# Ship-source Oil Pollution Fund ("SOPF")
# Guidelines for Claims Involving Vessel Deconstruction[1]

## Introduction & Purpose

The following paper describes the approach taken by the Administrator of the SOPF (the "Administrator")[2] in assessing claims filed by the Canadian Coast Guard ("CCG") that include the deconstruction of a vessel as a measure taken in response to actual or anticipated oil pollution damage. The intent is to shed light on the Administrator's process for determining whether and to what degree deconstruction in a given claim represents an established measure under Part 7 of the *Marine Liability Act* (the "MLA").[3] Many of the assessment and evidentiary principles discussed herein are broadly applicable beyond the context of vessel deconstruction and should be of assistance to CCG from the beginning of an environmental response through to claim compilation. It is hoped that this paper, along with a frank discourse flowing therefrom, will result in an improved CCG rate of recovery on its SOPF claims.

This paper considers the statutory amendments that came into force in December 2018 as a result of Bill C-86,[4] noting that occurrences that predate the coming into force of the substantive amendments remain subject to the former regime.

What follows is somewhat legalistic in flavour, but it must be acknowledged that both CCG and the Administrator exist in a world governed by federal statutes. Broadly speaking, the *Canada Shipping Act, 2001* (the "CSA")[5] sets out the circumstances in which CCG can respond as well as the scope of its powers in the course of such a response; the MLA deals with liability and compensation, including the Administrator's powers and obligations with regard to the assessment of claims. This paper makes an effort to explain the relationship between these two statutes and the two organizations that call them home, from the response stage to the ultimate issuance of an offer of compensation.

This paper begins with the Administrator's Policy Statement on claims involving vessel deconstruction as an oil pollution mitigation measure. It then sets out and explains the statutory regime under which both CCG and the Administrator operate, providing a detailed explanation of

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[1] This document is an adaptation of a paper delivered to the Canadian Coast Guard by the Administrator of the SOPF on 18 October 2019 in preparation for a 6 November 2019 bilateral claims workshop. For referencing purposes, please cite this document as: Canada, Office of the Administrator of the Ship-source Oil Pollution Fund, "Guidelines for Claims Involving Vessel Deconstruction", (Ottawa: SOPF, 2019).

[2] Or the Deputy Administrator, as the case may be.

[3] SC 2001, c 6 [MLA]. See, especially, MLA, s 105(1)(b), which provides for the issuance of "an offer of compensation to the claimant for whatever portion of [the claim] that the Administrator finds to be established" [emphasis added], following investigation and assessment.

[4] *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2018, which made changes to both the MLA and the *Canada Shipping Act, 2001*.

[5] SC 2001, c 26 [CSA].

the Administrator's assessment process, with a focus on vessel deconstruction claims. It concludes with an Appendix containing an Assessment Process Map.

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# I. Policy Statement: Compensation for Vessel Deconstruction

With regard to "measures taken to prevent, repair, remedy or minimize oil pollution damage from [a] ship," the Administrator compensates claimants only to the extent that the claimed measures are reasonable in light of an actual, demonstrated pollution threat posed by that ship.[6] Costs and expenses associated with the claimed measures must also be reasonable in light of the threat in order to be compensable.[7] Where an oil pollution threat has been reasonably mitigated, further compensation for additional measures, including vessel deconstruction, is not considered. Should the evidence produced by the claimant show that a ship is in and of itself an oil waste, and that measures short of deconstruction will not reasonably mitigate the oil pollution threat it poses, the Administrator may consider compensation for the deconstruction of that ship. The Administrator cannot compensate claimants for deconstruction where that measure is attributable to wreck removal.

# II. Threshold Requirements

## A. CCG Acting Within Statutory Powers under the CSA

### *i. Discharge or threat thereof: evidence of reasonable grounds to believe*

Before assessing the reasonableness of vessel deconstruction as a measure in a given claim, the Administrator must be satisfied that CCG acted within its lawful powers as enumerated in section 180 of the CSA when it opted to deconstruct.[8] CCG may deconstruct when it "believes on reasonable grounds that a vessel . . . has discharged, is discharging, or may discharge a pollutant."[9] The vessel in question need not actually discharge a pollutant: risk of a discharge somewhere beyond the likelihood expected under normal operational conditions is all that is required.[10] Belief on reasonable grounds is a generous standard that may take the form of a demonstrable hunch, but this standard nonetheless places an evidentiary burden on CCG.

