

U.S. Department
of Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center

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16480

April 16, 2013

CERTIFIED MAIL Number: 7011 1570 0001 2445 2866

Thomas O. Melius
Regional Director, USFWS Midwest Region
5600 American Boulevard West, Suite 990
Bloomington, Minnesota 55437-1458

Re: Claim Number: E10527-OI03 - *Enbridge* Oil Spill Vegetation Assessment Survey

Dear Mr. Melius:

The National Pollution Funds Center (NPFC) has completed its review of the Department of the Interior's (DOI) claim for costs to implement its vegetation survey to assess damages resulting from the *Enbridge* oil spill (Claim Number E10527-OI03). We have determined that \$167,067 of the \$167,100 amount claimed is compensable under the Oil Pollution Act (OPA, 33 U.S.C. 2701 *et seq.*) and the OPA regulations (33 C.F.R. §136 and 15 C.F.R. 990 *et seq.*). The basis of our decision follows.

Summary of the Incident and Claim

On or about July 26, 2010, a 30-inch diameter pipeline owned by Enbridge Energy, Limited Partnership (Enbridge) ruptured near Marshall, Michigan, discharging over 840,000¹ gallons of crude oil into Talmadge Creek, which flows into the Kalamazoo River. Approximately 40 creek and river miles² were exposed to oil, with high water levels carrying oil beyond the river banks and into adjacent floodplains³. On July 27, 2010, the Environmental Protection Agency identified Enbridge as the owner and/or operator of the facility from which the discharge took place⁴.

Following the spill, DOI, along with the National Oceanic Atmospheric Administration (NOAA), state of Michigan, and tribal representatives⁵ began collecting data to assess the spill's impact on natural resources and recreational use of those resources in and near the

¹ <http://www.fws.gov/midwest/es/ec/nrda/MichiganEnbridge/>

² 2 miles of the Talmadge Creek and 38 miles of the Kalamazoo River

³ Over 4,400 acres of the surrounding land were flooded at the time of the discharge, (DOI claim letter to NPFC dated February 11, 2013), exposing emergent, scrub-shrub, forested wetland, and forested upland vegetative communities to oil.

⁴ <http://www.epa.gov/enbridgespill/ar/enbridge-AR-0004.pdf>

⁵ Nottawaseppi Huron Band of the Potawatomi and Match-E-Be-Nash-She-Wish Band of the Pottawatomi

creek and river. Specific efforts conducted jointly with Enbridge in August 2010⁶ and September 2011⁷ assessed the plant communities that were potentially affected by the discharged oil and associated response activities⁸.

Based on information from the initial August 2010 and September 2011 assessments showing injury, or potential injury, to shoreline habitats and river resources from exposure to oil and continuing response efforts⁹, as well as lost human use of those resources from river closures imposed following the spill, the trustees initiated restoration planning under OPA to assess and restore damages resulting from this incident¹⁰. As part of this overall effort, DOI developed a Vegetation Assessment Survey Work Plan focused on assessing plant communities that were adversely affected by oiling and response activities.

Enbridge declined to participate in or fund this effort.

On February 12, 2013, DOI presented a claim to the NPFC for \$167,100 to implement its Vegetation Assessment Survey Work Plan. The NPFC notified Enbridge on February 15, 2013¹¹ that this claim was received, and the NPFC would proceed to adjudicate it based on OPA and the OPA claims regulations. Enbridge acknowledged receipt of the NPFC's letter on March 15, 2013¹². The remainder of this determination presents the NPFC's analysis and findings with respect to this claim and the OPA claims requirements.

Jurisdictional Information

The NPFC first considered whether the claimed damages arose from an incident as defined by OPA. 33 U.S.C. 2701 *et seq.* To be covered, the incident must involve a discharge of oil or a substantial threat of discharge of oil from a vessel or facility into navigable waters of the United States after August 18, 1990. Based on the information submitted by DOI with the claim record, as summarized above, the NPFC finds that this claim is for natural resource damages resulting from an OPA incident.

Claimant Eligibility

Federal natural resource trustees are designated by the President, pursuant to OPA (33 U.S.C. §2706 (b)(2)), with responsibility to assess natural resource damages for natural resources under their trusteeship and shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources under their trusteeship. 33 U.S.C. §§ 2706(c)(1)(A) and (C). Natural resource

⁶ DOI Final 2012 Vegetation Assessment Survey Work Plan, Section 1

⁷ The September 2011 vegetative assessment survey included a more intensive characterization of the plant communities present, used multiple assessment methods, and included study sites that were selected to address the different types of response actions.

