

Industry's Role in Texas' Natural Resource Damage Assessment
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Diane B. Hyatt, Director, Natural Resource Damage Assessment
Texas General Land Office, Austin, Texas

INTRODUCTION

The Texas General Land Office (GLO) is a state natural resource trustee. The GLO was established in 1836 by the Congress of the Republic of Texas to collect all records of Spanish and Mexican land titles, to provide maps and surveys and to countersign patents (titles) to public lands. Texas entered the Union in 1845 owning its public lands, the only state to ever do so. In 1991, Governor Ann Richards designated GLO as natural resource trustee because of new oil spill legislation, the public land management, and resource protection programs within the agency.

In Texas there are three state trustee agencies. The other two state agencies are the Texas Parks and Wildlife Department (TPWD) and the Texas Natural Resource Conservation Commission (TNRCC). There are federal trustees such who may or may not have overlapping jurisdiction with the state depending upon the unique circumstances of the spill or release. They are: the U.S. Department of the Interior (DOI), the National Oceanographic and Atmospheric Administration (NOAA), the U.S. Department of Energy (DOE), the U.S. Department of Defense (DOD), and certain Indian Nations. Most Texas NRDA's involve either DOI or NOAA or both. Since 1995, a State-Federal Memorandum of Agreement (MoA) ensures that the trustees speak with one voice. The federal agency signatures are with NOAA and DOI.

PURPOSE

The purpose of this paper is to outline industry's role in the natural resource damage assessment process. In Texas, trustees have many years of experience in implementation of a NRDA process which incorporates an open, cooperative partnership approach.

HOW INDUSTRY BECAME A PARTNER

The state Legislature passed an oil spill statute in 1991: the Oil Spill Prevention and Response Act (OSPRA). The Legislature amended the act in 1993 to include specific

language regarding natural resource damage assessment. Out of that legislation, the state trustees instituted a negotiated rulemaking with industry and the public and were able to adopt consensus-based rules in 1994.

In order to implement the new partnership, the state trustees, industry and the response community have taken a proactive stance in pre-spill planning. The trustees work with local area committees in accordance with the National Contingency Plan (NCP). This effort has helped to educate the response community and incorporates a specific NRDA chapter in the Area Committee Plans (ACP) entitled "Trustee Roles and Responsibilities." This document is available on the NRDA webpage at the GLO. (<http://www.glo.state.tx.us>)

Another pre-spill planning tool, which was uniquely authorized by the legislature and funded by the Coastal Protection Fund, is a coastal "baseline" database. A Natural Resource Inventory (NRI) of the Texas coast aids in baseline resource identification and targets resources at risk for pre-spill protection-planning and booming strategies. The NRI is on the Internet for use by public and industry. (<http://www.nri.state.tx.us/nri/>).

Industry had a significant voice during our state rule writing through negotiated rulemaking. Other initiatives are the "generic Memorandum of Agreement" that was negotiated by an ad hoc-stakeholder committee in the Galveston area. The generic MoA provided for a basis for individual case MOA's such as the San Jacinto and clearly defines the roles of the parties while affording protection of rights.

As of October 1997, the state trustees are working with industry on 31 active cases: 13 oil-spill related, 16 Superfund cases, and 2 under preliminary investigation. In most cases, industry works closely with the trustees on the assessment/restoration. Also, local governments and local advisory committees are often called upon as an advisor/participant particularly with regard to restoration planning.

HOW DOES IT WORK

According to the OSPRA and OPA rule, the state trustees issue an invitation to the Responsible Party (RP) to participate with the trustees in data collection and to share these data in order to have a more cost effective and time efficient assessment. The trustees invite participation by the responsible party as designated by the Federal On-Scene Coordinator (FOSC) which is the Coast Guard for coastal spills, EPA for inland spills, or by the State On-Scene Coordinator (SOSC) which is the Texas General Land Office for coastal oil spills, the Railroad Commission of Texas for spills associated with pipelines and oil and gas facilities, or the Texas Natural Resource Conservation Commission for hazardous releases and inland oil spills.

