

**Perspectives on
Achieving Cooperation
in Assessing Injury and
Planning the Restoration of
Natural Resources**

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I. Introduction

In December 1998, the ASTSWMO Natural Resources Damages (NRD) Focus Group met with industry representatives to assess the potential for use of a "cooperative NRD process" between Responsible Parties (RP) and Natural Resources Trustees ("Trustees"). This perspectives paper shares insights on positions and attitudes of RP gained by the NRD Focus Group. The presentation of RP positions and attitudes, however, should not be understood as an endorsement of those views by the Focus Group or ASTSWMO. The NRD Focus Group provides these positions and attitudes to point out the differences that need to be bridged in order to achieve cooperative NRD assessments.

II. Background

The Governors of each State were required by the Comprehensive Environmental Response, Compensation, Liability Act (CERCLA) to designate state Trustees for natural resources injured by releases of oil and hazardous substances. CERCLA provides authority for these natural resource Trustees to assess both the types and levels of impact caused to trust resources. One of the first, and most important, steps in obtaining restoration and compensation for injury to natural resources from the release of hazardous substances is the performance of the Natural Resource Damage Assessment (NRDA). RP typically prefer to resolve all environmental liabilities for releases at a site and therefore have focused more attention on the completion of NRDA's.

Under CERCLA, participation by RP in the assessment process is not required. Trustees are authorized to perform NRDA's independent of RP and to seek restoration and compensatory damages through CERCLA litigation. Adversarial approaches to NRDA's, however, have tended to slow the process, enhance uncertainties, and place scientific issues in the hands of lawyers and competing expert scientists. The ASTSWMO NRD Focus Group believes that a cooperative process between RP and Trustees in

performing NRDA's can provide a win-win alternative to the uncertainties of litigation. Cooperative assessments between RP and Trustees can be an efficient and effective approach to resolving liability for restoration at sites with releases of hazardous substances to the environment.

To assess the potential for the use of a "cooperative NRDA process" between RP and Trustees the ASTSWMO NRD Focus Group met with industry representatives in December 1998. The meeting agenda facilitated a free and civilized exchange of viewpoints. The result was considerable conversation and a much better understanding of Trustee and RP positions in NRD cases. The common goal of dealing more effectively and productively with NRD cases by engaging in a cooperative assessment process was furthered by these discussions and understandings.

The remainder of this perspectives paper discusses: (1) insights the Focus Group gained from this meeting that should be useful to Trustees and remediation managers in addressing NRD cases; (2) benefits to be achieved from a cooperative assessment process in determining natural resource damages; and (3) issues Trustees and remediation managers will face in negotiating cooperative assessments.

III. Insights

The following insights are intended to pass on insights gained by the NRD Focus Group members. The presentation of RP positions on one or more issues should not be understood as an endorsement of those positions by the NRD Task Force or ASTSWMO. The Focus Group provides these insights to point out the differences in positions and attitudes that need to be bridged in order to achieve cooperative NRD assessments. It needs to be kept in mind that for a cooperative NRD assessment to take place, both Trustees and Responsible Parties need to recognize the perspectives and pressures facing each other.

A. Institutional Differences

To constructively use suggestions offered by RP to improve the NRD assessment process, the differences between the institutions that RP and Trustees work for should be understood. Goals are different; expectations are different; and management and reporting requirements are different. The RP generally stated that the goal for their institutions is survival, which is a function of profit or the bottom line. Profit is then used to meet financial dividend responsibilities to shareholders and improve cash flow, market share expansion and competitive position - domestic and international. Trustees, on the other hand, have much different pressures. Although Trustees have a statutory responsibility to carry out the provisions of State and federal laws that provide for the NRD process and must answer to public sentiment and contend with political considerations, they do not face market share issues or have to answer to shareholder owners.

Like RP, trustees face budgetary constraints.

