

MEMORANDUM OF UNDERSTANDING

among

the State of Michigan,

acting through

the Department of Natural Resources and Environment,

and the Department of Attorney General;

the United States Department of Interior,

acting through the Fish and Wildlife Service and

the Bureau of Indian Affairs;

and the United States Department of Commerce

acting through the National Oceanic and Atmospheric Administration;

the Nottawaseppi Huron Band of the Potawatomi; and

the Match-E-Be-Nash-She-Wish Band of Potawatomi

REGARDING NATURAL RESOURCE DAMAGE ASSESSMENT

AND RESTORATION FOR THE

ENBRIDGE PIPELINE OIL SPILL

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## MEMORANDUM OF UNDERSTANDING

### I. INTRODUCTION

This Memorandum of Understanding (MOU) by and among the State of Michigan (State), acting through its co-trustees for natural resources, namely the Director of the Michigan Department of Natural Resources and Environment (MDNRE) and the Attorney General of the State of Michigan (MDAG), respectively; The Nottawaseppi Huron Band of the Potawatomi (Huron Tribe), The Match-E-Be-Nash-She-Wish Band of the Potawatomi (Gun Lake Tribe), the United States Department of the Interior (DOI), acting through its representatives, the Fish and Wildlife Service (Service) and Bureau of Indian Affairs (BIA); and the United States Department of Commerce, acting through the National Oceanic and Atmospheric Administration (NOAA), all of whom are collectively referred to as the “Trustees,” is entered into to ensure the coordination and cooperation of the Trustees in assessing damages for injuries to natural resources and natural resource services resulting from the discharge of oil into navigable waters including Talmadge Creek and the Kalamazoo River, Calhoun and Kalamazoo Counties, Michigan beginning on or about July 26, 2010 (the Spill), and the application of any damages recovered toward the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources (hereinafter referred to as natural resource damages (NRD)). In addition, this MOU is intended to ensure coordination of Trustee concerns and activities with removal, remedial, corrective or other response actions carried out by others in an effort to abate and/or minimize continuing and residual injury and to achieve or enhance restoration of injured natural resources.

## II. PARTIES

### A. State, Federal and Tribal Natural Resource Trustees

The following officials, or their designees, who are natural resource Trustees designated pursuant to 40 C.F.R. Part 300-Subpart G, are parties to this MOU, and act on behalf of the public under this MOU:

1. The Director of Michigan Department of Natural Resources and Environment.
2. The Attorney General of the State of Michigan.
3. The Regional Director of Region 3 of the U.S. Fish and Wildlife Service, as Authorized Official for the Department of the Interior who represents the interests of DOI including its participating bureaus, the Service and BIA.
4. The Director, Office of Response and Restoration, NOAA, acting on behalf of the Secretary of Commerce.
5. The Tribal Council Chairperson of the Nottawaseppi Huron Band of the Potawatomi Tribe.
6. The Tribal Chairman of the Match-E-Be-Nash-She-Wish Band of the Potawatomi (Gun Lake) Tribe.

### B. Additional Trustees

Any natural resource trustee designated pursuant to 40 C.F.R Part 300-Subpart G that is not a party to this MOU and that has a natural resource interest shall not be precluded from exercising its authority as a natural resource trustee or cooperating in the natural resources damage assessment process. Additional trustees may join this MOU through a modification as described in Section X.

### **III. PURPOSE**

The purpose of this MOU is to provide a framework for the coordination and cooperation of the Trustees in the assessment of damages for injuries to natural resources resulting from the discharge of oil at and from the Spill, the recovery of such damages, and the use of any damages recovered to restore, rehabilitate, replace and/or acquire the equivalent of the injured natural resources. In addition, this MOU is intended to ensure coordination of Trustee concerns and activities with removal, remedial, corrective or other response actions carried out by others in an effort to abate and/or minimize continuing and residual injury and to achieve or enhance restoration of injured natural resources.

