

The Benefits of Cooperative Natural Resource Damage Assessment

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ABSTRACT

The role of the Responsible Party in the damage assessment process for oil spills is evolving. The adversarial experience of the *Exxon Valdez* damage assessment and other early cases led trustee agencies and industry to seek alternative approaches. Early experiences with cooperative assessments were largely positive and the National Oceanic and Atmospheric Administration promoted the concept of cooperative assessments in the 1996 regulations for conducting natural resource damage assessments under the Oil Pollution Act. Cooperative assessments are now commonplace, but the extent of cooperation and the roles of the Responsible Party vary by incident.

INTRODUCTION

The Oil Pollution Act of 1990 (OPA) established liability for cleanup costs and for damages for the restoration of natural resources and services injured by oil spills. In the United States, government agencies have been appointed as "Trustees" to act on behalf of the public for protecting and restoring the environment. When a spill occurs, Trustees may conduct a natural resource damage assessment (NRDA) to evaluate injuries to natural resources and determine the need for restoration actions.

The NRDA process is conceptually simple but the quantification and restoration of oil spill impacts brings up controversial technical and legal issues. These factors, combined with the possibility of litigation, has often led to an assessment process where both the Responsible Party and the Trustees conduct independent and carefully guarded studies. An innovative concept in the NRDA regulations is the requirement that responsible parties be given the opportunity to participate in the damage assessment and, when appropriate, jointly conduct a coordinated and open damage assessment. The philosophy is that open and cooperative assessments are more expeditious and cost-effective than adversarial assessments. However, while the regulations encourage cooperation, the guidance on the specific terms and nature of that cooperation is limited. This has allowed Trustees and Responsible Parties to negotiate satisfactory agreements, but has also created misunderstandings over the extent, timing, and degree of the cooperation. This article summarizes the goals, key elements, and boundaries of cooperative assessments. With greater understanding of the process, it is hoped that both parties will take better advantage of this provision in the regulations.

WHAT IS A COOPERATIVE ASSESSMENT?

Simply stated, a cooperative assessment is one that directly involves the Responsible Party in an evaluation of the incident. The degree of cooperation can vary, from simply sharing assessment plans and data, to a fully cooperative process where the Trustees and Responsible Party jointly design and conduct studies and work together to develop and implement a restoration program. The concept of cooperative assessment may be best illustrated through an example:

On June 8, 1990, the Norwegian Tanker *Mega Borg*, loaded with 41 million gallons of Angolan crude exploded and caught fire while transferring cargo about 60 miles offshore from Galveston, Texas. A few days later, the Trustees and Responsible Party reached an agreement under which the owners of the vessel would fund and participate in the conduct of five scientific studies to evaluate the environmental effects of the spill¹. Funds were also provided for project management and report preparation. At the conclusion of these studies, the Trustees decided there had been insufficient injury to natural resources to warrant further consideration of a damage assessment.

The *Mega Borg* cooperative assessment was successful in several regards. The studies were designed and conducted under joint oversight and all parties worked from a common set of data. The Trustees received up front funding for the preassessment and came in under budget—the remaining funds were returned to the vessel insurer. Preliminary observations and results were shared with the response agencies instead of being protected under litigation confidentiality. Finally, the results of the studies were made public in a summary report of the incident.

REGULATORY GUIDANCE:

The *Mega Borg* illustrates one way to structure a cooperative assessment. The nature of the cooperation is up to the Trustees and RP to negotiate, but the OPA regulations provide the following guidance:

Timing and Duration: Trustees must invite identified responsible parties to participate in the assessment as early as practicable, but no later than the completion of the preliminary assessment phase of the incident². The invitation to participate should be in writing, and a written response by the responsible parties is required to confirm the desire to participate. Cooperation need not be limited to the conduct of assessment studies; ideally the cooperation may extend through data interpretation, restoration planning, and restoration implementation.

Control and Decision-making: Although a cooperative NRDA process involves representatives from the Responsible Party and their contractors and consultants, the process is led by the Trustees. The Trustees retain the authority to determine to what extent responsible parties may participate, and Trustees can terminate or limit Responsible Party participation if it interferes with Trustees fulfilling their statutory obligations. The Trustees are required to objectively consider all written comments and proposals provided by the responsible parties and while the Trustees will attempt to reach consensus with the Responsible Party, the final authority to make determinations regarding injury and restoration rest solely with the Trustees.

¹ This pre-assessment strategy assumed that the vessel fire would be extinguished and the bulk of the cargo salvaged. If a catastrophic release of the entire cargo had occurred, a potential spill four times the size of the EXXON VALDEZ, additional preassessment studies likely would have been required. Eventually, however, the vessel was stabilized, the fire was extinguished, and the remaining cargo successfully lightered.

² Cooperative efforts often begin during the first few days of an incident but may not be formalized for several weeks or months.

Level of Participation: The Responsible Party is not required to participate. If the RP desires participation, the Trustees must at least provide notification of all formal determinations required by Trustees, and an opportunity to comment on documents prepared by the Trustees. Increased levels of participation may occur at the mutual agreement of the parties.

Agreements: The rule strongly encourages formal agreements between Trustees and Responsible Parties on how the cooperation will be structured. The parties are also encouraged to reach agreement on a list of facts, such as the natural resources injured, the extent of injury, the most appropriate assessment procedures to determine injury and/or restoration needs, and how the results of the procedures will be interpreted.

Public Involvement: The Trustees represent the public and any cooperative process between the Trustees and Responsible Party must be open and allow for public involvement as assessment and restoration plans are developed. Any data generated through a cooperative assessment must be made available to the public in a timely manner.

