

SUMMARY OF CAP STAKEHOLDER WORK GROUP MEETING OF SEPTEMBER 24-25, 2002

Acronyms:

AIG – American International Group
API - American Petroleum Institute
ASTSWMO – Association of State and Territorial Solid Waste Management Officials
CERCLA – Comprehensive Environmental Response, Compensation, and Liability Act
CAP – Cooperative Assessment Project
DOI – Department of the Interior
EPA – Environmental Protection Agency
NGO – non-governmental organization
NOAA – National Oceanic and Atmospheric Administration
NRDA – natural resource damage assessment
PRP – potentially responsible party
SWG – stakeholder work group

I. Introduction

On September 24-25, 2002, the National Oceanic and Atmospheric Administration (NOAA) hosted the second meeting of the combined stakeholder work group (SWG) for CAP in Seattle, Washington. Linda Burlington of NOAA's Office of General Counsel for Natural Resources facilitated the meeting. Eli Reinharz and John Kern of NOAA's Damage Assessment Center took the notes from which this summary was compiled. A list of the meeting attendees is attached (see attached list).

II. Case discussion

The SWG began its discussions with an analysis of several case examples in the southeastern United States, some of which are unnamed since the assessments are still in progress. The success of cooperative assessments may be attributed to a number of principles that have evolved among the parties involved in those cases. These principles are:

The company looked at the site holistically to come up with a net environmental benefit. In this site, there were many restoration opportunities because of other stresses on the system. The site was resolved by forming a group to negotiate the best approach for this site. The group included the company, the remedial decision makers, the trustees, and NGOs. There was recognition that constant communication with and education of all the parties involved were essential to success.

Another case discussed was the Saginaw River. The Saginaw River and Bay sites in Michigan involved releases of PCBs and related compounds beginning in the 1940's that resulted in advisories against human consumption of fish for all species of fish in the River and many species of fish in the Bay, and less successful bald eagle reproduction in these areas. A settlement was negotiated with General Motors, Corp., and the cities of Bay City and Saginaw. This case has been resolved by taking a goal-oriented approach. The assessment and restoration accomplishments for this site can be found at: <http://midwest.fws.gov/nrda/saginaw/index.html>. Several participants noted and were thankful for the Department of the Interior's (DOI) participation in the SWG and recognized its work in making Saginaw a success. DOI recognizes the value of cooperative assessments and requires all potential assessment cases to consider cooperative work before requesting funding for work from DOI.

A group member from the insurance industry discussed the circumstances of the Iron Mountain Mine case in California. In this case, insurance solutions were used to resolve certain issues among the parties, so that the parties could focus on restoration. The appropriate insurance was used to address potential contingencies, an approach that could be used at other sites. Insurance may cover worst-case scenarios, potential third party claims, and the PRP's liability. A policy can be written once the values involved can be quantified. The insurers can underwrite the risk and serve as the financial guarantors. Information on this case can be found at: <http://www.darcnw.noaa.gov/imm.htm>.

Another case example, however, showed the disruption that can be caused by the public expecting punitive measures rather than restoration. In this case, the company and the trustees developed restoration projects that appropriately compensated for natural resource injuries. However, once the cost of implementing the restoration was revealed, public groups tried to file suit, claiming that the company did not pay enough.

The case discussions involving the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) stressed the need for close coordination between the trustees and Environmental Protection Agency (EPA) and/or state remedial agencies. Remedial agencies' decisions are risk-based, while trustees' decisions are restoration-based. Trustee agencies can advise on remedial decisions through Biological Technical Assistance Groups. However, better coordination with trustees and early integration of trustee issues in the remedial planning process would lead to better results. This goal should be sought by all parties at a site. The Brownfields program was offered as one way to demonstrate and promote cooperative ventures.

III. Characteristics of a cooperative assessment

Following the discussion of the cases, the group felt it would be productive to discuss certain characteristics of a cooperative assessment. The group agreed that one important factor was whether the parties have had prior relationships in other contexts that have led to some level of trust or at least familiarity. Another factor is that the PRPs and trustees talk with each other early in the assessment process about the needs and focus of the project at hand. The parties should also agree to a restoration focus on the project and start talking about restoration as early as possible. The parties should agree to use one data set, share all data, and agree to equal access to one set of experts. The parties should also be partners in determining the need for and types of studies, with decisions made by consensus. All parties should get approval of and document decisions made.