### **IV. AUTHORITY**

The Trustees enter into this MOU in accordance with the natural resource trustee authorities provided for each Trustee under Section 1006 of the Oil Pollution Act (OPA) of 1990, as amended, 33 U.S.C. § 2706, Section 311(f) of the Clean Water Act (CWA), as amended, 33 U.S.C. § 1321(f), as amended, and other applicable federal, state, and tribal laws and authorities including, but not limited to, the Natural Resource Damage Assessment Regulations, 15 C.F.R. Part 990, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), as amended, 40 C.F.R. Part 300, and the Michigan Natural Resources and Environmental Protection Act 451 of 1994, as amended (NREPA).

### **V. ORGANIZATION**

#### **A. Trustee Council**

The Trustees hereby agree to form the Enbridge Pipeline Oil Spill Trustee Council (Trustee Council) to implement the provisions of this MOU. Being duly formed, the Trustee

Council agrees to designate the Service as the Lead Administrative Trustee (LAT) to coordinate its activities with and act under the direction of the Trustee Council. The Trustee Council may designate a subsequent LAT at the Trustee Council's discretion. The Trustee Council also agrees to create subcommittees when necessary to accomplish the purposes of this MOU.

**B. Council Representatives**

Each Trustee shall appoint one primary representative and one alternate representative to the Trustee Council. No later than twenty (20) working days after the final execution of this MOU, or following a change in any Trustee's primary or alternate representative, each Trustee shall notify the other Trustees of relevant contact information for that Trustee's primary and alternate representatives as well as their legal advisors, to include: name, address, phone number, e-mail address, and facsimile number.

**C. Advisors**

As determined to be appropriate by the Trustees, or as required and/or permitted by applicable law, the Trustees will coordinate with and seek advisory participation of appropriate federal, state and local agencies and the public.

**VI. DUTIES AND RESPONSIBILITIES**

**A. Trustee Council**

On behalf of the Trustees, the Trustee Council shall coordinate and authorize all Trustee activities and matters under this MOU in accordance with the decision-making requirements contained in Section VII. The Trustee Council may take whatever actions the Trustee Council, in its discretion, determines are necessary to fulfill the responsibilities of each Trustee under, and to accomplish the purposes of, applicable federal and state law. In order to address the Trustees'

responsibilities, it is expected that the Trustee Council, in accordance with applicable laws and policies, may take actions, including, but not limited to, the following:

1. Conduct scientific and technical studies, sampling, and other matters related to the assessment of damages for injuries to natural resources that may be or have been lost, injured or destroyed.
2. Seek compensation from the responsible party or parties for the natural resource damages assessed by the Trustees. In recognition of the Congressional intent under OPA and the CWA and the legislative intent under NREPA to restore natural resources injured as a result of discharges of oil, the measure of recoverable natural resource damages contemplated under this MOU may include:
  - a. The costs of restoring injured natural resources,
  - b. Interim lost use or diminution of value of the injured natural resources pending natural recovery or restoration of the injured natural resources,
  - c. Reasonable costs of the assessment of natural resource damages and restoration, to include past assessment and related costs incurred during the response phase and
  - d. Trustee oversight costs associated with administering or implementing restoration projects for injured natural resources. This may include documented Trustee costs of participation in removal, remedial, corrective or other response actions carried out by others in an effort to abate and/or minimize continuing and residual injury, and to achieve or enhance restoration of injured natural resources.
3. Communicate with the public and encourage public review and comment on assessment and restoration planning.