The RP representative normally undertakes a critical balancing act: how do I convince my management to volunteer to accept responsibility and the related costs? How can I explain to Management that cooperative NRD assessments are in the financial interest of the company? This task can be difficult, especially if RP management has little training in environmental issues. Trustees, on the other hand, have, as a clear component of their mission statements, the requirement "to protect the environment" and organizational employees are focused and trained to do so.

B. Accountability

RP also perceive a difference from Trustee organizations in perspectives on time and accountability within time periods. RP management usually requires, from staff, annual budgets in expected numbers, not prospective ranges. RP management looks at discrete numbers for future costs and liabilities to meet SEC filing requirements. Trustee NRD estimates that range by orders of magnitude do not fit well in reports and budgets.

The annual business report for RP is the basis for assessing the company's net worth, credit worthiness and investment potential. Any financial advantage which may have accrued from a past activity that is now restricted under current environmental regulations has no bearing on this year's annual report. RP carefully scrutinize the bottom line of cost and profit centers and invariably seek to minimize environmental liability because it is a negative factor. Trustee organizations also have annual budgets, but often times the overriding time periods are the two and four year election cycles. There are budget requirements and performance measures within Trustee organizations, but the ramifications are different and the concept of profit centers is not applicable.

Another aspect of the timing and accountability is who received the benefits of past "polluting activities" and who is now bearing the costs. In many cases the decision-makers of the past are long gone, taking their "excess profits" with them. In addition, shareholders from prior years have already received their dividends in those years; current shareholders expect dividends to continue.

The RP often are left with the financial legacy of those past practices, but still face the ongoing responsibility to turn a profit and pay shareholders for their investment. On the other hand the public of today and tomorrow face the costs of the pollution that the predecessor RP or management have left behind.

This disconnect in timing creates a disconnect in perspective. The bottom line is that, one way or another, we are all facing the costs of prior polluting activities.

C. RP Concerns and Suggestions to Improve the Process

1. Sideboards and Ceilings to Potential NRD Claims

RP, in part because of their annual budget process, strongly appreciate willingness on the part of Trustees to identify early in the process resource categories of concern and restoration alternatives which will be included or excluded from NRD consideration. Early decision-making can be very difficult for Trustees due to the lack of injury information and the unwillingness to transfer the risks of uncertainty from RP to the public. RP often have the perception that the root cause of Trustees' unwillingness to eliminate certain areas from consideration in the assessment is primarily "politics." RP recommend that if it is not possible to delineate sideboards and ceilings that the Trustees explain clearly and honestly why they cannot be delineated.

2. Apportionment of Contribution

RP recommend that Trustees adopt a policy of apportioning the damages to each RP when entering into a cooperative assessment. RP recognize that Trustees may be faced with limited information about contribution and are not required to apportion liability because of the joint and several liability provisions of CERCLA; however, they argue that a "fair share" approach is more consistent with a cooperative assessment process.

3. Reciprocity

RP believe that litigating an NRD case presents a significant barrier to Trustees, given the expense and time of litigation. RP believe that if they are asked to remove this barrier by joining in a cooperative assessment process, then they should receive some consideration in return. RP recognize their liability for costs of assessment under the regulations, but take the view that if they have to be on the defensive and prove a negative (i.e., no natural resource injuries), they will do so in a court of law.

4. Primary Restoration v. Equivalent Acquisition

RP recommend that Trustees consider restoration options other than on-site restoration, citing that often it is more expensive to conduct primary restoration than it is to acquire the equivalent of lost resources or services. For example, RP contend that rather than restoring a wetland area, it may be less costly to purchase

another wetland and set it aside for public use. The potentially wide difference in costs between primary restoration and equivalent acquisition may create another opportunity for compromise under a cooperative assessment approach. Trustees and RP should recognize that each side may hold different thresholds and criteria for deciding what is sufficient and appropriate with any specific case. Although a difficult task, RP prefer that restoration criteria be developed together.

5. Joint and Planned Public Participation

RP recommend two improvements in the public participation phase of cooperative assessments. First, Trustees and RP should refrain from any type of negative publicity and plan and conduct public participation together. Second, RP recommend that Trustees draw on the resources and experience of RP in developing effective, state-of-the-art presentations.

