

Uncertain Success: Evaluating the Potential of Cooperative Damage
Assessments Under the Oil Pollution Act of 1990

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Introduction

In January of 1996, the National Oceanic and Atmospheric Administration (NOAA) promulgated a new approach for natural resource damage assessments under the Oil Pollution Act of 1990 (OPA). NOAA's OPA regulations adopt a cooperative framework that is designed to expedite the damage assessment process such that restoration proceeds more quickly and at lower total costs than traditional assessments. The OPA process also aims to promote communication and issue resolution compared to the secrecy and conflict characteristic of traditional damage assessments. The OPA framework, however, is untested and natural resource damage assessments present unique circumstances that heretofore have not been successfully addressed using a cooperative model.

This note considers whether OPA's cooperative framework can be successfully applied to natural resource damage assessments. We propose four tests from the dispute resolution literature to evaluate the potential of the OPA framework to achieve its stated goals. In each case, OPA fails to provide sufficient guidance to ensure successful outcomes. This does not mean that OPA will not facilitate productive assessments and restoration plans; however, OPA's cooperative process will be challenged to significantly improve upon the efficiency and cost-effectiveness of traditional damage assessment methods.

Evaluating the OPA Framework: Lessons From Environmental Mediation

The environmental mediation literature identifies specific characteristics that influence the likelihood that a given dispute will be resolved successfully. We use four of these characteristics to evaluate the OPA framework:

1. The nature of the dispute;
2. The distribution of power among participants;
3. Technical uncertainty, and;
4. The level of each party's commitment to the negotiation.

Nature of the Dispute

The mediation literature generally characterizes disputes along a continuum based on the nature of the controversy. The continuum is bounded at one end by purely distributional disputes and at the other by legal disputes. Cooperative processes have been widely applied to distributional altercations. Negotiations are an effective means of resolving these distributional disputes since participants can identify different combinations of "goods" and explore exchanges that will produce mutual gain outcomes. Legal disputes, however, create specific procedural requirements and minimum restitution standards. Traditionally, we have relied on the courts to enforce these standards and ensure equitable outcomes.

OPA applies a cooperative framework in the context of a legal dispute, which by definition, establishes obligations that limit negotiation opportunities. Although OPA is cooperative, the trustees' legal responsibilities cannot be compromised for the purposes finding the "middle ground." Within this legal context, the process becomes a cooperative search for the correct answer and does not provide an opportunity to negotiate lenient restoration options.

Power

Disputing parties establish bargaining positions and calculate probabilities of success based on the relative power of each participant. Participants that secure relatively more power have less incentive to entertain opposing positions. Negotiations have the highest probability of success when power is evenly distributed. OPA defines power in two ways:

Legal/Regulatory Power. The legal obligation to restore the resource and protect the public trust guarantees a minimum level of power for the trustees. Accordingly, the trustees can compel responsible party participation, either through the cooperative- or court-defined process. OPA's regulatory power also gives the trustees the ability to determine the scope and timing of responsible party participation. The trustees can use this regulatory decree to establish rules for the conduct of the damage assessment that benefit their position.

Financial power. OPA is designed to improve trustee access to personnel, equipment, and funding. Instead of recovering costs at the conclusion of a litigated settlement, the OPA framework provides for on-going responsible party funding. Trustee dependence on this funding affords significant power to the responsible party. To the extent that the responsible party is not satisfied with specific aspects of the cooperative process, funding may not be forthcoming and the assessment may stall.

OPA's legal and regulatory power definitions are consistent with the nature of the dispute and the obligation of the trustees to fulfill the public mandate. Financial power, however, represents a wild card in the trustee/responsible party relationship. The responsible party's ability to control assessment and restoration finances may provide more power to the responsible party than is advisable given the trustees' legal responsibilities. The uncertain distribution of power suggests that incentives to work productively within the OPA framework may shift throughout the damage assessment process.

Technical Uncertainty

Negotiations have the highest probability of success when the participants are able to evaluate tangible differences using defined metrics and mutually accepted analytic methods. Environmental disputes, however, often arise as a result of technical and scientific uncertainty. Polarization among the parties becomes even more pronounced because each side often can retain equally qualified experts that disagree.

OPA's cooperative process encourages the responsible party and trustees to use joint fact finding and negotiation to establish mutually accepted assessment methods. To the extent that the responsible party and trustees agree with the cooperative conditions and analysis techniques, the process can be successful. However, the technical uncertainty associated with injury assessment and restoration science provides numerous opportunities for disagreement. Since OPA does not provide an impartial mediator to arbitrate these differences, uncertainty results in protracted negotiations and increased costs.

Commitment

OPA makes information available at little or no cost. Since responsible parties place a high value on this information, there are strong incentives to participate. Within the OPA framework, however, participation does not equal commitment. In fact, OPA does not require long-term commitment from any of the participants. Responsible parties can therefore gather information and then withdraw from the cooperative process when an impasse arises. Since commitment is not a prerequisite for participation, no penalty exists for defection. The responsible party can benefit further by using the information collected during the cooperative phase to expose trustee weaknesses should the case proceed to trial.

Conclusion

Cooperative damage assessments should be evaluated based on their ability to return resources to baseline and compensate the public for lost services in a cost-effective and efficient manner. At present, we do not have enough experience with cooperative assessments to determine if OPA's framework is viable. We have, however, identified several areas where OPA does not adequately consider the unique attributes of cooperative interactions. Accordingly, we should monitor OPA damage assessments and implement adjustments as necessary to meet restoration goals. Without these regular, case-specific modifications, the integrity of the cooperative damage assessment framework will be challenged over the long-term.