The group also agreed that PRP funding of trustee participation is essential. Also important is dealing with and protecting confidential information through appropriate confidentiality agreements. Equally important is keeping all parties informed throughout the process through separate technical and legal meetings with collective briefings as needed. Finally, the group recognized that all parties must be prepared to assume some level of risk.

One issue that came up in this discussion was the statute of limitations for NRDA. Tolling agreements were seen as a means of protecting both PRPs and trustees. Tolling agreements were also considered as a way to take the time pressures off of trustees. However, in some cases, it was thought that tolling agreements may delay the assessment process and, therefore, the implementation of restoration. In such cases, an alternative to a tolling agreement might be the PRPs and trustees agreeing to a strict timeline for the process.

IV. Restoration banking

One participant suggested the idea of restoration banking for NRDA as an option to explore. NOAA responded that restoration banking is difficult to apply in NRDA because of the need to link restoration services for various cases and scenarios. However, NOAA noted that restoration banking may be likely in a multiple PRP scenario where one major PRP is conducting much of the restoration and can sell restoration credits to the remaining PRPs.

V. Framework

The group was asked its opinion on the framework document. Generally, the participants felt that the framework was much improved, but could use some additional clarification. Several other suggestions were made. An industry participant suggested that the difference between CAP and existing regulations is that, while the existing regulations always encouraged cooperation, it seems that this was the exception. He noted that CAP's most important aspect is its use as a clearinghouse on how assessments are working through case examples and product development that ultimately highlight lessons learned and that this goal should be reflected in the framework. Other participants noted that this goal should be reflected in broader outreach efforts as well. Another suggestion was that the framework should include a statement promoting innovative, creative settlements.

Finally, DOI noted that the framework should highlight the reduction of uncertainty, suggest how to facilitate settlements, and address situations in which trustee staff might not be available to participate in a project.

VI. Pilot Projects

Some participants suggested removing the word "pilot" from CAPP. These participants noted that some industries are willing to work cooperatively on a project, but do not want a particular project spotlighted as a "pilot." One of these participants noted that highlighting a project as a pilot for CAP might result in external influences trying to control the project. Participants suggested that there is still the opportunity to move forward with projects cooperatively, then note their successes within the CAP framework. The timing and degree to which projects are publicized as CAP pilots can be addressed as sites are evaluated.

Participants suggested that using CAP as an information clearinghouse may be as important as conducting projects. Projects, as they occur, can be used to build a track record for cooperative assessments, giving closure to the parties and demonstrating the cost savings associated with cooperative work.

Other participants, however, noted that projects are necessary to groundtruth CAP. NOAA agreed that there may be a stigma attached to a "pilot" project, and thus is changing the name of this effort to Cooperative Assessment Project (CAP). NOAA is interested in continuing the development of the CAP concept and education/outreach efforts. NOAA also agreed that projects can be addressed as they arise. Some participants again encouraged industry to propose new cases where cooperative assessments may be appropriate.

VII. Outreach

The SWG recognized that outreach is an important element of CAP. Therefore, outreach should be used to emphasize the value of cooperative assessments. The SWG discussed the following issues related to outreach efforts: messages to be stressed; venues and audiences; workshops; products to develop; an outreach subgroup of the SWG; and an outreach plan for CAP.

One important message to include in outreach is the value of both restoration and cooperative assessments. Some measure of success of incidents is needed by public agencies in reporting to legislative bodies. Traditionally, parties reported restoration metrics in terms of dollars, e.g., the cost of a project compared to the monetary value of a project. Some participants urged using a metric other than dollars, for example, acre-years gained, percentage of recover of a system, or public satisfaction with a project. The SWG also discussed valuing the benefits of working cooperatively by estimating the money saved by all sides. Other outreach messages included focusing on corporate incentives for cooperative work and explaining the increased flexibility of assessments under CAP.