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[6] See MLA, ss 51(1), 71(1), 77(1). See also "preventive measures" under both the International Convention on Civil Liability for Oil Pollution Damage, 1992, and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

[7] *Ibid*.

[8] Additionally, the various other claim eligibility criteria found in the MLA must be met.

[9] CSA, s 180(1) [emphasis added]. Note that CCG powers in the context of any incident that occurred prior to 13 December 2018, when Bill C-86 came into force, were slightly more limited. Instead of "may discharge" (i.e., *possible* spill), the relevant statutory provision then read "likely to discharge" (i.e., *probable* spill). Another change that is perhaps worthy of note, though likely made for clarification purposes only, was the explicit addition of a CCG power to "dismantle" a vessel in s 180(1)(a) CSA. Previously, the provision had explicitly conveyed powers to remove, destroy, "sell, or otherwise dispose of the vessel and its contents" [emphasis added]. Given past CCG conduct and the findings of the Administrator and the courts, it is unlikely that the new wording conveys any broader power on CCG than what previously existed. Curiously, the word "deconstruct" is not derived from statute.

[10] There is no clear legal test in Canada for the new "may discharge" threshold. From the perspective of the SOPF, it is likely that the lower intervention threshold will generate an increase in CCG claims involving measures taken in anticipation of a spill. Such measures may include deconstruction.

*ii. Belief both subjective and objective*

For greater clarity, the Administrator applies a legal test for establishing belief on reasonable grounds that is both subjective and objective. This means, respectively, that CCG must believe a pollution threat exists *and* that a hypothetical, informed observer would likely reach the same conclusion. A deconstruction claim must contain sufficient evidence to allow the Administrator to agree with CCG on both fronts.

*iii. Where insufficient evidence of reasonable grounds*

If the Administrator is not satisfied that CCG acted on reasonable grounds to believe that a pollution threat was present when the decision was made to deconstruct a given vessel, the assessment of the measure is complete. This includes situations in which a credible pollution threat is identified but the threat is subsequently mitigated below the reasonable grounds threshold prior to deconstruction. Even in situations where a vessel has discharged a pollutant, the pollution threat might be sufficiently or even fully mitigated by measures falling short of deconstruction. In such cases, the continuum of the threat is broken and further measures fall outside the powers under section 180 of the CSA. The Administrator cannot compensate CCG for such action.

### B. Costs or Expenses Actually Incurred: Evidence Required

A second threshold requirement is that the costs or expenses claimed by CCG must have been actually incurred rather than merely anticipated.[11] This may seem obvious, but it must be addressed in this paper as it too engages an evidentiary burden on the part of the claimant. Receipts or invoices indicating payment, the amount paid, and the date of payment[12] are generally satisfactory.

## III. Reasonableness of the Measure

A finding that CCG was acting within its statutory powers when it opted to deconstruct a vessel that posed a pollution threat is alone insufficient to render deconstruction compensable as a measure. If the Administrator is satisfied that CCG acted within its powers under section 180 of the CSA and that it actually incurred costs or expenses in the process, the next step is the core component of the investigation and assessment process: determining whether the measure was reasonable in the circumstances with regard to the oil pollution threat posed by the vessel.[13]

[11] This threshold assessment criterion is derived from the MLA and the international conventions attached thereto.
[12] This is crucial, *inter alia*, to the accurate calculation of a claimant's interest entitlement under s 116 MLA.
[13] CCG powers under CSA, s 180 cover "pollutants", which are defined in s 165 as including oil, but also extending to other substances that "degrade or alter or form part of a process of degradation or alteration of the quality of the waters to an extent that is detrimental to their use by humans or by an animal or a plant that is useful to humans". The sections of the MLA relevant to this paper restrict liability, compensation, and the Administrator's mandate to oil pollution.

## A. Reasonableness in the Vessel Deconstruction Context

Reasonableness in the context of a given measure is difficult to define, but the following occasionally overlapping factors are all considered to some degree during the assessment process. Salient themes throughout the reasonableness assessment are the nature, degree, and continued existence of the oil pollution threat. These assessment themes apply at the time a measure was taken.

### *i. Objective decision-making*

A reasonable measure is the result of an objective decision-making process free from external influence, which can be problematic particularly where it leads to duplication of efforts, disproportionate measures, and inflated costs.