⁸ Response actions identified by DOI with potential adverse impacts to natural resources include: removal of vegetation, disturbance (i.e., trampling, compacting, and/or scraping and/or removing soil and organic matter)

⁹ <http://www.epa.gov/enbridgespill/ar/enbridge-AR-1152.pdf>

¹⁰ <http://www.fws.gov/midwest/es/ec/nrda/MichiganEnbridge/pdf/EnbridgeNOIMarch2012.pdf>

¹¹ Letter from NPFC to Enbridge dated February 15, 2013

¹² Letter from Enbridge to NPFC dated March 15, 2013

damages include the reasonable cost of assessing the damages. 33 U.S.C. § 2706(d)(1)(C). Pursuant to 33 C.F.R. §136.207, natural resource trustees may present claims to the Oil Spill Liability Trust Fund (OSLTF) for uncompensated natural resource damages, which include the reasonable cost of assessing those damages.

This claim for natural resource damage assessment costs was submitted by DOI on behalf of themselves and NOAA. DOI, under the authority of the Secretary of the Interior, and NOAA, under the authority of the Secretary of Commerce, are appropriate federal natural resource trustees pursuant to the President's designation of federal trustees under OPA, Executive Order 12777 (56 Fed. Reg. 54757, October 22, 1991), and Subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan (40 C.F.R. §300.600).

Claimant's Burden of Proof and Adherence to NRDA Regulations

Under OPA, trustees bear the burden of proving their entitlement to the amount claimed for compensation of natural resource damages. 33 C.F.R. §136.105. Any determination or assessment of damages to natural resources for the purposes of OPA by a trustee in accordance with the regulations at 15 C.F.R. Part 990 shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act. 33 U.S.C. §2706 (e)(2) and 15 C.F.R. §990.13.

After reviewing the claim and supporting documents, the NPFC finds that DOI followed 15 C.F.R. 990 *et seq.* Specifically, they coordinated actions with other trustees to ensure no double recovery of damages, issued a notice of intent to conduct restoration planning, invited Enbridge to participate in the natural resource damage assessment, prepared a plan that was reviewed by the public, and are maintaining an administrative record that is available for public review¹³.

General Claim Presentment Requirements

Claims to the Fund must be presented in writing to the Director, NPFC, within three years after the date on which the injury and its connection with the incident in question were reasonably discoverable with the exercise of due care, or within three years from the date of completion of the natural resource damage assessment under OPA (33 U.S.C. §2706(e)), whichever is later. 33 U.S.C. §2712(h)(2), 33 C.F.R. §136.101(a)(1)(ii). This claim is for costs to implement DOI's plan to assess potential injuries to vegetative communities resulting from the incident and response to the incident. The assessment was not complete when the claim was received on February 13, 2013; therefore, the claim was received within the period of limitations for claims.

Natural resource damage claims presented to the NPFC must be based on a plan that the public has had an opportunity to review. 33 U.S.C. §2706(c)(5). On January 7, 2013, DOI

¹³ <http://www.fws.gov/midwest/es/ec/nrda/MichiganEnbridge/adminrecord.html>

published its plan on the U.S. Fish and Wildlife Service's Enbridge Oil Spill Natural Resource Damage and Restoration webpage^{14,15}, thereby meeting this requirement.

Claim Presentment to the Responsible Party

With certain exceptions, claims to the NPFC for damages must be presented first to the responsible party (RP). 33 U.S.C. §2713(a). If a claim is presented in accordance with §2713(a) and the claim is not settled by any person by payment within 90 days after the date upon which the claim was presented, the claimant may elect to commence an action in court or present the claim to the OSLTF. 33 U.S.C. §2713(c)(2).

On July 26, 2012, DOI presented their Vegetation Assessment Survey Work Plan and claim for implementation costs to Enbridge¹⁶. The plan identified survey objectives, the potential types of vegetation injuries and injury pathways resulting from oil exposure and response actions, survey sites, methods, and costs totaling \$167,100. On October 10, 2012, Enbridge declined to pay, stating that "further collection of data was unnecessary because sufficient data already existed that would allow the trustees to establish a recovery timeline, quantify lost services, and evaluate a compensation plan"¹⁷.

On February 12, 2013, more than 90 days after presenting Enbridge with its assessment plan and claim for implementation costs, and after Enbridge declined payment, DOI presented a claim to the NPFC for funds to implement its plan. Based on the above facts, the NPFC finds that the claim before the Fund was presented to Enbridge in accordance with OPA prior to presentment to the Fund.

