

COOPERATIVE NRDA PLANS: A NEW IMPERATIVE

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The Oil Pollution Act of 1990 (33 U.S.C. §§ 2701-2761, Supp. II 1990) (hereinafter "OPA") mandates that the oil industry develop contingency clean-up response plans describing the methods to be used to remove oil from the environment in the event of an oil spill. The deadline for submitting these plans was February 1993. However, after an oil spill, clean-up is only the first part of the equation; natural resource damage assessment ("NRDA") and restoration of injured resources together form the second component of the statutory scheme. Nevertheless, there is no statutory requirement in OPA for industry to submit contingency NRDA plans, and so opportunities for pre-spill planning in the NRDA area have largely been overlooked.

Under OPA, clean-up of an oil spill may be handled by the responsible party unless federal management is dictated by the size or catastrophic nature of the spill. On the other hand, OPA has no requirement for participation by responsible parties in the NRDA process. Instead, OPA provides for trustees to assess injury to natural resources and seek damages from responsible parties for that injury. The trustees may be federal, state, indian tribe, or foreign governments and usually some combination of these groups is involved in each spill. Absent a statutory mandate, development of a cooperative NRDA process will have to proceed from a realization by both industry and trustees

that the alternative of costly litigation is inefficient and ineffective.

A cooperative approach to NRDA requires an agreement between natural resource trustees and responsible parties for a joint scientific inquiry into the natural resource injury resulting from the spill (Cecil and Foster, Natural Resource Injury at Oil Spills: A New Approach, 45 BAYLOR L. REV. 423-439, 1993). Under OPA, as under its predecessor, the Clean Water Act, absent a cooperative agreement, the trustees will perform the NRDA and then seek damages through the litigation process. The responsible party will usually enter into the NRDA process as well in order to maximize its defense. A cooperative approach, as opposed to an adversarial one, will benefit both trustees and industry and will lead to earlier restoration of the injured resources.

Standing in the way of cooperation are many obstacles that must be overcome. Past differences, beginning with the Exxon Valdez spill, have solidified adversarial positions. Varying approaches by the individual trustees are daunting as oil companies try to develop cohesive, coherent plans for the conduct of NRDA. The specter of contingent valuation studies to measure existence values is so fraught with controversy that many feel cooperation between trustees and industry is not possible. Finally, new regulations guiding the conduct of NRDA are due to be published this fall

by NOAA. Industry is uncertain about the approach these new regulations will take.

These obstacles are enormous and no attempt will be made here to minimize them. In the exigency of an oil spill, often the best intentions of trustees and responsible parties are waylaid by the need for hurried decisions. Another polarizing pressure can be the glare of extensive media coverage. However, instead of viewing obstacles as a rationale for distrust and, hence, inaction, it is more productive to confront them with a vigorous plan for cooperation both among trustees and between trustees and responsible parties. Such an approach must involve the planning and development of a model for cooperation before the time of an oil spill - a model that can be applied across the nation. The issues among the trustees and between trustees and responsible parties are complex and, if they wait to be addressed until an oil spill, it is likely that the parties will find it easier to go their separate ways and begin planning for litigation.

NOAA plans to conduct several regional meetings after publication of their proposed NRDA regulations expected in fall 1993. These meetings will augment the ninety day comment period by providing an opportunity for verbal as well as written responses to the proposed regulations. A series of workshops can also be coordinated with these regulation review meetings which will allow industry and trustees to begin planning for cooperative NRDA's. It is axiomatic that contingency planning for cooperative assessments is necessary to develop a thoughtful construct within which to operate. Any pre-spill planning workshops therefore should be jointly sponsored by the

appropriate federal, state and industry groups.

One of the initial difficulties encountered at spills is the lack of a comprehensive plan for organization among the trustee agencies. The proposed workshops would allow trustees to meet on a regional basis and agree on governance of their interactions at a spill. In an early Advance Notice of Proposed Rulemaking (57 Fed. Reg. 8978, Appendix I, March 13, 1992) NOAA published a draft Memorandum of Understanding (MOU) which had been developed by the federal trustees and the Department of Justice. One important function of the proposed workshops should be to introduce this document to the various trustees and discuss how it might be used to make inter-trustee coordination more efficient. The draft MOU provides for a Trustee Council, a Lead Administrative Trustee and decision-making by consensus. It also provides for the joint use by trustees of all funds received for restoration. This MOU should be pre-negotiated by the trustees so that at a spill, important time is not taken in tending to administrative matters.