### *ii. Definable goal*

A reasonable measure has a definable goal. In the marine oil pollution context, this goal, writ large, is the mitigation of a demonstrable threat. Good optics, for instance, are not a justifiable goal from the liability and compensation perspective. If a threat has been mitigated before a vessel is deconstructed, demobilization is the only reasonable course and any additional measures are *prima facie* unreasonable. It should be noted that threat mitigation may be the result of successful CCG measures, but it may also be the result of changing conditions or the simple passage of time. As a result, reasonableness in the context of an extended response requires periodic CCG reassessment of an oil pollution threat.

### *iii. Proportionality in light of pollution threat indicators*

Reasonableness is highly contextual. Context is determined based on the nature and degree of the pollution threat, which occurs and develops on a continuum. As discussed, where the continuum is broken, further measures cannot be reasonable. Many indicators conspire to form an oil pollution threat, including, but not limited to the following:

- Situation, state, construction, accessibility, and seaworthiness of the vessel;
- Location, quantity, type, and nature of actual or potential pollutants;
- Status, capacity, and responsiveness of the vessel owner;
- Sensitivity of the local environment, including natural and economic elements; and
- Weather and sea conditions at the site of the incident, including any navigational hazards.

These indicators, as evidenced in the claimant's submissions, are weighed in the Administrator's assessment. It is noteworthy that in cases of vessel deconstruction, the indicators surrounding the condition of the vessel and the character of actual or potential pollutants are often most important. This is discussed further below. A reasonable measure is proportionate in light of all the pollution threat indicators.

*iv. Not subject to hindsight*

Reasonableness is not subject to hindsight. Reasonableness is assessed only in light of what was known by CCG at the time it elected to take a given measure. If CCG acts reasonably based on what it knew, an unlikely or undesirable result does not render a given measure non-compensable. By the same token, a gamble that by some chance yields a desirable result cannot be compensable. It must be stressed here that wilful blindness seldom leads to a reasonable decision: consideration is always given to whether any missing facts could and should have been ascertained before a key decision was made. On the other hand, it is possible to gather too much information before acting: excessive duplication of efforts cannot be deemed reasonable. This latter issue has occasionally been noted when CCG commissions a vessel survey prior to proceeding with deconstruction.[14]

*v. Plurality of reasonable measures*

Finally, there may be a plurality of reasonable measures in a given situation. The test of reasonableness never assumes that there is a single, "correct" option, though this may be the case on certain facts, particularly — though not invariably — in successful claims for vessel deconstruction. This is largely due to the nature of the measure: deconstruction is irreversible, final, and often costly, and thus it is usually a measure of last resort in the oil pollution prevention context.

## B. The Evidentiary Component: In Support of Reasonableness

CCG bears the burden of submitting sufficient evidence, in the form of claim documentation, to allow the Administrator to assess the reasonableness of its measures. The Administrator, in the course of statutory assessment and investigation, necessarily becomes a finder of fact.

*i. Evidence of decision-making*

As discussed, the evidence must include a chronology that — at a bare minimum — identifies and describes the circumstances surrounding the various decision points of an incident. For reasonableness in the circumstances (i.e., at the time of various key decisions) to be assessed, the circumstances must be clear. If the circumstances at the time of a key decision are unknown by the Administrator, the claimed measure fails on evidentiary grounds. While CCG environmental response personnel may be experts in their field with exceptional response powers conveyed by statute, CCG actions do not attract a presumption of reasonableness under the MLA. As with those of any other claimant, CCG actions must be supported by evidence.

*ii. Conflicting evidence*

If conflicting evidence is present in claim documentation, or if follow-up correspondence with CCG and/or other parties or witnesses to a response, produces details that conflict with the original documentation, a twofold problem emerges. First, the Administrator must weigh the credibility of differing accounts before any factual conclusions can be reached. Second, and as discussed, it may

[14] Vessel surveys are discussed in more detail below.

not be possible for the Administrator to assess the reasonableness of measures taken in the face of uncertain or unreliable facts.

If follow-up correspondence and exchanges with a claimant produce evidence that conflicts with the original claim documentation, the Administrator generally attaches more weight to the original submissions. By the same token, formal documentary records and records created at the time of an incident or soon thereafter usually carry more weight than later conflicting testimony.

