

**NATURAL RESOURCE DAMAGES:  
PERSPECTIVES ON COOPERATIVE  
ASSESSMENTS AND RESTORATION OF  
NATURAL RESOURCES**

**By**

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**Introduction**

Natural resource trustees have the jurisdictional authority to bring an action or claim for natural resource damages (NRD) resulting from a release or threat of release of oil or hazardous substances. In order to meet statutory responsibilities and seek compensation from responsible parties (RPs) for restoration of injured resources, trustees must develop a comprehensive strategy for pursuit of NRD and commit adequate funding and oversight of NRD actions. However, trustees, particularly at the state level, are faced with insufficient resources to conduct the comprehensive assessments necessary to support pending NRD claims. One method, which has met with some success in resolving NRD liability, is the "cooperative assessment process" in which RPs fund and jointly conduct coordinated and open NRD assessment and restoration actions with trustee oversight.

Resolution of NRD liability provides benefits to all parties at a site -- trustees, RPs, and remedial agencies. With a coordinated effort by involved parties, environmental liabilities can be resolved, thus allowing RPs to achieve the global settlements, which are typically preferred. Transaction costs are reduced, injuries to resources are minimized, and resource restoration achieved in a more timely and cost-effective manner.

In recognition of the merits of the cooperative assessment process, the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) NRD Focus Group consulted with industry representatives to discuss the advantages and feasibility of a more broadbased application to NRD cases.<sup>1</sup> This article shares those insights gained on issues in negotiating cooperative assessments which need to be bridged by RPs and trustees order to ling effectively and achieve a common goal in dealing effectively and productively with NRD assessments and restoration. In addition, this article discusses the legal basis for NRD, funding options, the regulatory guidance, and benefits of the cooperative process.

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<sup>1</sup> Ms. Young has been a member of the NRD Focus Group for five years. Her primary work responsibilities are as the NRD for coordinator for the Commonwealth of Massachusetts, Executive Office of Environmental Affairs. The views expressed herein do not necessarily reflect any official opinions or positions of the Commonwealth of Massachusetts.

It is important to note that the insights presented herein do not establish any official opinions, positions, or preferences by ASTSWMO or by the ASTSWN10 NRD Focus Group. Also, the presentation of RP perspectives should not be understood as an endorsement of those views. Instead, the information is intended to provide trustees and RPs with meaningful recommendations in utilizing cooperative assessments as one of several accepted approaches in addressing NRD liability.

## **Background: NRD Legal Basis**

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>2</sup> the Oil Pollution Act of 1990 (OPA),<sup>3</sup> the Clean Water Act (CWA),<sup>4</sup> and other applicable federal and state statutes, parties responsible for the release of hazardous substances or the discharge of oil may be held liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss, resulting from such a release..."<sup>5</sup>

CERCLA defines natural resources as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to or otherwise controlled by the United States...any State or local government [or] any Indian tribe:"<sup>6</sup> The statute excludes purely private resources, but clearly does not limit the definition of "natural resources" to resources *owned* by a government, instead referring to certain types of governmental (federal, state, or local) interests in privately-owned property.<sup>7</sup>

NRD claims may be brought exclusively by designated federal or state government trustees of natural resources, acting on behalf of the public, or by trustees of Indian tribes. CERCLA requires that all sums recovered by Trustees shall be used "only to restore, replace, or acquire the equivalent of such natural resources."<sup>8</sup> Restoration actions should be expeditious, cost-effective, technically feasible, and coordinated with site response actions. The objectives of site remediation and site restoration are distinct but interrelated. The remedial program abates a threat to public health and the environment; the NRD program minimizes injuries to public resources and provides for restoration of natural resources and lost services to baseline conditions.

Trustees have the option to conduct an NRD Assessment (NRDA) according to federal regulations promulgated by the U.S. Department of the Interior (DOI), 43 C.F.R. Part 11, or the National Oceanic and Atmospheric Administration (NOAA), 15 C.F.R. Part 990. For example, DOI regulations outline a phased NRDA process comprised of: (1) Pre-assessment Screen: reviewing available information and determining if an NRD assessment can and should be performed; (2) Injury Determination and Quantification: determining the nature and extent of injuries and loss of services; (3) Damage Determination: evaluating and selecting restoration alternatives and determining the appropriate monetary compensation for injuries and loss of services. The measure of damages can include the cost of restoration and compensable value, i.e., compensation to the public for lost services from onset of injury to completion of restoration. In addition, trustees can recover the cost of the NRD assessment; and (4) Restoration Implementation: developing and implementing a restoration plan to restore, replace, or acquire the equivalent of the injured resources and services.

