible party for the source.

If, during a removal funded from the OSLTF, it is determined that the substance discharging or substantially threatening to discharge to protected waters or shorelines is a specifically listed or designated CERCLA hazardous substance, NPFC policy is that generally OSLTF funding should end. At that point, as appropriate, the FOSC may decide to seek funding from the CERCLA Superfund. In such circumstances, the NPFC and EPA should work together to facilitate a smooth transition of funding sources.

If an incident includes a distinct discharge or substantial threat of discharge of an oil and a distinct release or substantial threat of release of a CERCLA hazardous substance, and there are distinct response actions directed to each, those distinct response actions directed to the discharge or substantial threat of discharge of oil generally should be funded from the OSLTF, and those distinct activities directed to the CERCLA hazardous substances generally should be funded from CERCLA's Superfund.

B. Is there a Discharge or Substantial Threat of a Discharge?

If there is oil in or on the navigable water or adjoining shorelines, there has been an actual discharge that clearly satisfies this threshold element. This element is also satisfied if there is a substantial threat of a discharge of oil to navigable waters or adjoining shorelines.

1. FOSC and NPFC roles

The FOSC, in exercise of his/her FWPCA oil response authority, determines the existence of a discharge or a substantial threat of a discharge of oil to navigable waters or adjoining shorelines. The FOSC also determines what action is needed to ensure the substantial threat of a discharge to protected waters and shorelines is mitigated or prevented. The NPFC does not exercise oil removal authority under FWPCA, but is responsible for making funds available for response actions authorized under 33 USC §1321 and consistent with the NCP to ensure the substantial threat of a discharge of oil to navigable waters or adjoining shorelines is mitigated or prevented. NPFC has a fiduciary responsibility to ensure proper use of the OSLTF and therefore will work with the FOSC to ensure that the OSLTF will be used appropriately.

To that end, the FOSC and the NPFC Case Officer should initiate a dialogue at the beginning of a response to a substantial threat of a discharge. These discussions help provide the NPFC with a full understanding of the FOSC's determination that a substantial threat of a discharge exists and help facilitate funding.

2. Substantial Threat

The OSLTF may be used when the FOSC responds under authority of FWPCA section 311(c) to prevent or mitigate a substantial threat of a discharge of oil to the navigable waters or adjoining shorelines. In making the determination that circumstances present a substantial threat of a discharge of oil to navigable waters or adjoining shorelines the FOSC should consider relevant factors in the context of the overall situation, including the following:

a. The source of the oil, the condition of the source including any environmental factors or weather which may change the condition of the source, and if the source is functioning in some way to contain the oil in whole or in part, facts relevant to an evaluation of the integrity of that containment mechanism and predicted or potential failures of that containment mechanism;

b. The proximity of the oil source to navigable waters or adjoining shorelines, the quantity of oil, any relevant available information regarding the nature of the oil, and the flow path from the oil source to the navigable waters, including slope, terrain, natural or manufactured conduits or drains, the absence of effective natural or manmade barriers between the source and the navigable waters, any environmental factors or weather conditions that may affect movement of the oil, and any other available information relevant to the potential movement of the oil from the source to the navigable waters;

c. Whether under all the facts and circumstances response action should be undertaken in order to prevent a discharge of oil to navigable waters or adjoining shorelines.

3. Documentation for Substantial Threat Incidents

FOSCs are to document the facts and circumstances relied upon in making the "substantial threat" determinations to the NPFC in order to memorialize the basis for the exercise of removal authority. Summary documentation should be provided in the initial POLREP, and detailed documentation should be provided as soon as practical. All documentation should reflect consideration of the relevant factors, as discussed above, and the basis for the determination that the circumstances present a substantial threat of a discharge of oil to the navigable waters or adjoining shorelines

Documentation of the "substantial threat" determination is important since the OSLTF is not available for response when an oil source has merely a remote potential to discharge oil "someday". Thus, provision of adequate documentation is a predicate to OSLTF funding. Even after OSLTF funding is made available, if additional relevant information becomes available, it is the FOSC's responsibility to provide that additional information and documentation to the NPFC, and to respond to NPFC's requests for additional information. In addition to its funding responsibilities, this documentation is also used by NPFC in support of other responsibilities that the NPFC fulfills, including the payment of claims under OPA, determination of liable responsible party debts, and to support enforcement actions necessary to recover removal costs from responsible parties

