

**TITLE:** Cooperative Natural Resources Damage Assessment and Restoration  
Workshop: Working Together to Restore Injured Natural Resources

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**DISCLAIMER:** The information in this paper does not reflect or represent any official opinions, positions, or preferences by any agencies associated with or mentioned by the above authors. Nothing in this paper should be understood as an endorsement of any

views expressed. Instead, the information provided in by this paper is intended to offer insights in further promoting cooperative damage assessments as an approach in addressing natural resource liability.

**ABSTRACT:** When natural resources and their services are injured by hazardous substances or oil, how can affected stakeholders expeditiously and effectively restore these resources and services? How can the natural resource damage assessment and restoration be streamlined? What does it take to bring affected interests to the table—and keep them at the table—to resolve liabilities and ensure development of a common restoration vision?

These questions and more were the focus of a workshop on Cooperative Natural Resource Damage Assessment and Restoration held on June 9 and 10, 2004, in San Diego, California. The workshop included participants from federal and state government, industry, American Indian tribes, consultants, and environmental groups. Workshop planners included the National Oceanic and Atmospheric Administration, the U.S. Department of the Interior, the Association of State and Territorial Solid Waste Management Officials, the American Petroleum Institute American Chemistry Council, the Environmental Law Institute, the Center for Public Environmental Oversight, and Scenic Hudson.

This paper and presentation presents innovative and creative ideas and solutions discussed at the workshop that may serve to facilitate and further promote cooperative damage assessment.

## **DISCUSSION:**

### **Purpose of the Cooperative Assessment Workshop**

The Cooperative Assessment Workshop was held on June 9 and 10, 2004, in San Diego, California. For the first time, this event brought together a broad array of natural resource damage assessment and restoration (NRD or damage assessment) practitioners across all stakeholder communities to develop ideas on how to better promote cooperative assessment and restoration (for the full workshop report, see [www.darp.noaa.gov](http://www.darp.noaa.gov)).

Representatives from 20 different companies, 28 states, 5 federal agencies, as well as various Indian tribes, public environmental groups, and consultants comprised the 170 practitioners in attendance.

In an interactive framework, participants shared their views on:

- The status of cooperative assessment efforts and initiatives;
- Defining when a cooperative assessment is appropriate; and
- Identifying ways to streamline NRD.

### **Cooperative assessment efforts and initiatives**

At the outset of the workshop, a number of agencies and groups made a formal commitment to promote cooperative damage assessments. This commitment was made

based on their experience that, where possible, this is the preferred option. They recognize that where cooperation is impossible, stakeholders can always resort to adversarial approaches.

Below are some notable past cooperative efforts initiated by state and federal agencies, with input from industry and other interests.

The National Oceanic and Atmospheric Administration (NOAA) has promoted a cooperative assessment approach for the last five years. Founded on the success of early cooperative cases, NOAA drafted a concept paper that served as a basis for individual stakeholder meetings on this topic. The result of these meetings was the creation of a broad-based stakeholder group that provides insights and ideas on cooperative assessment and restoration approaches, including a framework for cooperative assessments that can be found on NOAA's web site ([www.darp.noaa.gov/](http://www.darp.noaa.gov/) and [www.darp.noaa.gov/partner/cap/index.html](http://www.darp.noaa.gov/partner/cap/index.html)).

The U.S. Department of the Interior (DOI) is committed to following a strategic plan and pursuing a policy of Conservation through Communication, Consultation and Cooperation (their 4C policy). DOI plans to convene a Federal Advisory Committee to address administrative NRD reforms. To further promote cooperative damage assessments, DOI is pursuing a three-pronged approach by developing tools for practitioners, focusing on getting to restoration through cooperation and partnerships, and improving working relationships with all stakeholders.

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO), a national, non-profit organization comprising solid waste cleanup agencies and staff, has an NRD focus group that includes ten states. These officials are exploring how to improve coordination with various stakeholders to further cooperative cases. ASTSWMO has published its efforts on past cooperative assessments in two documents, “Perspectives on Achieving Cooperation in Assessing Injury and Planning the Restoration of Natural Resources, 1999” and “ASTSWMO Cooperation in the Natural Resource Damages Process: Initiation, Assessment and Restoration, 2004” (see the publications page at [www.astswmo.org](http://www.astswmo.org)).

All of the above efforts continue the dialogue needed to promote and implement cooperative damage assessments. In 2005, NOAA, the American Petroleum Institute, and other agencies and groups will be hosting a series of smaller regional workshops with the goal of facilitating damage assessment work on the ground.

