CLAIM SUMMARY / DETERMINATION

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| **Claim Number:** | N10036-2034 |
| **Claimant:** | **Enbridge Offshore Facilities LLC** |
| **Type of Claimant:** | Commercial |
| **Type of Claim:** | Loss of Profits and Earnings |
| **Claim Manager:** | [redacted] |
| **Amount Requested:** | $503,444.83 |

## *FACTS*

On or about 20 April 2010, the Mobile Offshore Drilling Unit Deepwater Horizon (Deepwater Horizon) exploded and sank in the Gulf of Mexico. As a result of the explosion and sinking, oil discharged into the Gulf of Mexico, a navigable waterway of the United States. The oil continued to discharge for months and the cleanup response continued for years. The Coast Guard designated the source of the discharge and identified BP and others as the responsible parties (RP). BP accepted the designation and advertised its OPA claims process. The Gulf Coast Claims Facility (GCCF) was created to handle claims. On 23 August 2010, the GCCF began accepting and adjudicating certain individual and business claims on behalf of BP.

On 08 March 2012, the United States District Court, Eastern District of Louisiana issued a "Transition Order" (TO) limiting the GCCF's ability to accept, process, or pay claims except as provided in that order. The TO created a Transition Process to facilitate the transition of the claims process from the GCCF to a proposed Court Supervised Settlement Program (CSSP). The Court granted Preliminary Approval of the proposed settlement program on 02 May 2012, and the CSSP began processing claims on 04 June 2012.

## *CLAIMANT AND CLAIM*

On 6 October 2014, the NPFC received this claim to the Oil Spill Liability Trust Fund (OSLTF) from Enbridge Offshore Facilities, LLC (EOF) seeking $503,444.83 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.[1] EOF is a subsidiary company of Enbridge Inc. Enbridge Inc. transports and distributes energy around North America. Enbridge Inc. operates crude oil, liquids and natural gas transmission systems. The Claimant was constructing an onshore condensate stabilization facility in Venice, Louisiana in 2010.

EOF alleges that the oil spill delayed construction of its new facility from September 2010 until December 2010. It argues that tugs and a barge it needed for the construction project were diverted to the Deepwater Horizon (DWH) incident response. Because the vessels were not available for the construction project, EOF argues that the oil spill delayed construction and caused damages to EOF. EOF seeks alleged losses of

[1] Optional OSLTF Claim Form dated October 1, 2014.

$421,444.97 in carrying charges due to the alleged delay. EOF also seeks $81,999.86 in alleged increased housing costs for contractor personnel who were to work the construction project. EOF alleges that he housing increase was to rent trailers because housing was not available since DWH response personnel and visitors to the area occupied all of it. The Claimant alleged that this claim was first presented to the Responsible Party on August 7, 2013, and that the RP denied payment on the claim.

### *APPLICABLE LAW*

Under the Oil Pollution Act of 1990 (OPA), at 33 U.S.C. § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into or upon the navigable water, adjoining shorelines, or the exclusive economic zone of the United States, as described in § 2702(b) of OPA.

The OSLTF is available to pay claims for uncompensated damages pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136. One type of damages available pursuant to 33 C.F.R. § 136.231 is a claim for loss of profits or impairment of earning capacity due to injury to or destruction of natural resources.

Under the Oil Pollution Act of 1990 (OPA), at 33 U.S.C. § 2712(h)(2), no claim may be presented under this section for recovery of damages unless the claim is presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care, or in the case of natural resource damages under section 2702(b)(2)(A) of this title, if later, the date of completion of the natural resources damage assessment under section 2706(e) of this title.

Under 33 C.F.R. § 136.233 a claimant must establish the following:

(a) That real or personal property or natural resources have been injured, destroyed, or lost;
(b) That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of property or natural resources, and the amount of that reduction;
(c) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established; and
(d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant received as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.

Under 33 C.F.R. § 136.105(a) and § 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 C.F.R. § 136.235, the amount of compensation allowable for a claim involving loss of profits or impairment of earning capacity is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for—

(a) All income resulting from the incident;
(b) All income from alternative employment or business undertaken;
(c) Potential income from alternative employment or business not undertaken, but reasonably available;
(d) Any saved overhead or normal expenses not incurred as a result of the incident; and
(e) State, local, and Federal taxes.

Under 33 U.S.C. § 2712(f), payment of any claim or obligation by the Fund under OPA shall be subject to the United States Government acquiring, by subrogation, all rights of the claimant or State to recover from the responsible party.

***DETERMINATION OF LOSS***

Under 33 U.S.C. §2712(h)(2), "no claim may be presented under this section for recovery of damages unless the claim is presented within three years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care..." This statute of limitations in OPA is strictly applied, and there is no provision which allows for its waiver. Claimant's alleged losses occurred in 2010. This claim was presented to the NPFC as custodian of the OSLTF on October 6, 2014, which is four years beyond the alleged loss period. Claimant knew of any delays and would have known of its losses in 2010, and possibly in early 2011. Either way, the claim was not presented within three years of its reasonable discovery date. This claim must be denied as being outside the statutory period of limitations.

Further, even if the claim had been submitted in a timely manner, NPFC would deny it on the merits. Under 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136, a claimant must prove that any loss of income was due to injury, destruction or loss of real or personal property or of a natural resource as a result of a discharge or substantial threat of a discharge of oil. Under 33 C.F.R. § 136.105(a) and § 136.105(e)(6), the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

The record indicates that Claimant's alleged losses were not due to the injury, destruction or loss of real or personal property or a natural resource. Even though Claimant provided very little documentation with its submission, that documentation proves that any alleged losses were caused by factors other than the oil discharge. The record shows that EOF hired Kiewit Offshore Services to construct the facility. Kiewit tried to hire McDonough

Marine Service to provide tugs and a barge for the project.[2] However, McDonough had diverted its assets to the spill response and could not provide them for the project. The unavailability of assets for Enbridge's project is an intervening cause of any alleged delays and losses to EOF.

With regard to the claimed additional housing costs, those too are not caused by the injury to or destruction of property or natural resources by the oil spill. If housing was not available and Claimant's contractors had to bring in temporary housing, these costs were the result of intervening factors as well. The fact that rental property filled up with response personnel and other visitors to the area does not make Claimant's costs to rent other housing compensable. Further, as stated before, the delays were not caused by the spill, but by the absence of appropriate tug and barge equipment, so any additional housing costs caused by these delays are also not a direct result of the spill.

Based on the foregoing, this claim is denied because the Claimant failed to present its claim within the statute of limitations for damage claims, 33 USC 2712(h)(2), and the alleged losses are the result of other intervening causes and not directly due to the injury to, destruction of, or loss of property or natural resources as a result of a discharge or substantial threat of discharge of oil.

Claim Supervisor: [redacted]

Date of Supervisor's Review: ***11/3/14***

Supervisor's Action: ***Denial Approved***

Supervisor's Comments:

[2] Claimant provided no contract to show the terms of their agreement, so it is unclear whether a contract was executed or breached.