## **NRD Funding Options**

As indicated above, one of the first, and most important, steps for trustees in obtaining restoration and compensation for injury to natural resources is the performance of the National Environmental statutes such as CERCLA and OPA, which are premised on the principle that the "polluter will pay" and the RPs are to finance both response and restoration actions. Under CERCLA, participation by RPs in the NRDA process is not required.

Trustees are authorized to perform NRDA's independent of the RP and to seek restoration and compensatory damages through CERCLA litigation and/or settlement. Adversarial approaches to NRDA's, however, can slow the process, enhance uncertainties, and place scientific issues the hands of competing expert scientists. In addition, funding alternatives available to trustees for conducting NRDA's are limited. Trustees' use of the Superfund for assessment costs or payment of NRD claims has been prohibited as a result of amendments to the Internal Revenue Code.<sup>9</sup> Other options for trustee funding sources, such as OPA's Oil Spill Liability Trust Fund, DOI's NRDA and Restoration Fund, and NOAA's Damage Assessment and Restoration Program, have proven inadequate. The loss of Superfund monies to fund assessments has restricted the trustees' ability to pursue assessments and restoration of injured resources.<sup>10</sup>

Based on the above concerns and limitations, the ASTSWMO NRD Focus Group believes that a cooperative process between RPs and trustees in performing NRDA's can provide a win-win alternative to the uncertainties of litigation. Cooperative assessments between RPs and trustees can be an efficient and effective approach to resolving liability for restoration at sites with releases of oil or hazardous substances to the environment.

### **Regulatory Guidance: Participation by RPs**

OPA regulations, 15 C.F.R. § 990.14, provide guidance for involvement of the RPs in the NRD process. The following concepts are outlined: Trustees should invite the RPs as soon as to participate as soon as practicable, no later than the Notice of Intent to Conduct Restoration Planning. Trustees and RPs should enter into binding agreements to facilitate their interactions and develop a set of agreed-upon facts concerning the incident and assessment. The scope of the RPs' participation shall be determined by the Trustees and may range from mere notification to creating levels of involvement including the funding and conduct of assessment studies. The final authority for determinations of injury and restoration remain solely with the trustees, and trustees may terminate the participation of the RPs at any time. In presenting their demand for NRD to the RPs, trustees must invite the RP to either implement the Restoration Plan or make payment to the trustees as compensation.

The parallel course, the DOI regulations, 14 C.F.R. § 11.32, require trustees to invite the participation of RPs in the development and performance of the assessment. At the option of the trustees, the RPs may implement all or any part of the approved Assessment Plan. At the conclusion of the assessment, the trustees present their demand for damages to the RPs.

The NRD regulatory guidance encourages assessments when appropriate; however, success has varied on a case-by-case basis. Trustees and RPs attempting to enter a cooperative assessment need to consider a number of important issues.

## RP Insights

Industry representatives have offered the following insights on issues which have both fostered and hindered implementation of cooperative assessments. R-Ps have specifically recommended the following:

- Limits to Potential NRD Claims

Trustees should identify early in the process the resource categories of concern and restoration alternatives which will be included or excluded from NRD consideration. Early decisionmaking, however, can be difficult for trustees due to the lack of injury information and the unwillingness to transfer the risks of uncertainty from the RPs to the public. The inability to make such limitations should be explained to RPs by trustees.

- Apportionment of Contribution

Trustees should adopt a policy of apportioning damages to each RP when entering into a cooperative assessment. RPs recognize that trustees may be faced with limited information about contribution and are not required to apportion liability because of the joint and several liability provisions of CERCLA; however, RPs argue that a "fair share" approach is more consistent with a cooperative assessment process.

- Reciprocity

RPs believe that litigating an NRD case presents a significant barrier to trustees, given the expense and time of litigation. If this barrier is removed by an RP's joining the cooperative assessment process, then RPs feel there should be reciprocity on part of the trustee. RPs recognize their liability for costs of assessment under the regulations, but take the view that if they must be on the defensive and prove a negative (i.e., no natural resource injuries), they will do so in a court of law.

- Primary Restoration versus Equivalent Acquisition

RPs believe that trustees should consider restoration options other than on-site restoration, arguing that it is often more expensive to conduct primary restoration than to acquire the equivalent of lost resources or services. Although a difficult task, RPs prefer that criteria for selection of on-site versus off-site restoration projects be developed jointly with trustees.