6. Trustees and Remediation Agencies Must Work Together

RP expressed the need for assurances that Trustees and remediation agencies work together. In many states the Trustee is only one of several agencies that can make decisions impacting remediation and NRD. RP recommend that Trustees work to ensure all stakeholders are informed and are "on board" with restoration decisions.

7. Interim Lost Uses and Non-use Losses

RP have difficulty recognizing and accepting the concept of damages attributed to past lost uses and interim lost ecological values. Their skepticism is based in part on the economic methodologies used to determine interim lost public values and the difficulty of convincing RP management that such assessments and compensation is necessary. RP management may agree with restoration of what was injured, but damages beyond that often are seen as punitive and unreasonable. As to damages based on lost non-use values, RP appear intransigent: these damages are too obscure and difficult for RP management to believe such compensation is appropriate. RP are very unlikely to participate in a cooperative assessment where Trustees want to include non-use losses.

IV. Benefits

Cooperative assessments between RP and Trustees can be an efficient and effective approach to resolving liability for restoration at sites with releases of hazardous substances to the environment. This approach can provide advantages to the Trustees, the RP, the public, and ultimately

the environment. The ASTSWMO NRD Focus Group believes that a State program which encourages cooperative NRDA's and extends invitations to RP to participate in the assessment process will expedite restoration, streamline costs, promote better science, enhance public involvement in the NRDA process, and establish good will between all parties. The following discussion highlights the potential benefits of the cooperative assessment process.

A. Early Focus on Restoration

Cooperative assessments are well suited to negotiation and restoration-focused settlements. The cooperative process provides parties the flexibility to focus on the implementation of restoration projects as compensation (rather than the determination of monetary damages). In addition, it allows for creative settlements that might involve in-kind or off-site restoration projects. It can help ensure that the end objective (restoration) is considered from the beginning of assessment and a focus on restoration is maintained throughout the process. As such, settlements should occur much earlier and restoration of lost natural resources is expedited. The cooperative assessment process sharply contrasts with a litigation-focused approach that can result in high costs of assessment and delayed restoration. Litigation-oriented assessments typically have had Trustee efforts focused on the development of monetary claims and actual restoration planning has not been initiated until well after settlement.

B. Promote the Integration of NRDA into the Remediation Process

Remedial Project Managers should understand that the size or scaling of NRD restoration can be tied to the size, nature and length of time of the final selected remedial action at the site. Cooperative assessment activities can also be more readily integrated into the remedial process, especially at RP lead sites. This cooperative integration of NRDA into the clean-up process should be the most efficient and cost-effective manner of performing a restoration-based assessment. If data is needed beyond that obtained in the ecological risk assessment or other remedial investigation, the RP may readily include the collection of this assessment data into the remediation sampling efforts. If a Remedial Project Manager is reluctant to incorporate NRDA concerns, the participation and support of the RP can be a catalyst to ensure that NRDA needs are more efficiently addressed within the remedial framework.

C. Helps Funding Shortfalls

State Trustees often have little or no budget with which to perform NRDA's. The cooperative assessment process can provide an

opportunity for Trustees to overcome funding issues by entering into an agreement with the RP to fund their costs of assessment. The ability to monitor Trustee costs and avoid any inefficiencies and eliminate duplication of efforts provides a good incentive for RP to enter into such agreements. Even in the absence of funding agreements, a rapid settlement for NRD can provide for a rapid recovery of Trustee assessment costs.

D. Reduce Assessment Costs

Foremost among the numerous incentives for RP to join Trustees in a cooperative NRDA is the potential to greatly reduce the costs of assessment. When parties reach a settlement, litigation costs are eliminated or significantly reduced. In a cooperative assessment, parties can often stipulate to impacts in lieu of costly assessments. For some impacts, the assessment can be streamlined through a joint decision-making process and costly independent duplicative assessments can be avoided.