WHEN COOPERATION WORKS:

A cooperative assessment has been likened to a multi-million dollar company, set up over night, run by multiple parties who just met and don't want to be there and have contradictory interests. Successful cooperation requires trust and integrity but what specific factors make cooperation work?

Commitment to Timely Restoration: The parties need to share the common goal of reaching a quick and fair resolution of the damage assessment. Keeping the goal of restoration in mind helps keep the cooperative relationship from being derailed by minor issues. In small or moderate spills, the parties may be able to reach consensus on the overall need for and type of restoration without conducting costly and time consuming assessment studies.

Focus: Oil spills can result in a myriad of environmental impacts. The parties need to focus their assessment efforts on the most significant categories of injury and lost uses and not be distracted by impacts that are technically interesting but not relevant to the overall assessment of damages or need for restoration actions.

Funding: Although advance funding is not a formal requirement for cooperation, it is a significant motivation for Trustees to enter into a cooperative relationship. Refusal to fund necessary and appropriate trustee activities may increase the trustee's skepticism over the intentions of the Responsible Party. In the long run, the Responsible Party may incur greater assessment costs if a case slows because of funding constraints.

Stipulations: Stipulations allow the parties to narrow the scope of the investigation and avoid incurring unnecessary costs. To the extent possible, the parties should attempt to reach consensus on factual issues and avoid tedious and costly documentation of clear impacts.

Clear Record of Decisions: Throughout the course of a cooperative assessment, many technical and administrative decisions will be made between the parties. These decisions need to be clearly documented to avoid later confusion.

Common Laboratory: Having a single, jointly selected laboratory conduct the majority of the analyses, with audits conducted by a separate firm can reduce the potential for data interpretation problems and result in significant cost savings. The Trustees and RP consultants should jointly determine which samples should be analyzed, the type of analysis, and the priority of the samples.

Joint Experts: The parties should consider jointly designated experts to conduct studies. Any technical directions and communications with that expert should be in writing and agreed upon by both parties. The expert's raw data and draft and final documents should be shared simultaneously.

Information Management: A single database of data, evidence and documents should be developed and maintained under proper custody. This database should be in a common electronic format and should include all samples, all photographs, videotapes, maps, field logs, analytical results, study plans, and other critical documents.

Technical Working Groups: The parties should consider developing working groups to address related injury categories. Each working group should have representatives of both the Responsible Party and the Trustees and all decisions should be documented in writing.

Strong Leadership: Cooperative assessments work best when the Trustees and Responsible Party provide leadership and are directly involved in the process. While there is a clear role and need for consultants and experts, the parties cannot abdicate their responsibilities for decision-making and management to third parties.

Common Public Communication: The parties should attempt to work together when communicating with the public and the media. Divergent communications can quickly derail a cooperative assessment, especially if antagonistic statements are made. Trustees and responsible parties should provide each other with advance notice of key decisions prior to their dissemination to the media.

Agree to disagree: The inability to reach a consensus on all aspects of an assessment should not be a barrier to cooperating on other activities. The Parties may be able to cooperate on some or most of the activities and proceed separately on the remaining tasks.

Early Technical Cooperation: Most cooperative assessments evolve from the early technical leadership of the government and Responsible Party scientists responding to an incident for the cleanup and preliminary damage assessment. Working together in the field during the emergency phase of an incident helps to build the trust necessary to make a cooperative assessment work.

WHAT ARE THE BENEFITS?

The premise of cooperation is that working together will result in cost savings, reduced potential for litigation and shortened time to restoration. A fully cooperative assessment would rely on a single set of studies, rather than both parties conducting studies to build their case or

defense. Furthermore, since both parties would be working with the same data, the likelihood for reaching common ground and avoiding litigation is increased. In addition to minimizing costs, cooperation should allow restoration to proceed more quickly. If technical consensus on injuries can be reached, efforts can be shifted to designing restoration projects rather than preparing for litigation. Other benefits may include:

- Allowing both parties to conduct studies that neither may have the expertise or funds to conduct individually.
- The parties may be able to share vessels, aircraft, laboratories, etc.,
- Working cooperatively promotes a more open assessment process where data can be openly shared with the response agencies, academic researchers and the public.
- A joint assessment may allow for an expedited assessment that need not be as expensive or rigorous than if the case were likely to be litigated.

WHAT ARE THE DRAWBACKS:

Cooperation is not universally accepted by Trustee agencies. Many Trustees are reluctant to include the Responsible Party in decisions that may have great financial and legal implications. Trustees are often concerned that the Responsible Party undermine the process or will use the knowledge gained from working with the Trustees to assist themselves to develop a better legal defense. The RP may be cooperative in one case but not in other on-going or future cases. Information and tactics divulged in the cooperative assessment may hurt the Trustees in the other cases. Responsible parties are also concerned that working cooperatively might backfire by enhancing the Trustees' ability to develop what they view as an excessive damage award. Both groups are concerned that the cooperative process might lead to loss of control, potential weakened legal case, or that the cooperation may breakdown, leaving the both the RP and Trustees on uncertain ground.

- Critical time may be lost while the Trustees and RP negotiate the terms of the cooperative assessment and design of specific studies.
- Both parties need to invest oversight effort to ensure that data are collected appropriately
- Working with the RP may appear to be a conflict of interest to outside parties and may result in public criticism and accusations.
- Cooperation on the NRDA aspect of a case may complicate other enforcement actions against the RP and third party claims.

CONCLUSIONS:

The cooperative natural resource damage assessment process is an opportunity for the responsible parties to work with the Trustees in the evaluation of the incident and the development of appropriate restoration actions. Although there are challenges and pitfalls along

the way, the adversarial and costly alternative can be avoided if both parties are straightforward, flexible, and committed to the goal of restoration.