- Trustees and Remediation Agencies

Trustees and remediation agencies should work together. In many states, the trustee is only one of several agencies making decisions that impact remediation and NRD. RPs recommend that trustees work to ensure all stakeholders are informed and are "on board" with restoration decisions.

- Interim Lost Uses and Non-Use Losses

RPs have difficulty recognizing and accepting the 'concept of damages attributed to past lost uses and interim lost ecological values. Their skepticism is based in part on the economic methodologies used to determine interim lost public values and the difficulty of convincing RP management that such assessments and compensation are necessary. RP management may agree with restoration of injured resources, but other damages are seen as punitive and unreasonable.

As to lost non-use values, RPs appear intransigent. These damages are obscure and difficult for RP management to accept as appropriate. Us are unlikely to participate in a cooperative assessment where trustees include non-use losses.

## Trustee Insights

- NRDA Objectives of Trustee and RP May Differ

An NRDA undertaken by a state trustee should involve: (1) Efficient assessment of impacts caused by releases; (2) the selection and scaling of restoration to fully compensate the public for those impacts and; (3) the implementation of those scaled restoration actions in an effective and timely manner. Trustees need to obtain enough information about the type, degree, and duration of the impacts to natural resources to ensure that the public trust is protected by implementation of the scaled restoration actions.

The RP's objectives for a cooperative assessment often differ from the trustee's with regard to the level of effort needed to document impacts as well as the selection of preferred restoration alternatives. While CERCLA states that the RP is responsible for the costs to assess and restore injured resources, it is the trustee who has ultimate authority to determine the most effective and appropriate restoration actions for natural resources under his/her trusteeship.

- Level of Effort Necessary to Identify and Assess Impacts

Many types of impacts to natural resources can result from the release of hazardous substances. Some of these impacts can be difficult and expensive to quantify. It is important to recognize that RPs often pay both the costs of assessment and restoration for any impacts that are measured by the trustees. Lack of information documenting an impact caused by a release can undermine a trustee's position in settlement negotiations as well as in judicial proceedings.

Trustees should, at a minimum, collect sufficient information to document injuries to natural resources, to ensure that restoration is scaled appropriately, and to explain the rationale supporting the settlement with the RP. State trustees can expect to encounter differences of opinion as to the need for particular assessment activities, the methods or techniques to be used for an assessment, and the particular endpoints or measurements to document a given injury to a resource.

- Use of Stipulations in Lieu of Particular Studies

Trustees should decide which resources and injuries should be assessed for a given release or impacted site. Trustees have the flexibility of allowing RPs to stipulate to a particular injury or public loss of use of a resource in lieu of jointly conducting a study to document the injury or loss. The trustee should be confident that enough information is known about the injury or loss to make a sound estimate for purposes of a stipulated agreement with the RPs. While the use of stipulations can reduce assessment costs and time required to study impacts, trustees must weigh tradeoffs associated with obtaining a reduced amount of information about a stipulated injury.

- Considerations Related to the Issue of Time

Trustees should be sensitive to the issue of statute of limitations (SOL) for recovery of natural resource damages under CERCLA. If RPs are willing to enter into a cooperative assessment, they should sign tolling agreements if the assessment runs beyond the SOL. If the state trustee has started a Judicial action for recovery of damages, the court may impose timelines that are difficult for a trustee to meet, even in a cooperative assessment process. Trustees typically have limited staff and time to participate in damage assessments and this fact can become a problem in a cooperative assessment. Finally, a cooperative assessment process may actually increase transaction costs if both sides cannot agree in a timely manner on the need for particular and appropriate studies and study methods.

- Co-Trustees for Natural Resources

It is important for state trustees to notify co-trustees (state or federal) when a release is known or expected to impact a jointly managed natural resource (e.g., migratory birds). Most RPs will request a covenant not to sue for damages from all affected resource trustees. Coordination with co-trustees, while requiring some effort, can often increase the trustees' resources in a cooperative assessment, with greater staff expertise, funding, data, and experience with damage assessments and restoration.

- Formal Cooperative Assessment Document

It is important to formalize a cooperative assessment in a document. The drafting of a cooperative assessment agreement helps improve the clarity and mutual understanding of the agreed-to process. The document should include some discussion of the following topics: parties to the agreement, purpose, agency authorities, background to the release/site, scope of the agreement, financial responsibility, conduct of independent studies, dispute resolution, severability, retention of privileges, confidentiality, reservation of rights and claims, termination, and notices or contacts. Various state trustees have developed model cooperative assessment agreements (e.g., California, Massachusetts, New Jersey, New York, Texas).