NPFC Review of Claim and Associated Costs

Costs shall be determined under 33 U.S.C. § 2706(d)(1) with respect to plans adopted under 33 U.S.C. § 2706(c)(5). 33 U.S.C. § 2706(d)(2). DOI claims \$167,100 to implement its Vegetation Assessment Survey Work Plan. The objective is to assess plant communities along the Kalamazoo River and Talmadge Creek that were adversely affected by oiling and response activities. Specific habitats include a mixture of emergent, scrub-shrub, and forested wetland vegetative communities, where exposure to oil and impacts of response actions have the potential to reduce ecological services that vegetative communities provide (e.g., habitat for birds and mammals), decrease biodiversity (e.g., number of different plant species found in the impacted area), and/or increase the risk of colonization by non-native plants.

¹⁴ Email from Kim Mitchell (DOI) to Stephanie Millsap (DOI) on January 7, 2013 confirming plan was posted on the webpage. This correspondence was provided to the NPFC via email from DOI to NPFC on February 27, 2013.

¹⁵ <http://www.fws.gov/midwest/es/ec/nrda/MichiganEnbridge/pdf/VegAssessSurveyWorkPlan23July2012.pdf>

¹⁶ Letter dated July 26, 2012 from DOI to Enbridge transmitting their Final 2012 Vegetation Assessment Survey Work Plan

¹⁷ Letter from Enbridge to DOI dated October 10, 2012

The proposed survey will be conducted in 2013¹⁸. Consistent with the 2011 survey, four methods will be employed at specific impact and reference sites: (1) direct measurements of percent plant cover, stem height, and stem density; (2) visual assessment of wetlands function based on hydrologic conditions, presence of invasive species, and habitat and soil alterations (using Michigan Rapid Assessment Method (MiRAD)); (3) visual assessment of native plants to assess plant diversity (using modified Floristic Quality Assessment (FQA) procedures); and (4) visual assessment of the presence of invasive species (using the protocols developed for the initial 2010 assessment), as a means of identifying potential sites for compensatory restoration.

Information from the four methods will be compiled in a draft report, allowing future efforts to measure the physical characteristics¹⁹ and plant diversity²⁰ of injured habitats as compared to non impact, or reference sites²¹. This information will then be used in a Habitat Equivalency Analysis (HEA) model^{22,23} to quantify injury and determine the amount of restoration necessary to compensate for the loss of habitat and habitat services due to the spill. Information from assessment of invasive species will be used to identify potential areas that could be targeted for restoration to compensate for the lost habitat and habitat services.

DOI claims \$167,100 to implement the four assessment methods described in their Vegetative Assessment Survey. Claimed costs are \$136,807 for contractor labor, travel, and supplies, and \$30,260²⁴ for agency²⁵ labor²⁶ and travel. Contract labor costs are to prepare for and conduct field work, develop datasheets and maps, travel to the sites, compile and summarize field data, prepare a summary report, and project oversight for a total of 1,161 hours²⁷.

The NPFC finds that the sum of costs presented in DOI's claim budget for contractors and agencies totals \$167,067 (i.e., \$136,807 for contractor labor, travel, and supplies, and \$30,260 for agency²⁸ labor and travel), an amount that is \$33 less than the claimed amount of \$167,100. Thus, \$33 is not supported by claim documentation or OPA-compensable.

¹⁸ The plan presented to the NPFC indicates that work would take place in 2012. As a result of delays caused, in part, by Enbridge's decision to not continue to fund DOI's vegetation assessment efforts, implementation will begin in early 2013.

¹⁹ This includes (1) measurements of percent plant cover, stem height, and stem density; (2) assessment of wetlands functional value based on hydrologic conditions, surrounding land use, presence of invasive species, and habitat and soil alterations

²⁰ Phone conversation with Stephanie Millsap on April 5, 2013 where she explained the importance of the FQA study.

²¹ Where baseline data does not exist DOI will use conditions within reference areas as surrogates to represent baseline conditions.

²² Habitat Equivalency Analysis is a means to determine the amount of compensatory restoration required to provide services that are equivalent to the interim loss of natural resource services following an injury.

²³ Phone conversation with Stephanie Millsap on March 27, 2013

²⁴ DOI (\$19,900) and NOAA (\$10,360)

²⁵ DOI and NOAA

²⁶ One field expert (NOAA) and two field technicians (DOI)

²⁷ Contract staff includes two experts with a PhD in botany or ecology, three intermediate experts with an MS in botany or ecology, and one field technician with a bachelor's degree.