### **Why conduct a cooperative assessment?**

Natural resource trustees<sup>1</sup> have the authority to bring a claim for a damage assessment resulting from a release (or threat of release) of hazardous substances or oil. In order to meet statutory responsibilities and seek compensation from potentially responsible parties (PRPs) for restoration of injured resources and lost services, trustees have the option to follow the natural resource rules in pursuit of an NRD claim (see Clean Water Act, 33 U.S.C. §1321; Comprehensive Environmental Response, Compensation, and

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<sup>1</sup> Only officials or agencies specifically designated by the President or by the Governor of a State are entitled to act as public trustees (see CERCLA §107(f)(1) and OPA §1006(b)).

Liability Act (CERCLA or Superfund Act) at 42 U.S.C. §§9601-9675; and Oil Pollution Act of 1990 at 33 U.S.C. §§2701-2761).

In part, trustees may choose to file a claim following the NRD rules because doing so may provide them the force and effect of a rebuttable presumption in any administrative or judicial proceeding (Clean Water Act §311; CERCLA §107(f)(2)(C); OPA §1006(e)(2)). While the legal effect of this presumption is still unresolved, trustees' interpretation is that by following the respective NRD rules, the burden of proving that there was no injury is shifted to the PRP (see United States v. Jessup, 575 F.2d 378, 383, 1<sup>st</sup> Cir. 1985; General Electric, supra, 128 F.3d at 771-72; Ohio v. DOI, 880 F.2d at 476-81). Thus, trustees may feel obliged to follow a more comprehensive strategy to address a claim, whether or not it is needed, to ensure the “protection” of rebuttable presumption if the case proceeds to litigation.

Over the past fifteen years that trustees have conducted damage assessments, some seminal lessons have surfaced:

1. The outcome of an adversarial approach, which may lead to litigation, is very uncertain and likely to be unsatisfactory to all stakeholders. The threat of a courtroom is not always the answer.
2. Cleanup should not be viewed independently from NRD. NRD should begin during the response as both makes most sense in terms of restoring resources and services efficiently and cost-effectively.

3. The focus of damage assessment should be on restoration, not monetary compensation. Additionally, attention should first be given to those actions that restore, replace, rehabilitate, or acquire the equivalent of the injured resources.
4. When trustees and PRPs talk to each other across the table about the same issues, they should identify areas of agreement on reasonable assumptions and develop the appropriate tests and standards to reach a similar goal.

There are roughly 1200 sites included on the U.S. Environmental Protection Agency's National Priorities List; roughly 700 of these sites are in coastal and marine areas and fall under the NOAA trustee mandate.

Currently, NOAA is addressing about 150 of these coastal hazardous waste sites. The number of sites does not include the universe of brownfield, RCRA, or state superfund sites. In addition, it may take five years to conduct a damage assessment at a complex hazardous waste site, with the possibility of an additional five to ten years of litigation, before any restoration occurs on the ground. An oil spill damage assessment may take three to five years to complete, plus additional time for litigation (see "Getting to Restoration," *The Environmental Forum*, May/June 2004).

In recent years, cooperative approaches to NRD have emerged as a means of resolving cases in a more timely and efficient fashion. Cooperative approaches are consistent with the provisions of and encouraged by the NRD rules for superfund sites and oil spills (see 43 Code of Federal Regulations Part 11 at 51 Federal Register 27674, Aug. 1, 1986 and

15 Code of Federal Regulations Part 990 at 61 Federal Register 439, Jan. 5, 1996), as well as a recent Executive Order (see Executive Order - Facilitation of Cooperative Conservation, Aug. 26, 2004).

While it is not always possible to conduct cooperative assessments, where opportunities and incentives exist, it should be seriously considered, especially as all stakeholders face increasing constraints on existing staff and fiscal resources. There are benefits and drawbacks to a cooperative approach, as provided in the table.

**Table: Benefits and Drawbacks to Cooperative Damage Assessments**

<b>Benefits</b>	<b>Drawbacks</b>
Resolving corporate liability more quickly	Lost time and money if the cooperative NRD is aborted
Investing in restoration rather than potential legal preparation	Stipulation and prior decisions may compromise alternative approaches if the cooperative NRD is terminated
Expediting restoration of resources	Trustees and PRPs may be perceived to have a conflict of interest
Enhancing predictability and certainty	Available information and perceptions may fuel third party claims
Reducing transaction costs	
Ensuring commitment and continuity	
Receiving positive recognition; and	
Strengthening relations.	