- Funding Issues in a Cooperative Assessment

RPs generally want the flexibility to choose which assessment activities to fund. It's helpful for a trustee to present an assessment plan with minimum tasks needed and estimated budget for the assessment. The RPs can be asked to commit to the assessment plan, after review and input, and the funding can be placed into a dedicated account. Alternatively, the assessment can be directly funded by the RPs with a high level of trustee oversight and involvement. It is important for the trustees to have an alternative source of funding for studies deemed essential by the trustees but not agreed to by the RPs. Disagreement over the need for one study or particular study methods should not derail the cooperative assessment process. Reasonableness of assessment costs may be resolved at a later date during settlement discussions.

- Ability to Conduct Independent Studies and Exchange of Information

Trustees and RPs should agree on the issue of independent studies or studies conducted by only one party. The agreement can be as simple as determining that no independent studies will be

conducted or more complex where each party agrees not to conduct any independent study on topics jointly assessed under the cooperative agreement. In general, trustees should not give up authority to conduct assessments on any aspect of injury or damage quantification. Trustees and RPs should agree to exchange previously collected information on topics to be jointly assessed by the parties.

- **Creating a Record**

Trustees should always create an administrative record pertaining to natural resource damage assessment and restoration cases. The creation of an administrative record throughout a cooperative assessment will help the trustees and RP document assessment activities and decisions which, in turn, can be used before and after settlement is reached to explain the process to the public. The development of such a record will also allow for judicial review that is focused on the administrative record.

- **Use and Oversight of Consultants**

If trustees and RPs have their own consultants working on assessment tasks, there is significant potential for increased transaction costs. A back-and-forth process for study plans and methods is one example of an area where costs can escalate. Trustees should require some level of peer review, both at the individual study level as well as the overall assessment plan. In general, it is preferable for trustees to direct the activities of a contractor when assessing the impacts to natural resources under their trusteeship. This direction can be provided in the form of drafting scopes of work, receiving and reviewing contractor invoices, and providing guidance on methods and implementation of assessment activities. Invoices that have been reviewed and approved by the trustees can then be routed to the RPs for review and payment. Alternatively, RPs can hire contractors so RPs and trustees can proceed with joint development and implementation assessment activities.

### **Benefits of Cooperative Assessments**

A state program which encourages cooperative NPDAs and extends invitations to RPs to participate in the assessment process will expedite restoration, streamline costs, enhance public involvement in the NRDA process, and establish good will between all parties. The following points highlight the potential benefits of the cooperative assessment process.

- **An Early Focus on Restoration**

Cooperative assessments are well suited to negotiation and restoration-focused settlements. The cooperative process provides parties the flexibility to focus on the implementation of restoration projects as compensation (rather than the determination of monetary damages). In addition, it allows for creative settlements that might involve in-kind or off-site restoration projects. It can help ensure that the end objective (restoration) is considered from the beginning of assessment and a focus on restoration is maintained throughout the process: As a result, settlements should occur much earlier with restoration of lost natural resources being expedited. The cooperative assessment process sharply contrasts with a litigation-focused approach that can result in high costs of assessment and delayed restoration. Litigation-oriented assessments typically have had



trustee efforts focused on the development of claims. Actual restoration planning has not been initiated until well after settlement.

- Promotion of Integration of NRDA into the Remediation Process

Remedial Project Managers should understand that the size or scaling of NRD restoration can be tied to the size, nature, and length of time of the final selected remedial action at the site.

Cooperative assessment activities can also be more readily integrated into the remedial process, especially at RP lead sites. This cooperative integration of NRDA into the clean-up process should be the most efficient and cost-effective manner of performing a restoration-based assessment. If data are needed beyond that obtained in the ecological risk assessment or other remedial investigation, the RPs readily include the collection of this assessment data into the remediation sampling efforts. If a manager is reluctant to incorporate NRDA concerns, the participation and support of the RPs can be a catalyst to ensure that NRDA needs are more efficiently addressed within the remedial framework

- Assistance in Overcoming Funding Shortfalls

State trustees often have little or no budget with which to perform NRDA's. The cooperative assessment an opportunity for trustees to overcome funding issues by entering-into an agreement with the RPs to fund their costs of assessment. The ability to monitor trustee costs and avoid any inefficiencies by eliminating duplication of efforts provides a good incentive for RPs to enter into such agreements. Even in the absence of funding agreements, a rapid settlement for NRD can provide for a rapid recovery of trustee assessment costs.