The SWG discussed possible audiences and venues for outreach activities. It was pointed out that outreach presentations should be tailored for the specific audience. Two audiences suggested were industry and the corporate attorneys. Other audiences would include managers and practitioners. Venues for outreach efforts include various industry associations, including the (American Petroleum Institute) API and (American International Group) AIG, EPA training sessions for On Scene Coordinators and Remedial Project Managers, Society of Environmental Toxicology and Chemistry, the International Oil Spill Conference, , and the Society for Ecological Economics.

Workshops were discussed as good opportunities to focus on the new cooperative assessment paradigm to demonstrate how to break out of past habits and move forward to resolve liabilities while carrying out successful restoration under CERCLA. Several workshop formats were suggested. Some workshops might be presented as point/counterpoint discussions between industry and trustee participants. Other workshops might be half-day meetings with participants engaged in role-playing in an assessment process. Workshops might also be two-day NRDA drills with role reversal panels large enough to include PRPs, response agencies, and each trustee agency involved in the drill. It was agreed that, whatever the format, presenters must be experienced in NRDA. Workshops could discuss how practitioners have addressed past NRDA, that is, the top 10 to 15 issues that are common to most cooperative assessments, e.g., confidentiality, common data base, tribal issues, etc. Participants might also contrast assessments that worked well with those that did not to identify the benefits of cooperative assessments. A similar idea would be to have a discussion of past assessments with specific suggestions on how they could have worked better. Another approach would be for parties to discuss what they did in past cooperative assessments and explain why they would or would not do the same types of things again. Several

participants pointed out that workshop presenters should represent all interested parties, including response agencies, NGOs, PRPs, and trustees. One participant pointed out that all workshops should present the CAP framework to get the message out. One participant suggested that CAP presentations need more context under CERCLA as to integration with pre-Record-of-Decision (ROD) and remedial process in the NRDA regulatory setting.

The group next discussed development of materials that can be used in outreach efforts. The group agreed that CAP can be a clearinghouse for information products. Products could include descriptions of lessons learned, compilations of existing examples such as the one ASTSWMO is producing, and presentations for workshops. Press releases on cooperative assessments developed jointly by PRPs and trustees should also be available through CAP. CAP should also identify possible restoration partnership opportunities such as National Wildlife Federation, Nature Conservancy, Ducks Unlimited, and Water Resources Development Act. Finally, one group member suggested the development of a white paper with joint authors on cooperative assessments that could discuss sensitivities, risks, and uncertainties with various case examples. A white paper could also be used to highlight common difficulties with past assessments and explain how these difficulties were, or could have been, resolved.

Finally, the SWG decided to form an outreach subgroup to provide direction to the outreach efforts. The outreach subgroup members are Tom Keane of AIG, Dale Young of ASTSWMO, Mike Ammann of Chevron/Texaco, Joe Medved of GM, Ralph Stahl of DuPont, and Eli Reinhartz of NOAA. This outreach subgroup will develop a first draft of an outreach plan for CAP, which would include information dissemination and the ideals/elements of a cooperative CERCLA workshop. The outreach subgroup will distribute the first draft of this outreach plan to the SWG for discussion at the next SWG meeting.

VIII. Next steps

The group decided that it should continue to work on three areas: 1) document and build a data set of cooperative assessments; 2) promote and encourage cooperative assessments; and 3) support any on-going cooperative assessments in appropriate ways. The group agreed to gather information on past cooperative assessments, as ASTSWMO is doing. To promote and encourage cooperative assessments, the group will make efforts to disseminate information on such things as lessons learned from past assessments, the manual of successful methods, and documentation of cost savings associated with working cooperatively and other outreach efforts. The group also agreed to be supported, as requested, of on-going cooperative assessments. The group will review any new cases proposed for CAP consideration. Finally, the group agreed that group products would be disseminated as group-authored products.

IX. Next meeting

The SWG agreed to meet in the spring of 2003 in Silver Spring, Maryland. The group will again discuss two to three cases in depth, and possibly several smaller cases, with the emphasis on lessons learned. The group will also review and suggest revisions to any relevant work products. Finally, the group will discuss a progress report from the outreach subgroup, focusing on plans for workshops and other outreach materials.

CAPP Stakeholder Work Group Attendees
September 24-25, 2002

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