Coordination among responsible parties is also important because it is the rare spill that concerns only one responsible party. If a cooperative NRDA is to work, then all responsible parties must agree on the approach and decide how decisions within their group are to be made.

The cornerstone of the workshop should be consideration of a model agreement to govern cooperative NRDA. For example, in 1990, an agreement was reached between trustees and responsible parties in the Mega Borg spill. In that spill, the

trustees had a hypothesis of no injury and a cooperative assessment was designed to test that hypothesis. The Mega Borg agreement could serve as a starting point for a model agreement.

The *sine qua non* of a cooperative NRDA is an open, joint scientific process fairly designed to determine the injury to natural resources attributable to the particular spill. Each party must have a hand in design of the assessment, participation in its execution, and complete access to the data derived from the assessment studies. The assessment must be designed to identify the most efficient, cost-effective restoration strategy for the injured resources. As a part of the process, estimates of the rate of recovery of the resources will be made and the economic value of their interim lost use will be calculated. We suggest that the responsible parties should fund the cooperative assessment process as the *quid pro quo* for having the opportunity to participate in design of the studies and access to all data. By underwriting the cost of the studies, responsible parties avoid funding two damage assessments which will result if an adversarial approach is taken and the government demands, as it most certainly will, that its assessment costs be recovered as part of the damages.

An agreement for a cooperative NRDA can incorporate several strategies. As trustees and industry begin to build the trust necessary for such a process, it might be useful to create a phased approach to NRDA. This would involve an incremental agreement under which each step is completed before agreement on the successive step is undertaken. For instance, the initial agreement might cover the acquisition of transitory data regarding mortality and extent of the

spill. Based on these data, the second phase could consider other impacts on the resources and their habitats and the value of lost uses. A third phase would cover development of alternative restoration plans. While each phase may be enforceable, all parties must retain the right to leave the process at the conclusion of any phase. Finally, negotiations based on the accumulated data will determine the amount paid by responsible parties for the agreed upon restoration.

In such a process, several considerations must be present. First, the agreement cannot act as an admission of fact or law. Nor can it be taken as evidence of liability. Furthermore, each party should retain the right to conduct damage assessment studies outside of those subject to the agreement. However, it should be stipulated that the studies under the joint assessment define method and content (as opposed to interpretation) if litigation should arise. This will mean that, at a minimum, future litigation will be more streamlined. At the end of each phase, all completed data can be entered into an administrative record and made available to the public.

Creating a process that is open to the public will dispel much of the criticism that has surrounded earlier spills, especially the Exxon Valdez spill. An open process will allow interested citizen and environmental groups to evaluate the on-going progress of the NRDA. Often, local groups are the most knowledgeable about the environment of a particular oil spill and can direct the parties toward creative and cost-effective restoration alternatives.

The most important function that will be served by the proposed workshops is to establish a working relationship among trustees and industry. If, in the event of a spill, the representatives of the parties have met beforehand and, even tentatively, considered the ground rules for working cooperatively in a scientific investigation, there is a significantly better chance that litigation can be avoided.

Depending upon the progress made at the proposed workshops, other technical issues can be addressed on a regional basis in follow-up discussions. Critical resources can be identified and existing data sources evaluated. The feasibility of developing data bases can be considered. Technical resources within each region can be identified,

including academic institutions, contractors, laboratories and equipment. Standard protocols can be cataloged for scientific as well as economic investigation.

It is critical that trustees and industry act now to formalize a cooperative approach. No major spills have occurred that have been governed by OPA, and the new NOAA damage assessment regulations are imminent. This lends impetus to a new approach. If the first spills under OPA and the new regulations go forward in the old adversarial format, important opportunities will be missed. Immediate action will avert such a failure and create a new framework for NRDA for the (unfortunately) inevitable next generation of oil spills.

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