The "R P" is usually the owner of the vessel that spilled the substance, or owner of the pipeline that ruptured. If this incident is of a large scope, the unified Incident Command

System (ICS) will go into effect and a triumvirate of Industry-State-Federal response is initiated. The industry's role in the ICS is well established. The natural resource trustees are there in two major roles: that of protection and prevention and that of injury assessment and documentation. It is our duty to fulfill the mandate to protect the resources by advising the on-scene coordinator in order to mitigate whatever injury possible, as well as to document the ephemeral conditions of an oil spill (i.e. the nature and extent of exposure.) In order to fit smoothly into the ICS, trustees work in Planning to help make scientific decisions that might protect resources identified in pre-spill planning documents and to add any expertise relevant to that goal.

Parallel to that response role, the trustees will document the exposure pathways and resources at risk for injury. The state trustees focus on restoration of the injured resources and the services that flow from those resources. The role of industry in the NRDA process is much like that in the response role: make the "wrong", "right".

As codified in the state NRDA rule (30 Texas Administrative Code, Chapter 20) and the OPA rule, the restoration must be tied to the resource that was injured. The law is not meant to penalize, but to restore.

After it is established that the trustees have jurisdiction, pathways, and potential injury, the cooperative approach becomes important. This approach offers: less duplication, and less expense. Transaction costs are cut. Exposure documentation proceeds through a cooperative "One Scope of Work" approach. When early samples of oil and water column can be collected and archived, and photos, videos, and overflights recorded, it takes the "guess-work" out of quantification of injuries. Even if in the final analysis the results are interpreted in different ways, having the same data set to work from cuts down on many unnecessary misunderstandings and disagreements between the parties.

FUNDING

There are several ways to skin this cat: open the "fund", either state or federal, with reimbursement by the RP, up-front funding to each agency (with documentation of expenses and audits), reimbursement of costs with documentation at the end of the process, or periodically.

SAN JACINTO SPILLS

An excellent example of a cooperative approach is the San Jacinto oil spills during October, 1994. This was a huge response effort due to the serious weather conditions, explosions and fire associated with the releases. The responsible parties were on-scene and talking to the trustees from the first day. There were several "potentially " responsible parties and they mutually hired a contractor to be "project manager". The Rps established a one "point of contact" approach much like an LAT. This approach has

simplified and streamlined communications between and with multiple parties. The trustees choose the GLO to be the LAT. During the preassessment phase, joint workplans were designed by consensus and documentation of ephemeral initial conditions was recorded. Regular meetings were held to collect exposure data, habitat data, degree of oiling or other treatments (i.e. burning, oiling and burning, etc.) Field data were compiled and put into a Geographic Information System database and map. We divided the large region under investigation into two geographic areas: South of I-10 and North of I-10. All information was collected by equal representation of members of the Cooperative Assessment Group (CAG) made up of trustees and RPs.

Recovery data was similarly designed by consensus and then fieldwork was jointly carried out. Resource recovery was monitored over time to scale the injuries and the restoration necessary. In this case since natural recovery is ongoing, we are measuring the "lost services" from the resources that were injured and are recovering at different rates. The method that was agreed upon by the parties for scaling the restoration is called Habitat Equivalency Analysis, developed by NOAA.

"Services" from natural resources are confusing to the public and to responsible parties. Examples of resource services are habitat for wildlife, shoreline stabilization, food chain functions, water purification, recreational fishing, and many, many more too numerous to list. In Texas, service to service and resource to resource restoration is preferred. Preservation, acquisition, enhancement, and reconstruction of essential habitat offsite are alternatives to consider when natural recovery onsite is the best option and "lost use" of the resource is being compensated. The goal of direct restoration of habitats is one that can lead to gains in production in habitat-limited resources. The trustees seek to restore diversity and natural systems that can support multiple resource recoveries. Service flows are best restored in the long term by this simple philosophy. The strictly lost interim human uses such as beach-days, recreational fishing or boating, swimming, snorkeling, and scuba diving or birdwatching, hiking, wildlife viewing, etc. can only be reduced by substitution or enhancement projects that promote more or better experiences in the future. The restoration must provide both components: direct and compensatory restoration.