There are numerous ways an FOSC can document the factors considered and the basis for the decision that a specific situation presents a substantial threat of discharge, in support of their request for funding. Whatever methods are used, the FOSC should describe all of the relevant facts and circumstances, as discussed above, and include any available photographs. The following list provides several examples of the types of documentation that may be used for this purpose:

a. For Coast Guard-managed incidents: Operational logs or ICS forms such as the Incident Information Form, the Incident Briefing form (ICS 201), the Response Objectives form (ICS 202), the Unit Log (ICS 214) or the Executive Summary form (ICS Exec. Sum.).

b. For EPA managed incidents: the OPA90 Removal Project Plan (ORPP);

c. POLREPS;

d. E-mail to operational superiors and the NPFC;

e. A memorandum regarding the substantial threat determination; or

f. Administrative orders issued under FWPCA 311(c) to responsible parties.

Any of these or other similar methods of documentation may be used as long as the purpose is fulfilled, which is to document the FOSC's consideration of relevant factors and the basis for the determination that the circumstances present a substantial threat of a discharge of oil to the navigable waters or adjoining shorelines.

C. Is the Discharge or Substantial Threat of a Discharge into Navigable Waters?

Under the FWPCA, the term "navigable waters" is broadly defined as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7).[4/] Regulatory definitions of the term include, among other things, waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters that are subject to the ebb and flow of the tide (sometimes referred to as traditional navigable waters); interstate waters, including interstate wetlands; tributaries to traditional navigable waters; and wetlands that are adjacent to traditional navigable waters or their tributaries. See, e.g., 40 C.F.R. §300.5.

In January 2001, the Supreme Court held that use of isolated, non-navigable, intrastate waters by migratory birds was not a sufficient basis for the exercise of federal regulatory jurisdiction under Section 404(a) of the FWPCA. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"). Since that decision was rendered, case law with respect to the meaning of the term "navigable waters" has been evolving.

Particularly given these legal developments, the FOSC should provide relevant information on the affected water or shoreline to the NPFC case officer, including the name and nature of the water, tributary connections between the water and downstream traditional navigable waters, and information regarding any other adjacent waters. If a question should arise with respect to the jurisdictional status of a particular water, agency counsel should be consulted.

D. Responsible Party Identification - Facility/Vessel Source

1. RP Definitions

OPA imposes liability for removal costs and damages "on each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone…." 33 U.S.C. §2702(a). Identification of the responsible parties under OPA depends on the source of the discharge or substantial threat of a discharge. See 33 U.S.C. §2701(32). In general, responsible parties for each type of pollution source are as follows:

a. Vessel. In the case of a vessel, responsible party or parties means the owner(s), operator(s), and demise charterer(s).

b. Onshore Facility. In the case of an onshore facility, responsible party or parties means the owner(s) and operator(s) of the facility. An onshore facility is any facility located in, on, or under any land within the United States other than submerged land.[5/] There are

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[4/] Under OPA, the term "navigable waters" is also defined as the "waters of the United States, including the territorial seas," 33 U.S.C. §2701(21), and the term has been construed by courts to have the same meaning under OPA as under the FWPCA.

[5/] "Facility" is further defined as

some exceptions for states and other government owners that have transferred possession and right to use the property to other persons by lease, assignment or permit at the time of the discharge or substantial threat of discharge. In the case of an actual discharge, the relevant time for determining ownership and operation is the time during which the discharge occurred. In the case of a substantial threat of a discharge, the relevant time for determining ownership and operation is the time during which a substantial threat was posed.

c. Offshore facility. In the case of an offshore facility, responsible party or parties means the lessee(s), permitee(s), and holder(s) of a right of use and easement of the area in which the facility is located. An offshore facility includes any facility located in, on, or under water. There are some exceptions for states and other government owners that have transferred possession and right to use the property to other persons by lease, assignment or permit at the time of the discharge or substantial threat of discharge.

d. Deepwater Port. In the case of a deepwater port licensed under the Deepwater Port Act of 1974, responsible party or parties means the licensee

e. Pipeline. In the case of a pipeline, responsible party or parties means the owner(s) or operator(s) of the pipeline.

f. Abandonment. In the case of an abandoned vessel, onshore facility, deepwater port, pipeline, or offshore facility, responsible party or parties means the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility.