- Reduction of Assessment Costs

Foremost among the numerous-incentives for RPs to join trustees in a cooperative NRDA is the potential to greatly reduce the cost of assessment. When parties reach a settlement, litigation costs are eliminated or significantly reduced. In a cooperative assessment, parties can often stipulate to impacts in lieu of costly assessments. For some impacts, the assessment can be streamlined through a joint decisionmaking process and costly independent duplicative assessments can be avoided.

- Promotion of Good Science

Where NRDA's focus on litigation, the planning and data gathering process normally are closed to preserve a legal advantage. However, this type of scientific investigation process may serve to limit peer review and the objective critical evaluation of studies performed during an NRDA.

Furthermore, the literature reviews, study designs, and analytical results of studies performed for an NRDA in anticipation of litigation are withheld from the scientific community at large, limiting potential use of this information in other arenas. The cooperative assessment process should encourage good science by combining the expertise of both trustee and RP scientists and allowing for a more open peer review process.

- Enhancement of Public Participation

Similarly, the cooperative assessment process tends to promote citizen awareness and participation in NRDAs. When the assessment and restoration planning activities are developed in preparation for litigation, the public can be restricted from any of participation in the process. Pub hearings and an open record of the assessment can eliminate or reduce the potential for negative public comment and citizen lawsuits.

- Establishment of Good Will

RPs can use restoration-based settlements to maximize public relations benefits and put forth the positive message that the corporation and its industry are good environmental citizens. Good public relations capital may translate to increased market benefits. Further, a more rapid resolution of NRDA issues can reduce or eliminate contingent liabilities that must be identified on the financial statements of public corporations.

### **Contact**

If your state or environmental agency has questions or recommendations concerning the conduct of NRD cooperative assessments, please contact Gary King, ASTSWIYIO NRD Focus Group) Chairman, by email at < EPA4136@epa.state.il.us>. It is essential that trustees communicate regarding their experiences in addressing injured natural resources in order to develop efficient and effective approaches to resolving liability for restoration at sites with releases of oil or hazardous substances. The cooperative assessment process presents challenges to management due to the differing perspectives between trustees and RPs. However, the benefits recommend its use when appropriate.

### **ENDNOTES**

Section 107(f)(1) of CERCLA, 42 U.S.C. § 9607(f)(1).

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<sup>1</sup> In 1995, ASTSWMO formulated a Focus group on NR.D. The ASTSWMO NRD Focus Group is currently composed of representatives from eight states - California, Delaware, Illinois, Massachusetts, Missouri, New York, Texas, and Washington. On November 5, 1999, the ASTSWMO NRD Focus Group released a paper, "Perspectives on Achieving Cooperation in Assessing Injury and Planning the Restoration Natural Resources." This article presents the findings of the ASTSWMO paper.

<sup>2</sup> 42 U.S.C. § 9601 et seq.

<sup>3</sup> 33 U.S.C. §2701 et seq.

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<sup>4</sup> 33 U.S.C. §1251 et seq.

<sup>5</sup> See section 107(a)(C) of CERCLA, 42 U.S.C. 9607(a)(C).

<sup>6</sup> Section 101(16) of CERCLA, 42 U.S.C. 9601(16).

<sup>7</sup> See *Ohio v. United States Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1989).

<sup>8</sup> Section 107(f)(1) of CERCLA, 42 U.S.C. 9601(f)(1).

<sup>9</sup> 26 U.S.C. § 9507(c)(1)(A)(ii). Section 111(b)(2) of CERCLA, 42 U.S.C. § 9611 (13)(2), states that the Superfund can not be used to compensate the public for NRD claims unless all administrative and judicial remedies have been exhausted; however, the term "NRD claims" does not include the costs of assessment. Section 111(c)(1) specifically allows the use of Superfund for the cost of assessment. Contradictory provisions, which amended the Internal Revenue Code section dealing with Superfund monies, were inserted into section 517(a) of the Superfund Amendments and Reauthorization Act. These provisions limit the use of Superfund monies by specifically excluding their use for NRD assessment and the payment of NRD claims.

<sup>10</sup> Additional options for funding and conduct of NRDA are being explored by various state trustees. A review of these options is outside the scope of this article.