4. Participate in negotiations with the responsible party and its agents consistent with Paragraph D below.
5. Supervise, manage and obligate any money paid to the Trustees by or on behalf of the responsible party or parties for the purpose of assessing, restoring, replacing, rehabilitating and/or acquiring the equivalent of the affected natural resources.
6. Conduct and/or oversee the development and implementation of a plan for restoring, replacing, rehabilitating and/or acquiring the equivalent of the affected natural resources and/or the services provided by those resources.
7. Arrange for one or more contracts with professional consultants, technical or otherwise, that the Trustee Council determines are necessary and best qualified to provide services for the Trustee Council.
8. Coordinate Trustee concerns and activities relating to affected natural resources with the removal, remedial, corrective or other response actions carried out by other federal and state agencies in an effort to abate and/or minimize continuing and residual injury and to achieve or enhance restoration of injured natural resources.
9. Execute additional agreements, as necessary, to carry out the duties and responsibilities of this MOU.

**B. Lead Administrative Trustee (LAT)**

The LAT will provide a Trustee Coordinator to perform administrative activities. The selection of the Trustee Coordinator will be subject to approval of the Trustee Council. The duties of the Trustee Coordinator shall include, but are not limited to:

1. coordinating, monitoring, and reporting on the progress of the natural resource damage assessment process;
2. scheduling of meetings of the Trustee Council, notifying members of those meetings on a timely basis, and preparation of agendas for those meetings;
3. acting as a central contact point for the Trustee Council;
4. managing and maintaining documents designated for inclusion in the Administrative Record by the Trustee Council in accordance with applicable federal and state law and guidance;
5. coordinating with the National Pollution Funds Center to establish access to the Oil Spill Liability Trust Fund for NRD activities;
6. overseeing the development of a cost documentation policy applicable to the Trustees' actions under this MOU;
7. and other such duties as may be directed by the Trustee Council.

The Trustee Coordinator will be responsible for informing other Trustees of all pertinent developments on a timely basis. The LAT may delegate any of its duties to another Trustee, with the permission of that Trustee.

**C. Documentation of Assessment and Restoration Costs**

Each Trustee is responsible for tracking and documenting the costs and expenses it incurs as a result of its participation in the natural resource damage assessment and restoration process under this MOU in a form and manner sufficient to support the recovery of such costs under OPA, CWA, or other applicable federal, state, or tribal law and authorities. The documentation of such costs will, at a minimum, (i) evidence the actual time spent, by date, and the hourly salary rate applicable to each agency participant; (ii) identify all indirect or overhead rates used

in determining costs, including the manner of their application; and (iii) include evidence (such as invoices or receipts) of all contract costs or other expenditures presented for payment. Each Trustee will be responsible for the accuracy of the assessment costs it reports or presents for payment under this MOU. No Trustee is to certify or warrant any assessment or restoration cost information other than its own.

**D. Notification of Negotiations with the Responsible Party (RP)**

The Trustees and the Trustee Council members agree that they will coordinate communications with the RP or its agents for matters related to the natural resource damage assessment and restoration for this Site. No Trustee will discuss these matters with the RP or its agents without first providing the other Trustees with reasonable notice, but not less than seven (7) days, and an opportunity to participate in such discussions as appropriate. While every effort will be made to provide the other Trustees with notice of communications with the RP or its agents, the above agreement shall not preclude a Trustee from having separate communications with the RP or its agents on matters within the scope of this MOU where circumstances warrant, provided that each Trustee notifies the other Trustees of the person contacted and summarizes the subject of the communications.

**VII. DECISION-MAKING**

**A. Approval**

1. Except as provided in paragraphs 2. and 3. of this subsection, the Trustees agree that all decisions implementing an action taken pursuant to this MOU shall require unanimous approval. Each party to this MOU shall have one vote that shall be cast by the party's primary representative, or in the absence of the primary representative, by the alternate representative.

