

# COOPERATIVE ASSESSMENT PROJECT (CAP) FRAMEWORK

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## Introduction

This document provides a framework<sup>1</sup> for conducting cooperative Natural Resource Damage Assessments as envisioned under the Cooperative Assessment Project (CAP). As with similar efforts, CAP is intended to further promote cooperative damage assessments by, among other means, allowing for greater participation between natural resource trustees (Trustees) and Potentially Responsible Parties (PRPs) and encouraging the use of more streamlined and innovative approaches to settle damage assessment liability and restore natural resources.

Recognizing that cooperation is not always possible, there nevertheless are sites and circumstances where cooperation could prove useful. The focus of this framework is on potential damage assessments where cooperation is viable, appropriate, and beneficial.

The CAP framework is consistent with and does not modify in any way current regulations governing the conduct of natural resource damage assessments. The commitment to a restoration-based approach that includes determination of injury, quantification of loss, and evaluation of restoration alternatives is still relevant and critical to the conduct of cooperative damage assessments.

CAP is not intended to compromise the authority or responsibility of either the Trustees or response agencies. Nor is CAP designed to complicate the relationship between PRPs and response agencies, or to slow the response process. Instead, CAP hopes to help optimize the integration of response and natural resource restoration needs without jeopardizing agency responsibilities.

This framework outlines the concept and scope for conducting cooperative natural resource damage assessments. A compendium entitled "Cooperative Assessment Project (CAP), Compendium of Additional Ideas and Example Documents" provides further insight on potential ways to conduct a cooperative damage assessments. It is hoped that these two documents will be used by damage assessment practitioners in government and industry to

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<sup>1</sup> This framework reflects concepts and suggestions submitted by a stakeholder work group formed in January 2002 to facilitate cooperative natural resource damage assessments. The content of this framework should not be understood as an endorsement by the stakeholder work group *per se*. Instead, based on the substantial background and experience of the stakeholder work group, the framework should serve as a construct that will help guide cooperative damage assessments to successful outcomes.

seek prompt settlement of damage assessment liability and restoration of natural resources in cooperative contexts.

### **Potential Incentives**

There are potentially numerous and varied incentives for conducting cooperative natural resource damage assessments. Regardless the type of incentive or reason for participation, the clear benefit in a cooperative process is that parties are motivated to resolve their respective concerns.

For PRPs, participation in a cooperative damage assessment may include: reducing transaction costs and time commitments by PRP staff and contractors; resolving liability and reaching closure in a timely fashion; investing in restoration rather than potential legal preparation; enhancing predictability and certainty relative to the objectives, scope, outcome, timing, and budget of an effort; receiving positive recognition from the Trustees and the public; and strengthening relations among all stakeholders.

For Trustees, many of the PRP incentives also apply. However, Trustees may further benefit by: restoring contaminated sites that might not otherwise be addressed or be addressed more slowly; and receiving PRP funding upfront or through timely reimbursement to participate in a cooperative damage assessment.

For non-government organizations, providing an opportunity for early and continued public involvement represents an incentive for their commitment in a cooperative damage assessment effort. When successful, cooperative damage assessments should also allow Trustees to increase program outputs in the form of restoration by reducing the expenditure of resource on litigation and other adversarial processes. Thus, the public benefits from the accomplishment of more restoration.

### **CAP Efforts**

CAP evolved with dual efforts in mind. The first effort includes the formation of an ongoing stakeholder work group with representatives from industry, response agencies, environmental interest groups, and tribal, state and Federal natural resources Trustees (see <http://www.darp.noaa.gov/cap.htm> for further information on CAP). The CAP stakeholder work group provides input on the CAP effort, including how best to conduct outreach. CAP is intended to serve as a clearinghouse for the collection and dissemination of lessons learned about innovative damage assessment approaches. The stakeholder work group also serves as a liaison to their respective stakeholder communities on CAP efforts. The CAP stakeholder work group will not direct or participate in a cooperative assessment site, unless explicitly requested to do so by the parties engaged in that project. The second CAP effort focuses on identifying and encouraging cooperative damage

assessments so that lessons learned can be shared among government and industry practitioners.