2. Documentation Required From FOSC

Under the NCP, the FOSC is responsible for identifying potentially responsible parties to the extent practicable. 40 CFR 300.305(b)(3). For a simple vessel case, this task is fairly straightforward. For a facility case involving numerous leases and other title documents, that process may be more lengthy and complicated. In the case of an onshore facility, FOSCs should generally retain a deed and title search company when the FPN is opened in order to identify all of the responsible parties as promptly as possible. Because this search facilitates the prompt identification of responsible parties, it should be conducted before the commencement of the removal where time permits and, in any event, as soon as possible during the response phase. The OSLTF is generally available to pay the costs of this search, and a draft model Scope of Work ("SOW") for this purpose is available from the NPFC. This procedure is also available with respect to offshore facilities. Documentation with respect to the identification of responsible parties for vessels and onshore and offshore facilities is discussed further below.

a. Vessel. In the case of a vessel, documentation of the responsible party should include the name of the vessel, dimensions, type of vessel, and some identifying number, such an official number if it is a U.S. flag vessel or a Lloyds number for foreign flag vessels.

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any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes; exploring for, drilling for, producing, storing, handling, transferring, processing or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes. 33 U.S.C. § 2701(9).

A copy of the vessel's Certificate of Documentation should be in the case file. For vessels with no Coast Guard documents, a copy of the vessel's state registration and drivers license of the owner and/or operator should be obtained, along with any other documents identifying the owners and operators.

b. Onshore Facility. As soon as the FPN is opened, in a case involving an onshore facility, the FOSC should generally retain a deed and title search company familiar with relevant property records. The attached model SOW for "Onshore Facilities" should be used in contracting with the deed and title search company and modified where appropriate. If the FOSC does not retain a deed and title search company, the FOSC should obtain the information and documentation set forth in the model SOW. In general, the title documents and leases will determine the owner(s) of the facility at the time of the discharge or substantial threat of a discharge of oil. The term operator is not limited to the operator of record. The term operator may include others who had control with respect to the facility's operations, even though these parties may not have been designated an operator of record by the state regulatory body. FOSCs should contact their Regional Counsel (for EPA) or District Legal Office (for Coast Guard) to resolve any enforcement issues and interpretation of various legal documents.

c. Offshore Facility. As soon as the FPN is opened, in the case of an offshore facility, the FOSC should generally obtain the documents and information set forth in the attached SOW for "Offshore Facilities." With respect to submerged lands owned by the state most of this information is usually kept by the state leasing authority or state oil gas regulatory body. As discussed above, the FOSC may contract these services out at the beginning of the removal project to a deed and title company familiar with records pertaining to oil and gas leasing.

FOSCs should contact their Regional Counsel (for EPA) or District Legal Office (for Coast Guard) to resolve any enforcement issues and interpretation of various legal documents. NPFC legal staff is available to provide advice to case managers on interpretation of these documents.

E. Funds Access Procedures

1. EPA FOSCs can initially obtain $50K from the OSLTF using CANAPS. EPA FOSCs should use CANAPS to request higher ceilings when necessary. Upon receipt of the request, the NPFC Case Officer will coordinate with the FOSC and raise the ceiling as appropriate. EPA FOSCs must prepare and submit Oil Removal Project Plans when requesting ceilings in excess of $250K.

2. USCG FOSCs can initially obtain $500K from the OSLTF using CANAPS. USCG FOSCS should use CANAPS to request higher ceilings when necessary. Upon receipt of the request, the NPFC Case Officer will coordinate with the FOSC and raise the ceiling as appropriate.