There are various factors that may be holding trustees and PRPs back from initiating cooperative such as: the belief that it may not work, misunderstandings, unrealistic expectations, disagreements, fear, lack of trust and credibility, unsupportable statements



or unilateral actions, being distracted or overwhelmed by process, too many changes in staffing, and lack of progress.

Given these factors, how should affected stakeholders approach cooperative assessments? Some ideas are provided below. Recognize that a cooperation involves negotiation. Start with known facts and develop a reasonable framework that is mutually acceptable. Look for areas where compromise is possible.

### **When is a cooperative assessment appropriate?**

During the workshop, panelists were asked to answer the following two questions. First, what does it take for stakeholders from traditionally opposed interests to engage in a cooperative assessment? Second, once at the table, what does it take for these stakeholders to remain until a cooperative settlement is achieved?

In response to the first question, participants at the workshop identified the following concerns:

*Incentives:* Different incentives work for different situations. However, some incentives prove to be constants. Workshop participants noted that for a cooperative assessment to get off to the right start, the following conditions are required: opportunities need to exist to settle the issues; involvement in and responsibility for NRD need to be shared by both trustees and PRPs; the cooperative approach needs to be effective and efficient relative to alternative approaches; Alternative Dispute

Resolution (ADR) mechanisms need to exist should differences of opinion arise; and all the stakeholders need to be acknowledged and recognized for their efforts in the public forum.

*Deal Breakers:* Clearly, stakeholders need to understand what they can agree on from the outset. The trustees cannot delegate away their decision-making authority nor can they dismiss the public's right to be heard. For PRPs, there are internal business, cultural, philosophical and external market forces that come into play. Ultimately, all stakeholders reserve their rights and defenses in a cooperative NRD.

*Trust:* Trust can be assessed more easily when stakeholders have previously engaged each other in an NRD case or other context. Trust is a function of deeds following words and those deeds carried out as stated. However, when stakeholders face each other for the first time, trust must be earned by identifying, clarifying, and memorializing understandings, expectations and goals. Stakeholders must focus on shared objectives, set out principles or rules to guide the stakeholders, determine how decisions will be made, and design a framework that accomplishes the stated objectives.

*Commitment:* No effort will be successful unless there is an unequivocal commitment by the stakeholders, not only to each other but within their own management structures. Success in a cooperative assessment is best ensured when people with the appropriate authority are at the table, namely the trustees and PRPs

involved in the assessment. To ensure that trustees participate in a cooperative assessment, PRPs will likely need to provide some form of funding.

Capabilities: Whether stakeholders coming to the table have financial or in-kind resources available, the nature and extent of these capabilities are important to understand. Decisions and actions on such cooperative efforts as the use of common laboratories, joint experts, and facilitators will require the collective capabilities of all the stakeholders. No one party will have all the resources to do all things, thus a shared effort is needed to succeed in a cooperative assessment.

Cost-Benefit of Alternative Approaches: Much is made over cost-benefit analyses and the numerous ways to conduct these analyses. The question most relevant for all interests: Do the costs justify the result? A recent article by Conner and Gougnet (The Environmental Forum, May/June 2004) raises the specter of the Exxon Valdez and the \$100 million spent by agencies on the NRD—this amount does not include what Exxon paid to conduct its own studies. To answer this question, stakeholders must do their “homework” at the outset, i.e., scoping the site (its potential impact and restoration opportunities) and understanding the public concerns and interest groups that may want to play some role in a cooperative damage assessment.

When answering the second question of what is needed for participants in a cooperative assessment to remain at the table, workshop participants indicated that the outcome must drive NRD, there must be an agreed upon framework, there needs

to be progress, with specified milestones and schedules; all interests need to share risks and be upfront; the participants need to have a mechanism to deal with uncertainties; and all participants need to keep assessing costs versus benefits.

### **How can NRD be streamlined?**

The participants at the workshop offered many insights to existing NRD issues. Some of the more relevant issues and solutions they offered in the context of a cooperative damage assessment included:

*Early Agreements:* One of the challenges of cooperative assessments is memorializing the commitment made by the stakeholders at the outset in a way that facilitates NRD. For some past cooperative cases, these agreements were either not or delayed work on a site before the agreement document was completed.