### **Potential Cooperative Assessment Projects<sup>2</sup>**

Cooperative natural resource damage assessments can be appropriate in many circumstances. The greatest need and opportunity for cooperation, however, are for sites affected by chronic hazardous substances or oil contamination. Focusing on chronic conditions allows more time to create partnerships and develop cooperative approaches than would be allowed by the typical catastrophic spill, and provides opportunities to integrate response and restoration actions. Cooperative assessment opportunities may exist where there is a potential damage assessment liability under CERCLA (National Priority List (NPL) and non-NPL sites), OPA, Resource Conservation or Recovery Act, or other appropriate regimes - be they Federal- or state-lead sites.

Cooperative damage assessment projects are also likely where Trustees have jurisdictional authority, where affected parties are willing and capable to commit to the project, and where injuries to natural resources and their services are sufficient for affected parties to engage in the project. The scope of cooperation, however, should not be constrained by complexities related to the nature of contamination, parties involved, or other factors. Cooperative projects may be contemplated where:

- Cleanup is planned or underway such that Trustees and response agencies can integrate their respective efforts;
- Response agencies have decided on a response, or concluded response actions; or
- Response agencies will not be involved, but PRPs are willing to address restoration while mitigating response concerns.

In all the above circumstances, the Trustees need to consult with the appropriate response agencies to address any response issues up front. In the last circumstance where response agencies decide not to be involved in a cooperative project, the Trustees need to keep the response agencies apprised of the cooperative project if initiated.

### **Suggestions for Getting Started on a Cooperative Assessment Project**

To achieve success, a cooperative natural resource damage assessment must be balanced by ground rules that define the assessment process yet allow for sufficient flexibility to save time and money, and to adapt to changes in project circumstances. This section is intended to provide some

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<sup>2</sup> In this context, the term “project” refers to the entire damage assessment and restoration process; not necessarily to a unique component of the process.

fundamental concepts for parties considering a cooperative assessment project prior to engaging in that project. These concepts are organized according to the general sequence of events that may be expected for cooperative assessment projects as pictured under CAP.

### Proposing a Cooperative Assessment Project

When a cooperative assessment project is proposed, it is the responsibility of the potentially affected Trustees to determine whether the project fulfills the project criteria. As stated previously, the Trustees need to determine the appropriateness of the project against criteria that address jurisdictional authority, willingness and capability to commit to the project, and degree and scope of injuries to natural resources and their services.

Ideally, all Trustees that have jurisdictional authority would be at the table and agree on a common approach to the project. However, where certain Trustees support but decide not to participate in a project, they need to be kept informed on project activities by the participating Trustees. Reasons that Trustees may not wish to participate in a project may include the nature and extent of injury does not justify their participation, the injured resources that are under their jurisdiction need to be adequately addressed by other participating Trustees, or the resources necessary to devote to the project may not be available. Non-participating Trustees can join in a settlement or enter a project effort prior to settlement as long as prior decisions made by the participating Trustees will not be revisited without new and substantive information.

PRPs should have the opportunity to fully participate in a cooperative assessment project, e.g., plan and implement restoration projects. Where PRPs wish to participate in a project, Trustees and PRPs should address statute of limitations issues, and particularly, evaluate whether a tolling agreement is appropriate.

Sites with multiple PRPs present additional complications and challenges, e.g., some PRPs may not want to work cooperatively with the Trustees. For such sites, Trustees and PRPs should evaluate if and when a natural resource damage assessment following the concepts outlined here would proceed.

According to Federal law, PRPs are responsible for paying reasonable costs incurred by Trustees in conducting a natural resource damage assessment. Payment of these costs should be discussed at the outset of a cooperative assessment project. In many instances, Trustees need to seek payment of costs in advance on a periodic basis, with cost documentation submitted to the PRP before approval of a subsequent cost request. In addition, PRPs will often be asked to pay for scientific studies and expert consultants needed to support the project. Funds for these purposes may be provided to the Trustees on a project-by-project basis.

Agreements on the cooperative assessment project process, protections, funding, and other mutual arrangements should be reached at the outset of a project. Such agreements may be formal or informal and may also address project-specific concerns collectively or individually as circumstances warrant.