E. Promote Good Science

Where NRDA focus on litigation, the planning and data gathering process normally are closed to preserve a legal advantage. However, this type of scientific investigation process may serve to limit peer review and the objective critical evaluation of studies performed during an NRDA. Furthermore, the literature reviews, study designs and analytical results of studies performed for NRDA in anticipation of litigation are withheld from the scientific community at large, limiting potential use of this information in other arenas. The cooperative assessment process should encourage good science, by combining the expertise of both Trustee and RP scientists and allowing for a more open peer review process.

F. Enhance Public Participation

Similarly, the cooperative assessment process tends to promote citizen awareness and participation in NRDA. When the assessment and restoration planning activities are developed in preparation for litigation, the public can be restricted from any meaningful level of participation in the process. Cooperative assessments can allow for public involvement at critical junctures. Public hearings and an open record of the assessment can eliminate or reduce the potential for negative public comment and citizen lawsuits.

G. Establish Good Will

Responsible Parties can use restoration-based settlements to

maximize public relations benefits and put forth the positive message that the corporation and its industry are good environmental citizens. Good public relations capital may translate to increased market benefits. Further, a more rapid resolution of NRDA issues can reduce or eliminate contingent liabilities that must be identified on the financial statements of public corporations.

V. Issues

Cooperative assessments between RP and Trustees for injured natural resources can be an efficient and effective approach to resolving liability for restoration at sites with releases of hazardous substances to the environment. Trustees and RP attempting to enter into a cooperative assessment, however, need to consider a number of important issues. The following discussion highlights several issues that state Trustees should understand when entering into a cooperative assessment with RP.

A. NRDA Objectives between Trustees and RP Can Differ

An NRDA undertaken by a State Trustee should involve: 1) efficient assessment of impacts caused by releases; 2) the selection and scaling of restoration to fully compensate the public for those impacts and; 3) the implementation of those scaled restoration actions in an effective and timely manner. Trustees need to obtain enough information about the type, degree, and duration of the impacts to natural resources to ensure that the public trust is protected by implementation of the scaled restoration actions.

In most cases an important RP objective is to resolve environmental liability in a cost-effective manner. On the other hand, other RP are interested in fully compensating the public for losses of natural resources or resource services due to the release of hazardous substances. The RP's objectives for a cooperative assessment often can differ from the Trustee's with regard to the level of effort needed to document impacts, as well as the selection of preferred restoration alternatives. While CERCLA states that an RP is responsible for the costs to assess and restore injured resources, after remediation or cleanup actions, it is the Trustees that have ultimate authority to determine the most effective and appropriate restoration actions for natural resources under their trusteeship.

B. Level of Effort Necessary to Identify and Assess Impacts

Many types of impacts to natural resources can result from the release of hazardous substances. Some of these impacts can be difficult and expensive to quantify. It is important to recognize that RP often pay both the costs of assessment and restoration for

any impacts that are measured by the Trustees. Lack of information documenting an impact caused by a release can weaken a Trustee's position in settlement negotiations, as well as judicial proceedings.

Trustees should, at a minimum, collect sufficient information to document injuries to natural resources, to ensure that restoration is scaled appropriately and to explain the rationale supporting the settlement with the RP. State Trustees can expect to encounter differences of opinion as to the need for particular assessment activities, the methods or techniques to be used for an assessment, and the particular endpoints or measurements that should be used to document a given injury to a resource.

C. Use of Stipulations In Lieu of Particular Studies

Trustees should decide which injuries to which resources should be assessed for a given release or impacted site. Trustees have the flexibility to allow RP to stipulate to a particular injury or public loss of use of a resource, in lieu of jointly conducting a study to document the injury or loss. The Trustee should be confident that enough information is known about the injury or loss to make a sound estimate for purposes of a stipulated agreement with the RP. While the use of stipulations can reduce assessment costs and time required to study impacts, Trustees must weigh the tradeoffs associated with obtaining a reduced amount of information about a stipulated injury.