To initiate or demonstrate early progress at a cooperative assessment site, informal or phased agreements may be appropriate depending on the level of trust existing among all parties. These phased agreements would address the most manageable or fundamental elements of an NRD, memorializing them as appropriate. For example, early agreements might address the participating stakeholders involved, the goals and scope of the assessment, principles and rules that might apply, coordination and communication mechanisms, legal or policy concerns (e.g., liability, Statute of Limitations, confidentiality, funding; mechanism for resolving disputes; and public

participation); and how/when these concerns could be addressed. Other, perhaps more critical issues could be addressed at a later time.

Coordination and Cooperation: Like real estate, where the value is largely influenced by the location of the property (simply put “location, location, location”), the success of any group approach, including a damage assessment, is “people, people, people.” Effective and efficient outcomes in NRD are highly dependent on getting the right people to the table. The individuals involved must have “people skills,” the appropriate expertise, the commitment to work towards restoration, the ability to maintain flexibility in NRD, and the needed decision-making authority. Constancy and consistency of team players is also important, something that can be ensured through PRP funding. Creating a workable and reasonable working structure, clearly defining roles and responsibilities, efficiently documenting decisions and actions (perhaps through simple meeting notes), and being able to address disputes through less formal mechanisms (such as ADR) will help to foster a sense of cooperation. *Of all the factors that work to make a cooperative assessment a success, the people directly involved is perhaps the most important consideration. Without people who are flexible and creative in their approaches, a cooperative assessment will most certainly fail.*

Integrating Cleanup with Restoration: The law governing the release of hazardous substance (CERCLA) was designed to provide a fairer playing field by which trustees and PRPs can readily communicate with the response agencies. If conducted

well, the integration of cleanup and restoration ought to be seamless. Unfortunately, this is not always the case. Some of the more substantive ideas offered during the workshop on this topic include:

- Engaging all affected stakeholders as early as practical;
- Integrating restoration as soon as possible, i.e., at least before the cleanup investigation begins;
- Developing and initiating effective communication and coordination mechanisms, e.g., for more significant sites, consider the use of the Environmental Protection Agency's (EPA) Biological Technical Assistance Groups;
- Recognizing the mandate, responsibility, and constraints of the cleanup agencies and the trustees;
- Maintaining a focus on the goal, i.e., remediation for cleanup and restoration for trustees; and
- Providing cleanup agencies with positive public relations for restoration success that they helped facilitate.

One of the biggest misperceptions that should be avoided is the expectation of “two cleanups” that NRD is merely another cleanup effort rather than an effort to assess and restore injured resources and services.

*Facilitating the Assessment - Focusing on Restoration and Being Creative:* It is critical to maintain a focus on the natural resources and not be sidetracked. Despite obvious tensions for trustees (sufficiency of settlement v. expedience) and PRPs

(precedence v. expedience), there are real NRD opportunities if respective stakeholders are motivated to settle, stay focused, and allow for creative solutions to restoration.

There is a benefit to using a reasonably protective approach (RPA) during a cooperative assessment. RPAs are now being used successfully throughout the country (see web site papers and workshop proceedings at [www.darp.noaa.gov/partner/cap/relate.html](http://www.darp.noaa.gov/partner/cap/relate.html)). Reasonably protective approaches promote a conservative (i.e. more protective), rapid evaluation of the resource injuries and takes advantage of the considerable amount of existing data and information, primarily generated during the cleanup. Where credible scientific information exists that provides a sound technical foundation for conservative but reasoned judgments about resource injuries attributable to the site, such an approach allows the assessment to proceed without pursuing additional specific injury studies by the Trustees. Individual injury studies may take 2-3 years to complete and produce. Using RPAs accelerates the ability of trustees and responsible parties to identify and scale appropriate restoration actions. The key to success of the RPA is that the extent of conservatism is not “gross overcompensation.” The PRP needs to feel that there is some amount of adequate overcompensation to account for uncertainty, but there is a limit.

Even when injury studies are needed, it should be clear that science has its limitations. Large amounts of money and effort can be expended doing studies that

will not be definitive or will not lead to a substantially different outcome in terms of what gets restored. Instead, stakeholders should ask themselves how and to what extent a proposed study provides further insight in advance of conducting the study.