2. Reasonable efforts will be made to obtain the vote of all Trustees on decisions undertaken pursuant to this MOU. In the event that a party/parties is unavailable to vote, the LAT or his/her designee will provide fourteen (14) days written notice to the absentee Trustee(s) that a vote will be called. The Trustees agree that a vote undertaken following 14 days written notice to the absentee Trustee(s) shall only require a consensus of a quorum of the Trustees. A quorum shall consist of at least five Trustees for any such vote.
3. Any absentee Trustee may participate in a vote through the submission of a proxy. For purposes of this MOU, a proxy is defined as a written authorization by an absentee Trustee instructing another Trustee on how it should vote for the absentee Trustee.
4. The Trustees acknowledge that a Trustee may wish to limit its involvement in certain aspects of the NRDA process. To avoid delaying the work of the Trustee Council as a whole, and to maximize the efficiency of Trustee assessment efforts, a Trustee may limit its involvement in the NRDA process by notifying the Trustee Council in writing, and in a timely manner, of those NRDA activities for which the Trustee would like to limit or end its participation. The approval of a decision implementing a provision of this MOU will not be required by any Trustee that notifies the Trustee Council in writing that it will not participate in such decision or activity on which such decision is based.

**B. Dispute Resolution**

In the event of a dispute involving any decisions under this MOU, the Trustee Council representatives shall initially attempt to resolve the dispute through good faith discussions

directed toward obtaining consensus among the Trustee representatives involved in the dispute and consensus by the Trustee Council as a whole. If unanimous consent still cannot be reached after good faith discussions, the matter shall be elevated to the management of the Trustee representatives for decision or further instructions. If necessary, the Trustees may establish other mechanisms by which disputes may be resolved.

**C. Intent**

The Trustees further agree that decision-making deliberations will focus upon the Trustees' mutual purpose of assessing, restoring, rehabilitating, replacing and/or acquiring the equivalent of the injured natural resources, rather than upon control or respective trusteeship over those resources.

**D. Recording**

All decisions agreed to by the Trustee Council shall be recorded in writing, either by resolutions signed by the Trustee Council or in minutes that are approved as to content and form by the Trustee Council.

**VIII. CONFIDENTIALITY**

**A. Data**

The Trustees agree that it is in the public interest that, consistent with applicable law, all validated scientific data arising out of their review of injuries to natural resources as a result of the discharge of oil are to be made available to the public. Therefore, consistent with applicable law, such data shall be made public as soon as publication will not prejudice the accomplishment of the purposes of this MOU as agreed to by the Trustees. Public sharing of validated scientific data will be the general policy of the Trustees.

**B. Communications and Work Products**

The Trustees recognize that all written or oral communications related to the assessment and recovery of damages for injuries to natural resources is being undertaken in anticipation of litigation. Accordingly, all written and oral communications and work products will be treated as either privileged attorney-client communications, attorney work product or protected by other applicable privilege (or a combination thereof), as appropriate, and will be protected from disclosure to the maximum extent possible under applicable federal or state law. The transmittal of any designated privileged documents or designated privileged communication between or among any of the Trustees or federal or state response action agencies or other federal, state or tribal Trustees (and their counsel, representatives, contractors, and consultants) does not waive, or imply any waiver of, any privilege or right which the transmitting government may assert with respect to that document or communication.

Except as provided in this Section VIII., no party shall release to a non-party any information, documents or communications which is/are developed and exchanged pursuant to this Agreement. If a party determines that it needs to share such information, documents or communications with one or more of its contractors or subcontractors in order to assist that party in this natural resource damage assessment, it may do so. Any such contractor or subcontractor will be informed of the terms of, and agree to be bound by, this Agreement before receiving any such information, documents or communications. Such information, documents or communications exchanged or disclosed by the parties pursuant to this Agreement shall be disclosed only to those employees of a party who, in the discretion of such party, require access to such information, documents or communications for the performance of their official duties.

The Trustees further agree that whenever a request for production of such a record is received pursuant to any applicable federal or state law, the request will be forwarded for consultation with the Trustee or Trustees to which the privilege applies or whose representatives originally generated or contributed the record requested. Nothing contained herein shall be construed as prohibiting or restraining the Trustees or the Trustee Council from agreeing to release any record or from disclosing any record for which disclosure is required by law. Nothing in this Agreement shall be construed to prevent the Trustees from complying with the Freedom of Information Act (FOIA), 5 U.S.C. § 552, or the Michigan Freedom of Information Act, MCL 15.231 *et seq.*, and applicable federal rules and regulations implementing FOIA.