²⁸ DOI and NOAA

During adjudication of this claim, the NPFC reviewed the response that Enbridge provided to DOI, declining to pay the cost to implement DOI's Vegetative Assessment Survey, specifically that implementation of the vegetation study as presented is not reasonable or necessary because sufficient data has already been collected²⁹. DOI addresses this concern in their claim to the NPFC. Specifically, DOI states that additional data is needed because: (1) Several of the study sites had response actions taken after the 2011 vegetation assessment was conducted and that may have resulted in additional impacts to vegetation. Additional sampling will allow Trustees to evaluate the extent of losses and recovery subsequent to new disturbances; (2) Many of the study sites had less than a year of recovery time after response actions were taken because the data was collected in 2011. Further recovery is likely to take longer than two years in areas where woody vegetation (including shrubs) was cut. Additional sampling will allow Trustees to develop recovery rate trajectories, rather than projections based on only a few months of recovery time; and (3) The Enbridge *2011 Shoreline and Floodplain Assessment Study* relied on cited literature to draw comparisons between vegetation recovery from natural disturbances and vegetation resilience to impacts of response actions and concluded that surveyed habitat types are recovering in a manner consistent with trends in the literature. Trustees believe these conclusions are inappropriate because it is unclear that the cited literature reflects the conditions, habitat types and impacts that occurred in the assessment area; therefore, these values may not be relevant. Further, even if the cited literature were appropriate for the assessment area, the cited literature indicates that multiple growing seasons are required for habitat recovery. Based on the above, the Trustees believe that additional sampling will allow DOI to develop a more reliable estimate of the duration of injury and rate of recovery and the evaluate the extent of the damages.

After reviewing the claimed activities and costs, the NPFC finds that: (1) DOI's assessment approach to determine injuries to vegetative communities is capable of providing assessment information of use in determining the type and scale of restoration appropriate for this incident and are reliable and valid for the particular incident (therefore, meeting the standards for assessment procedures under 15 C.F.R. §990.27, and (2) it is not unreasonable to conduct additional assessment efforts in 2013 given continuing response actions that have the potential to cause additional natural resource injuries, and (3) claimed costs of \$167,067 are reasonable and appropriate, given the scale of the incident, need for assessment, and work proposed. 33 U.S.C. §2706 (d)(1)(C), 33 C.F.R. §136.211.

Revolving Trust Fund and Return of Unused Funds to the OSLTF

As established by OPA (33 U.S.C. §2706(f)) and NRDA regulations (15 C.F.R. §990.65), sums recovered by trustees for natural resource damages must be retained by the trustees in a revolving trust account. The compensation for this claim will be placed in DOI's trustee restoration account: the Natural Resource Damage Assessment and Restoration Fund (NRDAR Fund). All sums must be used to implement the approved Assessment Plan, as approved by this determination. All unused funds shall be returned to the OSLTF in a timely basis and no later than six months from the completion of the proposed work as

²⁹ Letter from Enbridge to DOI dated October 10, 2012

described in this determination in accordance with 15 C.F.R. §990.65 and 33 U.S.C. § 2706(f).

Cost Documentation, Progress Reporting, and Final Report

As the claimant, DOI shall ensure that all expenditures of OSLTF funds are documented appropriately and spent according to the plan as approved in this determination. Any funds not spent or appropriately documented shall be returned to the Fund.

One year from the date of this determination, and annually thereafter, DOI shall provide the NPFC with a report on the status of implementation and expenditures. These annual progress reports should include:

1. Certification by DOI that all assessment activities have been conducted in accordance with the plan as approved in this determination;
2. A progress report that includes a description of work accomplished, timeline for future activities, and any unexpected problems incurred during implementation;
3. A summary of expenditures by category (i.e., labor, consultant/contractors, and travel); and
4. A narrative description of the work accomplished by each individual and how that work fits into the overall progress for the year. Enough detail should be included to determine reasonableness of costs for each employee when cost documentation is received with the final report.

In addition to annual reports DOI shall submit a final progress report within 120 days of the date that plan implementation is complete. This report should include:

1. Certification by DOI that all expenditures of OSLTF funds were in accordance with the plan as approved by the NPFC;
2. A summary of findings;
3. Copies of final reports and/or studies;
4. Documentation of OSLTF funds remaining in the Revolving Trust Fund for this claim, including account balance and interest earned; and
5. Documentation of all expenditures as follows:
 - a. Labor: For each employee –
 - i. A narrative description of the work accomplished by each individual and how that work fit into the plan. Enough detail should be included to determine reasonableness of costs; and
 - ii. The number of hours worked, labor rate, and indirect rate. An explanation of indirect rate expenditures, if any, will be necessary;
 - b. Travel: Paid travel reimbursement vouchers and receipts;
 - c. Contract: Activities undertaken, lists of deliverables, and contract invoices and receipts;
 - d. Purchases/Expendables: Invoices and receipts, along with an explanation of costs; and
 - e. Government Equipment: Documentation of costs, including the rate (i.e. hourly, weekly) and time for all equipment used for which costs were incurred.