In the realm of restoration, creative opportunities arise as well. Recently such thinking has resulted in some trustees and PRPs exploring the concept of Restoration Banking. Restoration Banking is intended to compensate for resource losses that have already occurred. It can be used to address injuries for one type of habitat by restoring a distinctly different type of habitat. In one NRD case, the Hylebos Waterway in Washington, the PRP (ATOFINA) intends to create dendritic marsh and other types of habitat values to compensate for injuries to sediments, and plans to sell excess restoration credits to other PRPs who also may have NRD liabilities related to contaminated sediments in the Hylebos. Restoration Banking differs from Mitigation Banking, which is used to compensate for an unavoidable loss. Potential benefits of Restoration Banking include creating higher ecological values through larger, integrated projects, focusing limited technical resources, faster implementation, a higher probability for long term success, and generating significant economies of scale.

*Public Involvement:* Public involvement in NRD is required by law. However, the perception, if not the fact, is that the public often is unaware that damage assessment is occurring, except at a highly visible site. The challenges facing trustees and PRPs include the following:



- Damage assessment is not brought up as an issue at the outset of a cleanup; and
- When damage assessment is raised , the public is confused on how NRD works in conjunction with cleanup, how the various government agencies ought to work together, and how the public can provide input in what are typically two complicated and bureaucratic approaches—cleanup and damage assessment.

It falls to the trustees and the PRPs to ensure that the interested publics are adequately identified, informed, and able to participate during a cooperative assessment to get the appropriate “buy-in” early in the effort. This avoids the potential for problems at the end, i.e., having to consider restoration projects based on late-coming public comments..

Many of the lessons learned in cleanup relating to working with and involving different publics can be applied to NRD. These include: scoping out public interest and potential public participants early in NRD; develop awareness and educational materials; involve and maintain involvement of interested public participants; listen earnestly and respond to public concerns; communicate clearly, concisely, and often; and inform different publics of the decisions that need to be made before they are made.

Establishing an advisory group may also be useful. The history of environmental cleanup is one of mistrust. Forming a group involving various public interests may help build trust to ensure that all parties (i.e., the PRP, trustees, and the different publics) are working towards the same goal: restoration. But even when the best efforts are conducted to inform and involve affected and interested publics, there may be other factors (such as political motivations) that steer the damage assessment in a different direction.

*Settling and Closing a Cooperative Assessment:* A number of issues can derail a settlement, regardless of size. Some of the more relevant issues include reservation of rights, the use of the appropriate settlement documents, PRP allocation, contribution protection, the appropriate signatories, reopeners, and stipulated penalties. The potential solutions to these and other similar issues include many of the suggestions discussed earlier—informing and engaging the appropriate representatives to the stakeholders on the relevant issue(s) soon after the issue is raised, mutually accepting the risk with some reasonable cap, and developing an appropriate public record.

## **CONCLUSION:**

One of the underlying themes for this workshop was that we all, either as individual practitioners or as organizations, go into any damage assessment with a shared goal. That is, we all want to restore the affected resources and resolve outstanding liabilities.

Reaching this goal sometimes can be very difficult, and at times there can be significant disagreements. Cooperative Assessment is one approach to achieving a successful

damage assessment. It is not the only approach, but it is one that, where possible and when done properly, can achieve great results at minimal costs to all stakeholders involved.

Now, if we lived in an ideal world, cooperative assessments would always work and they would always be really easy. Unfortunately, as we are all well-aware, we do not live in an ideal world and so, the challenge for all of us is to "turn words and ideas into action."

If only some of us believe in this principle, individual damage assessments will not be settled cooperatively and Cooperative Assessment as an approach will not be a viable option in damage assessment. We need everyone involved in damage assessment to take the words and ideas provided to make them a reality - one that benefits us all and gives us a sense of true satisfaction, so we can say to future generations that we have truly improved the state of our resources.

It is encouraging that, as a result of the workshop, there is the potential that some NRD cases may now move forward in a cooperative manner. In addition, states new to damage assessment have indicated that they are now better prepared and able to initiate programs that have a cooperative assessment component associated with them. Lastly, other stakeholders are considering establishing networking and communication forums to address cooperative assessment opportunities.

The National Workshop was but one step in the dialogue to promote cooperative assessments. Regional workshops will be taking place during 2005 so that cooperative assessment and other NRD issues can be discussed and resolved with the practitioners. We hope to engage you, the reader, at that time in the near future.

## **Biography for Eli Reinharz**

Eli Reinharz is an ecologist with the National Oceanic and Atmospheric Administration's Office of Response & Restoration, Damage Assessment Center. He provides support to NOAA's mission of assessing and restoring injuries to natural resources and their services resulting from hazardous substances releases, oil spills, and ship groundings.