This Agreement shall not be construed to prohibit the disclosure of documents or information already lawfully in the public domain.

#### **IX. PUBLIC STATEMENTS**

Except as stated above, the Trustees agree that they will not make public representations about the legal or factual positions of another Trustee unless agreed to in writing. However, the Trustees affirm that the general terms of this Agreement may be discussed. This Agreement, once executed, shall not be confidential.

#### **X. PUBLIC PARTICIPATION**

The Trustees recognize and agree that public participation during the injury assessment and restoration planning process is both desirable and necessary. The Trustees further recognize that the Federal Trustees are required by law to give public notice and to solicit public review and comment during certain phases of the injury assessment and restoration planning process. The Federal Trustees will undertake public outreach and will provide public notice and solicit public

review of and comment on the documents the Federal Trustees deem appropriate. Costs associated with public outreach constitute reasonable assessment costs.

#### **XI. RESERVATION OF RIGHTS**

Except for the confidentiality agreement contained in Section VIII, the Trustees understand that this document is not intended to create any further legal rights or obligations between the Trustees, their Trustee representatives, or any other persons not a party to this MOU.

Nothing in this Agreement is to imply, or operate in a manner, that any natural resource Trustee with an interest in the Spill, whether a party to this Agreement or not, is in any way abrogating or ceding any natural resource trustee responsibility or authority over natural resources which may have been affected by the Spill or agreeing to the existence and scope of Trustee responsibility or authority asserted by any Trustee with respect to such natural resources.

#### **XII. MODIFICATION OF AGREEMENT**

Modification of this MOU must be in writing and will become effective upon approval of all Trustees that are parties to the MOU at the time of modification.

#### **XIII. WITHDRAWAL**

In the event that any Trustee withdraws from the MOU, such withdrawal must be in writing and must be sent at least thirty (30) days in advance of the withdrawal. The Confidentiality provisions of this Agreement shall continue in effect as to each Trustee, regardless of withdrawal, until terminated by written agreement of all the Trustees. In the event of such withdrawal, this MOU remains in full force and effect for the remaining parties.



#### **XIV. TERMINATION**

This MOU shall be in effect from the date of execution until termination by agreement of the Trustees. At any time when the Trustees determine that the purposes underlying this MOU have been addressed, the MOU will be terminated.

#### **XV. ACCOUNTING**

In the event of the withdrawal of any Trustee(s) or the termination of this MOU, the Trustee(s) shall give a full and complete accounting to the Trustee Council of all natural resource damages jointly received, deposited, held, disbursed, managed, expended, or otherwise controlled by the Trustee(s) in any joint or separate account held pursuant to this MOU. A Trustee who withdraws shall return any unused and unobligated jointly received funds for natural resource damages that it controls to the remaining Trustees no later than ninety (90) days after the date of withdrawal from this MOU. If the MOU is terminated, the Trustees shall select an appropriate party or parties to whom to transfer any jointly received funds for natural resource damages and shall effect such transfer within one hundred twenty (120) days.

#### **XVI. LIMITATION**

Nothing in this MOU shall be construed as obligating the United States, the State or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law. This MOU also does not grant the Trustee Council or the LAT the authority to exercise any legal authority held by any Trustee other than as provided for in this MOU. Nor does this MOU authorize any Trustee to represent another Trustee in any litigation or settlement negotiations other than as provided for in this MOU.

## **XVII. THIRD PARTY CHALLENGES AND APPEALS**

The rights and responsibilities contained in this MOU are subject to the availability of funding and are intended to be guidance for the respective Trustees. They may not be the basis of any third party claims, defenses, challenges or appeals.

## **XVIII. EXECUTION**

This MOU may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOU. The date of execution shall be the date of the final Trustee's signature.