*iii. The claim narrative*

A detailed claim narrative is the best tool for presenting the chronology of an incident. In essence, a narrative represents a claimant's testimony. It also serves as a reference point and organizational tool in that it invariably refers to and supports other documentation in the claim. If a piece of documentation does not logically fit into a claim narrative, whether explicitly or by inference, the measures attached to that piece of documentation are less likely to be compensated. Photographs are also of assistance, provided that they are relevant, annotated, and time-stamped. While the narrative is an important tool for presenting a claim, it generally cannot stand on its own. Where a statement in the narrative is not supported by documentation or is inconsistent with it, that statement may be given little or no weight during the assessment process.

*iv. Vessel surveys*

While an independent, professional survey of a vessel is usually helpful from an evidentiary point of view, surveys are not *prima facie* compensable. If a survey aids CCG in defining and quantifying an oil pollution threat, and in its subsequent decision-making progress, it is likely compensable as a reasonable measure. If, on the other hand, a survey is conducted for the purpose of justifying a foregone decision to deconstruct, it is not likely to be compensable. Surveys conducted solely for appraisal purposes or for other reasons unrelated to oil pollution mitigation[15] are not compensable.

*v. Effort allocation*

While the Administrator recognizes that CCG is vested with extensive monitoring powers under the CSA,[16] the exercise of these powers is subject to the usual reasonableness assessment under the MLA. Where CCG deploys personnel to monitor a raising, removal, or deconstruction operation undertaken by an experienced, reputable contractor, some measure of effort allocation justification is generally required to avoid giving the impression that efforts have been unreasonably duplicated. This may take the form of an explanatory note in a claim narrative.

*vi. Vessel storage*

Finally, extended storage of a clearly condemned vessel on the hard or otherwise should be justified and documented. Storage and other kinds of delay represent cost-generating measures that generally do not serve to mitigate a pollution threat. As a result, storage is not compensable

[15] E.g. assessment of viability of reconstruction.
[16] CSA, s 180(1)(b).

unless it can be shown to be necessary in the circumstances. A few explanatory lines in the claim narrative may suffice on this front, though correspondence with the relevant contractor is preferred.

*vii. Proportionality assessment and evidence of a pollution threat*

As noted, the nature and degree of the oil pollution threat in a given incident are primary factors that inform the Administrator's reasonableness assessment in cases where deconstruction is claimed as a pollution mitigation measure. Because of the extraordinary and final quality of vessel deconstruction, proportionality is generally only established when the evidence points to a threat that is somehow intrinsic to a vessel. CCG, as the claimant, bears the burden of providing evidence to satisfy the Administrator on this front.

Claim documentation should point to the pollution threat indicators enumerated above in support of a decision to deconstruct. If other mitigation measures (e.g. pumping tanks and fuel lines, cleaning, etc.) have been considered by CCG, these should be described along with the rationale for ruling them out. Where no alternative options are considered by CCG, documentation of the pollution threat and the decision-making process must be especially thorough.

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Where all the evidence paints a sufficiently clear picture of the facts in a given incident, the Administrator can determine whether the decision to deconstruct a vessel was reasonable in the circumstances.

# IV. Reasonableness of Costs & Expenses

Once the Administrator has found that vessel deconstruction was a reasonable measure in the context of a given claim, the reasonableness of its associated costs and expenses is assessed. Generally, this stage of the assessment is less problematic than the stage immediately preceding it, but there are nonetheless recurring issues that are worthy of discussion.

*i. Benchmarking against historic claim data*

Given the limited number of shipyards in Canada that regularly conduct vessel deconstruction operations for CCG, and given sometimes stark regional differences, it is difficult to benchmark against industry standard practices or market rates in an assessment. That said, the Administrator has internally compiled data that illustrate broad expected ranges of deconstruction costs as a function of vessel gross tonnage where available, and length where not. When plotted against these rough data, a claim that appears to be an outlier may attract increased scrutiny from the Administrator on the costs front.

*ii. Claimant contracting practices*

Historically, the Administrator has not strictly held CCG as a claimant to federal contracting rules on procurement, justification, and record-keeping. Instead, a looser approach has been favoured in which CCG is expected to behave as a reasonably self-interested consumer: as might be expected, this standard entails a degree of shopping around (where possible) and negotiating. Increasingly, this standard has been difficult to apply given the paucity of evidence on offer from CCG with regard to its contracting practices. As above, where lack of evidence leads to an inability to properly assess, a claimant is likely to see shortfalls. Where faced with an evidentiary gap and high costs, the Administrator may substitute a deemed reasonable rate for a given contract service.

