

**Cooperative Assessments: Enticing the Parties to the Table**  
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**Introduction**

The role of a 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.

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 set out in the NRDA regulations for the Oil Pollution Act of 1990 (OPA) 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.

Cooperative assessments are not always easy to craft and manage. However, the benefits of a cooperative assessment are great enough that most parties (responsible parties and trustees alike) feel it is worth the effort. In crafting a cooperative assessment, remember that there is regulatory guidance on the topic. It is also important to recognize what all parties involved can and cannot agree to. With greater understanding of the process, it is hoped that both parties will take better advantage of this option.

**Regulatory Guidance**

The nature and extent of a cooperative assessment are determined by the trustees and responsible party on a case-by-case basis. However, NOAA provided some guidance on cooperative assessments in the natural resource damage assessment regulations under OPA at 15

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C.F.R. 990. Although this guidance was developed under OPA, the concepts could apply to any NRDA case.

Timing and Duration: Under the OPA rule, trustees are required to 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 incident. Cooperative efforts often begin during the first few days of an incident but may not be formalized for several weeks or months. 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 rests solely with the trustees.

Level of Participation: The responsible party is not required to participate. If the responsible party 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 OPA 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.

### **Factors Leading to a Successful Cooperative Assessment**

A cooperative assessment has been likened to a multi-million dollar company, set up overnight, run by multiple parties who just met and don't want to be there and have contradictory interests. Successful cooperation requires trust and integrity. There are some specific factors that may help a cooperative assessment 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 cases, the parties may be able to reach consensus on the overall need for and type of restoration to avoid some costly and time-consuming assessment studies.

Focus: Incidents 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 trustees' 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 an independent firm, can reduce the potential for data interpretation problems and result in significant cost savings. The trustees and responsible parties 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 stipulations, agreements, decision documents, samples, 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.

### **Potential Benefits of a Cooperative Assessment**

The premise of cooperation is that working together will result in cost savings, reduced potential for litigation, and expedited restoration. A fully cooperative assessment would rely on a single set of studies, rather than parties conducting separate studies to build their case or defense. Furthermore, since all parties would be working with the same data, the likelihood for reaching consensus 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.
- Allowing the parties to share vessels, aircraft, laboratories, etc.
- Promoting a more open assessment process where data can be openly shared with the response agencies, academic researchers, and the public.

- Allowing for an expedited assessment that need not be as expensive or rigorous as if the case were likely to be litigated.

### **Potential Disadvantages of a Cooperative Assessment**

Cooperative assessments are not universally accepted by all parties. 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 will undermine the process or will use the knowledge gained from working with the trustees to assist themselves to develop a better legal defense. The responsible party may be cooperative in one case but not in other ongoing 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 at the responsible parties' expense. Both groups may be concerned that the cooperative process might lead to loss of control, potentially weakened legal case, or that the cooperation may breakdown, leaving the both the responsible party and trustees on uncertain ground.

Negotiating the terms of a cooperative assessment can take a great deal of time that is time wasted if the negotiations cannot be successfully completed. In addition, all parties will be required to invest time and effort in oversight and management of assessment activities to ensure success of those efforts. Cooperating with trustees on the NRDA aspect of a case may complicate enforcement actions and/or third party claims against the responsible party. Finally, trustees may be concerned that working with the responsible party may appear to be a conflict of interest to outside parties and may result in public criticism.

### **Conclusion**

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.

*For further information on NOAA's Damage Assessment and Restoration Program, please visit the Program's website at: [www.darp.noaa.gov](http://www.darp.noaa.gov)*