With the final report(s), the NPFC will reconcile costs and all remaining funds and/or inadequately documented costs will be returned to the OSLTF by DOI.

The NPFC has prepared a standardized template with detailed instructions to facilitate annual progress and final cost reporting. These templates are provided on the compact disc included with this determination.

Conclusion

The NPFC has reviewed the claim submitted by DOI for costs to assess damages to vegetative communities resulting from the *Enbridge* oil spill in accordance with OPA (33 U.S.C. 2701 *et seq.*) and its implementing regulations (15 C.F.R. 990 *et seq.* and 33 C.F.R. §136). We have determined that \$167,067 is compensable to fund activities in the plan. This offer constitutes full and final payment for costs associated with this damage assessment plan.

If you accept this offer, please complete the enclosed Acceptance/Release Form and return to:

Director (cn)
National Pollution Funds Center
U.S. Coast Guard Stop 7100
4200 Wilson Boulevard, Suite 1000
Arlington, VA 20598-7100

If we do not receive the signed original Acceptance/Release Form within 60 days of the date of this letter, the offer is void. If the settlement is accepted, your payment will be mailed within 30 days of receipt of the Release Form. Please provide account information and instruction for the transfer of funds to your trustee account when you submit the Release Form.

If you have any questions regarding this determination, please feel free to contact me at 703-872-6055.

Sincerely,



Fredy Hernandez
Claims Manager
Natural Resource Damage Claims Division

- Encl: (1) Acceptance/Release Form
(2) Compact Disc with standardize template and instructions to facilitate annual progress and final cost reporting

U.S. Department
of Homeland Security

**United States
Coast Guard**



Director
United States Coast Guard
National Pollution Funds Center

U.S. Coast Guard Stop 7100
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Claim Number: E10527-OI03	Claimant Name: Department of the Interior
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On February 12, 2012, DOI presented a claim to the Oil Spill Liability Trust Fund (OSLTF or the Fund) in the total amount of \$167,100 for upfront costs to implement their vegetation assessment survey plan to assess potential damages to vegetation communities resulting from the discharge of oil on or about July 26, 2010, from a pipeline owned by Enbridge Energy (the *Enbridge* oil spill).

DOI accepts the settlement offer of \$167,067 as full compensation for the cost to assess damages to vegetation communities as described in the April 16, 2013 determination (E10527-OI03).

DOI agrees to provide annual and final reports to the NPFC as directed in the determination. DOI agrees to comply with 33 U.S.C. §2706(f) and 33 C.F.R. §136.211 by depositing into a revolving trust account the amounts awarded in the April 16, 2013 determination and any amounts in excess of those required for these reimbursements to accomplish the assessment studies approved in the determination shall be deposited to the OSLTF.

DOI hereby assigns, transfers, and subrogates to the United States all rights, claims, interest and rights of action, that it may have against any party, person, firm or corporation that may be liable for the loss. DOI authorizes the United States to sue, compromise or settle in the name of DOI and that the NPFC be fully substituted for DOI and subrogated to all DOI rights arising from the April 16, 2013 determination.

DOI acknowledges that the United States anticipates the pursuit of legal actions associated with the *Enbridge* incident but warrants that no settlement will be made by any person on behalf of DOI with any other party for costs that are the subject of the claim against the OSLTF and DOI will cooperate fully with the NPFC in any claim and/or action by the United States against any person or party to recover the compensation paid by the OSLTF. The cooperation shall include but not be limited to, immediately reimbursing the OSLTF any compensation received from any other source for the same claim, and providing any documentation, evidence, testimony, and other support, as may be necessary for the NPFC to recover from any other party or person

DOI certifies that to the best of its knowledge and belief the information contained in this claim represents all material facts and is true, and understands that misrepresentation of facts is subject to prosecution under federal law, including but not limited to 18 U.S.C. §§287 and 1001.

FOR THE DEPARTMENT OF THE INTERIOR

Thomas Melius
Regional Director, USFWS Midwest Region

Date