Prior to accepting a cooperative assessment project, Trustees and PRPs need to also coordinate with response agencies (Federal and/or state) to ensure that proposed actions do not interfere with or duplicate planned or on-going response actions. Where response actions are planned or on-going at a proposed project, Trustees and PRPs need to work with response agencies to determine how to optimally integrate proposed project actions with response actions as early as possible. For example, the parties should consider how best to: gather and share response and damage assessment data in a cost-effective manner; conduct response and damage assessment investigations for the benefit of all parties; and provide advice on potential liabilities associated with various response and damage assessment options. Where response actions are not planned or on-going at a proposed project, Trustees and PRPs need to determine how best to apprise the response agencies about the progress of the cooperative assessment project and how best to address possible cleanup concerns in the absence of a response action by the response agencies.

### Conducting Cooperative Assessment Projects

Trustees involved in a cooperative assessment project are accountable to the public for the conduct and outcome of the project. While PRPs should be encouraged to conduct injury assessment and restoration planning as appropriate, Trustees cannot forgo their responsibility to approve and oversee damage assessment actions taken on the part of PRPs.

Trustees and PRPs need to jointly take responsibility for the sharing of public information. The Trustees and the PRPs also need to ensure compliance with applicable Federal and state laws.

The success of cooperative natural resource damage assessments may be attributed to a number of characteristics that have evolved among Trustees and PRPs in addressing cases. These characteristics are listed as follows and are incorporated in this framework.

- Coordinate between the Trustees
  - All Trustees are at the table
  - Trustees agree on a common approach
- PRPs are invited to fully participate
- Communicate with the public
- Commit to a Cooperative Restoration-Based Approach

- Negotiate a restoration-based settlement with a focus on in-kind restoration
- Consider site-specific agreements that address process, protection, and funding (alternatively, consider existing umbrella agreements where possible)
- Integrate Restoration Concerns Early into the Response Process
  - Consider cost-effective data collection and sharing using
    - Response-related data, e.g., remedial investigation, ecological risk assessment, etc.
    - Literature benchmarks
    - Site studies as needed
    - Stipulations
  - Provide advice on damage assessment liability associated with various response options

As previously stated, critical to the success of cooperative assessment projects is a flexible process that will allow for refinements, iteration, and the ability to address scientific and technical uncertainties in a manner that protects the public interest in natural resources. Consequently, the parties need to balance the use of reasonable, protective assumptions against the need to conduct additional studies.

The parties need to collect or share information relevant to the project, and have the opportunity to participate in or oversee planned project activities. When considering additional studies, the parties need to address the necessity and relevance of such efforts.

In lieu of conducting additional studies, the parties may agree to stipulations. Stipulations may include agreements by the parties concerning the disposition of some relevant point, and may be easily documented through technical or general memoranda. These stipulations may serve as the basis for decisionmaking and need not be reconsidered except where justified by new, substantive information.

The parties need to document information considered in making decisions for the project. This information needs to be reasonably available and accessible to the public in some form of public record, subject to privileged or confidentiality information that would ordinarily be protected even outside of the context. Trustees are responsible for establishing and maintaining this public record. As part of the public record, the parties need to provide the restoration plan for public review, which serves as the basis for resolving the project.

If disagreements arise during the conduct of a cooperative damage assessment, the parties should have a prearranged method for resolving such disagreements without unduly disrupting the continuation of the

assessment.

### Ending Cooperative Assessment Projects

Upon completion of a natural resource damage assessment, the PRPs may be allowed to implement the selected restoration alternative as identified in the restoration plan. Where appropriate, PRPs should be encouraged to implement the selected restoration alternative.

Either the Trustees or the PRPs should have the opportunity to withdraw from a cooperative assessment project at any time, for any reason. Any information developed up to that point may be used by any party for any purpose. The Trustees may pursue a natural resource damage assessment under the existing regulations, and the PRPs would be free to engage that process using any strategy that they might select.

In cases where the PRPs have agreed to pay Trustee costs as they are incurred, upon termination of the project, the PRPs should be required to compensate Trustees for all costs up until the point the project is terminated.