D. Considerations related to the Issue of Time

Trustees should be sensitive to the issue of Statute of Limitations (SOL) for recovery of natural resource damages under CERCLA. If an RP is willing to enter into a cooperative assessment, they should sign tolling agreements if the assessment runs beyond the SOL. If the state Trustee has started a judicial action for recovery of damages, the court may impose timelines that are difficult for a Trustee to meet, even in a cooperative assessment process. Trustees typically have limited staff and time to participate in damage assessments and this fact can become a problem in a cooperative assessment. Finally, a cooperative assessment process may actually increase transaction costs if both sides cannot agree in a timely manner on the need for particular and appropriate studies and study methods.

E. Co-Trustees for Natural Resources

It is important for state Trustees to notify co-trustees (state or federal) when a release is known or expected to impact a jointly managed natural resource (e.g., migratory birds). Most RP will request a covenant not to sue for damages from all affected

resource trustees. Coordination with co-trustees, while requiring some effort, can often increase the Trustees' resources in a cooperative assessment. Different Trustees can often bring greater staff expertise, funding, data, and experience with damage assessments and restoration.

F. Formal Cooperative Assessment Document

It is important to formalize a cooperative assessment in a document. The drafting of a cooperative assessment agreement helps improve the clarity and mutual understanding of the agreed-to process. The document should include some discussion of the following topics: parties to the agreement, purpose, agency authorities, background to the release/site, scope of the agreement, financial responsibility, conduct independent studies, dispute resolution, severability, retention of privileges, confidentiality, reservation of rights and claims, termination, and notices or contacts. Various state Trustees have developed model cooperative assessment agreements (e.g., Texas, California, New York, New Jersey, Massachusetts).

G. Funding Issues in a Cooperative Assessment

RP generally will want the flexibility to choose which assessment activities to fund. It is helpful for a Trustee to present an assessment plan with minimum tasks needed and estimated budget for the assessment. The RP can be asked to commit to the assessment plan, after review and input, and the funding can be placed into a dedicated account. Alternatively, the assessment can be directly funded by the RP with a high level of Trustee oversight and involvement. It is important for the Trustees to have an alternative source of funding for studies deemed essential by the Trustees but not agreed to by the RP. Disagreement over the need for one study or particular study methods should not derail the whole cooperative assessment process. Reasonableness of assessment costs can be resolved at a later date during settlement discussions.

The important point about funding in cooperative assessments is that the process is clear to both parties. Trustees can work with the RP to minimize agency overhead charges for contracted work and discuss other measures to keep assessment costs low.

H. Ability to Conduct Independent Studies and Exchange of Information

Trustees and RP should agree on the issue of independent studies or studies conducted by only one party. The agreement can be as simple as no independent studies will be conducted, to more complex agreements where each party agrees not to conduct any independent

study on topics jointly assessed under the cooperative agreement. In general, Trustees should not give up authority to conduct assessments on any aspect of injury or damage quantification. Trustees and RP should agree to exchange previously collected information on topics to be jointly assessed by the parties.

I. Create A Record

Trustees should always create an administrative record pertaining to natural resource damage assessment and restoration cases. The creation of an administrative record throughout a cooperative assessment will help the Trustees and RP document assessment activities and decisions, which in turn can be used before and after settlement is reached to explain the process to the public. The development of such a record will also allow for judicial review that is focused on the administrative record.

J. Use and Oversight of Consultants

If Trustees and RP have their own consultants working on assessment tasks, there is significant potential for increased transaction costs. A back-and-forth process for study plans and methods is one example of an area where costs can escalate. Trustees should require some level of peer review, both at the individual study level as well as the overall assessment plan. In general it is preferable for Trustees to direct the activities of a contractor, when assessing the impacts to natural resources under their trusteeship. This direction can be provided in the form of drafting scopes of work, receiving and reviewing contractor invoices, and providing guidance on methods and implementation of assessment activities. Invoices that have been reviewed and approved by the Trustees can then be routed to the RP for review and payment. Alternatively, RP can hire contractors so RP and Trustees can proceed with joint development and implementation assessment activities.

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