The parties defining the cooperative process signed a Memorandum of Agreement (MOA). An attachment to the MOA can be a stipulation by the parties to agree upon facts. We have recently finished assessment and injury scaling in the South of I-10 assessment area and have sent the final stipulation

Document to the parties for signature. The North of I-10 assessment area is almost finished. Upon completion, the stipulation for the injuries will be similarly documented.

This method has worked fairly smoothly and a tremendous amount of technical work is near completion.

SUPERFUND SITES

Early participation of the trustees in the Remedial Investigations (RI) at hazardous waste sites provides the same sort of cost effective participation by using shared RI data and by scaling of injury and restoration contemporaneously with the decisions for remedy. The ALCOA Port Comfort Operations Superfund site adjacent to Lavaca Bay is an example of this process and has moved much faster than most Superfund sites in the past.

Restoration is targeted to be contemporaneous with remediation.

NEPA

In Texas, we have some cases that involve only the state trustees. These cases are not considered to fall under the National Environmental Policy Act (NEPA), however, our process includes public participation and public comment on each restoration plan.

In restoration scaling, the trustees utilize the information provided by project proponents, best professional judgment, interviews of resource managers, and literature sources as guides to answer the initial and detailed screening criteria derived from site specific injuries. This process includes applicable requirements under NEPA. Because the industry may wish to "cash out", the trustees sometimes receive a lump sum settlement, rather than resource to resource compensation. It is always necessary to meet specific criteria for restoration. The trustees much prefer that a responsible party undertake the restoration plan agreed upon by the public and the parties since it is less costly. If the trustees do the work, restoration costs more in time until completion and in money to industry.

WILL RESTORATION WORK?

Texas monitors restoration projects to meet success criteria. We have experienced that a responsible party can more efficiently contract and implement a restoration plan than multiple agencies.

A typical example of a monitoring plan, which describes the frequency and method of monitoring is that of the Gum Hollow Oil Spill, October 1994. Primary restoration for this case is planting of emergent estuarine vegetation (smooth cordgrass). In this monitoring plan which is implemented by the responsible party, the general criteria which define an overall positive trend are the one hundred percent survival and stabilization of the plant plugs and a positive trend in plant recruitment from seeds. Surveys are conducted at 180 days, 1 year, and 2 years. If the success criteria have been achieved after two years, then a three-year maintenance plan with semi-annual site evaluations is implemented. A maintenance and restoration fund is established for corrective measures during the three-year period. This enables the trustees to make mid-course corrections and to reinitiate planting should a "force majeure" event take place within that finite period. Any surplus from the maintenance fund is refunded to the responsible party at the end.

WHEN WE DISAGREE

“Litigation” is the last resort in Texas. In the Texas NRDA rule, the trustees and the responsible party must go to mediation before suit is filed. Trustees are mandated to seek to protect, preserve, and restore the public trust resources. Responsible parties wish to expunge their liability in the most cost-effective manner. The public interest is best served when rapid restoration can be achieved through the most cost-efficient and scientifically sound approach.

Our natural resources are finite. Trustees works to construct more habitats as natural areas are depleted; however, we are not successful in duplicating natural ecological systems. The trustees and the RPs who use objective science whenever possible and work in an atmosphere of fair-mindedness should not be lead to litigation. Litigation is an enforcement tool to be used only if necessary --restoration is the goal.

As you can imagine, with 31 cases active, trustee resources are sorely stretched. We believe early participation is a valuable tool and the most efficient way to conduct injury scaling and restoration. The restoration of resources can be achieved in an accelerated time frame, with the added benefit of an early global settlement with the responsible party. The trustees in Texas will continue to work toward this goal and use this approach in every case we can.