IN WITNESS WHEREOF the Trustees, through their authorized representatives, have executed this Agreement on the dates attested to below.

Enbridge Pipeline Oil Spill Memorandum of Understanding

MEMORANDUM OF UNDERSTANDING REGARDING NATURAL  
RESOURCE DAMAGE ASSESSMENT AND RESTORATION FOR  
THE ENBRIDGE PIPELINE OIL SPILL

FOR THE STATE OF MICHIGAN:



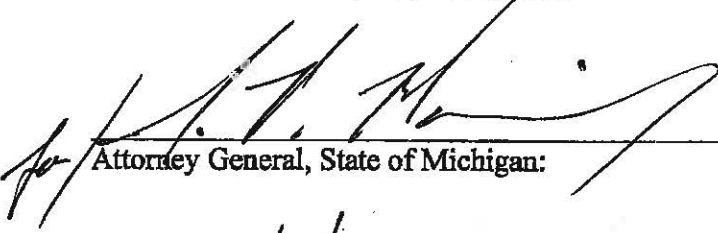
\_\_\_\_\_  
Director, Michigan Department of Natural Resources and Environment

DATE: 10/20/10

Enbridge Pipeline Oil Spill Memorandum of Understanding

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FOR THE STATE OF MICHIGAN:

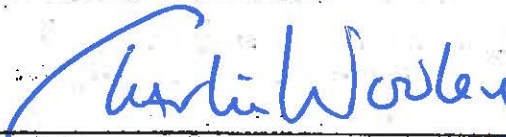


\_\_\_\_\_  
Attorney General, State of Michigan:

DATE: 11/4/10

**MEMORANDUM OF UNDERSTANDING REGARDING NATURAL  
RESOURCE DAMAGE ASSESSMENT AND RESTORATION FOR  
THE ENBRIDGE PIPELINE OIL SPILL**

**FOR THE UNITED STATES:**

*for*  **Charles M. Wooley**  
**Acting Regional Director**  
**Regional Director, Region 3, U.S. Fish and Wildlife Service,**  
**Authorized Official for the Department of the Interior.**

**DATE:** 11/5/10

Enbridge Pipeline Oil Spill Memorandum of Understanding

MEMORANDUM OF UNDERSTANDING REGARDING NATURAL  
RESOURCE DAMAGE ASSESSMENT AND RESTORATION FOR  
THE ENBRIDGE PIPELINE OIL SPILL

**FOR THE UNITED STATES:**



\_\_\_\_\_  
Director, Bureau of Indian Affairs

DATE: 10/18/2010

MEMORANDUM OF UNDERSTANDING REGARDING NATURAL  
RESOURCE DAMAGE ASSESSMENT AND RESTORATION FOR  
THE ENBRIDGE PIPELINE OIL SPILL

FOR THE UNITED STATES:



Director, Office of Response and Restoration,  
National Oceanic and Atmospheric Administration

DATE: October 12, 2010

RECEIVED

OCT 27 2010

OFFICE OF THE FIELD SOLICITOR  
PITTSBURGH, PA

Enbridge Pipeline Oil Spill Memorandum of Understanding

MEMORANDUM OF UNDERSTANDING REGARDING NATURAL  
RESOURCE DAMAGE ASSESSMENT AND RESTORATION FOR  
THE ENBRIDGE PIPELINE OIL SPILL

FOR THE TRIBE:



Tribal Council Chairperson, Nottawaseppi Huron Band of the Potawatomi

DATE: Oct 7, 2010



Enbridge Pipeline Oil Spill Memorandum of Understanding

MEMORANDUM OF UNDERSTANDING REGARDING NATURAL  
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THE ENBRIDGE PIPELINE OIL SPILL

**FOR THE TRIBE:**



\_\_\_\_\_  
Tribal Chairman, Match-E-Be-Nash-She-Wish Band of the Potawatomi

DATE: \_\_\_\_\_

12-3-10