*iii. Lack of evidence harmful to claimant*

When the Administrator requests — in the context of a vessel deconstruction contract — a statement of work, a detailed breakdown of services, or other explanatory information from CCG, the aim is to extract details that will help fill out the contracting process and the scope of the contract. On this front, a lack of detail is almost always harmful to the claimant.

*iv. Scope of emergency contracting and perils of open-ended contracts*

A final point for discussion focuses on the issue of emergency contracting, which invariably drives up costs. A contract to raise a sunken, actively polluting vessel and to remove it from the marine environment or otherwise secure it may reasonably attract emergency status. On the other hand, by the time a contract is entered into to deconstruct a vessel that has been stored on the hard for several days, then surveyed or otherwise assessed, and ultimately condemned, the emergency has probably diminished. If this is not the case, documentation is required in support.

Admittedly, a vessel that has been condemned after being raised, pumped, towed, and stored by a specific contractor (perhaps in the context of a demonstrated emergency) is likely, for a host of practical reasons, to be deconstructed by that very same contractor. The Administrator is unlikely to question such a decision from CCG. That said, some indication that at least two separate contracts were negotiated and entered into with the given contractor is beneficial to CCG in such circumstances, if only because this demonstrates an effort to avoid a generally expensive open-ended arrangement.

# V. Note on the *Wrecked, Abandoned or Hazardous Vessels Act*

It is worth briefly noting that the *Wrecked, Abandoned or Hazardous Vessels Act*,[17] along with the Nairobi International Convention on the Removal of Wrecks, 2007, came into force on 30 July 2019. This addition to the broader federal regulatory scheme represents a statutory expansion of the CCG mandate, as well as an expansion of civil and administrative liability for vessel owners. That said, the changes have had no effect on the liability of the Administrator, or on the Administrator's assessment powers and obligations. The Administrator's role remains entirely confined to the oil pollution context as set out under the CSA and the MLA.

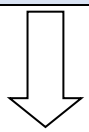
[17] SC 2019, c 1.

# Appendix: Vessel Deconstruction Assessment Process Map

The following Assessment Map illustrates the Administrator's process with regard to a CCG claim for vessel deconstruction. Evidentiary considerations are woven throughout.

**1. Threshold Assessment**

- Was CCG acting within its statutory powers under section 180 CSA?
  - Evidence of a pollution threat, whether active or potential?
  - Evidence of subjective and objective reasonable grounds to believe?
  - Was the pollution threat mitigated prior to deconstruction of the vessel?
- Did CCG actually incur the costs and expenses claimed?
  - Invoices? Receipts? Date of payment?



**2. Reasonableness of Measures**

- Was deconstruction a reasonable measure in the circumstances?
  - Completeness of claim narrative?
    - Clarity and justification of key decisions: Who? When? Why?
    - Specific or inferential reference to claim documentation?
  - Objective decision-making process?
  - Definable goal of mitigating demonstrated oil pollution threat?
    - Evidence of regular reassessment of threat?
  - Was deconstruction proportionate in light of:
    - Situation, state, construction, accessibility and seaworthiness of vessel?
    - Location, quantity, type, and nature of actual or potential pollutants?
    - Status, capacity, and responsiveness of vessel owner?
    - Sensitivity of the local environment (natural and economic factors)?
    - Weather and sea conditions, including navigational hazards?
    - Any other factors deemed relevant?
  - Did CCG have sufficient information at the time it decided to deconstruct?
    - Any evidence of duplicated efforts?
    - Reasonableness of survey, if conducted?
  - Alternatives to deconstruction considered?
    - Evidence in support of ruling out any alternatives considered?
  - Residual issues?
    - Conflicting evidence?
    - Unjustified monitoring?
    - Unjustified storage?

**3. Reasonableness of Costs and Expenses**

- Were the costs of each measure reasonable in the circumstances?
  - Is there an ascertainable market rate for the specific service provided?
    - Any regional factors of note?
  - Do claimed costs align roughly with past claims involving similar vessels?
  - Was the contracting process appropriate in the circumstances?
    - Support for emergency contracting?
    - Evidence of cost-minimizing efforts from CCG?
    - Justification for open-ended contracting?
  - Was the contracting process sufficiently documented?
    - Statement of work?
    - Bids or quotes?
    - Call for tenders?
  - Was the performance of the contract sufficiently documented?
    - Daily breakdown of tasking?
    - Conformity of services to those agreed upon?
    - Conformity of costs to those agreed upon?
    - Explanation of cost-generating measures?

**4. Offer of Compensation**