

Cooperative NRDA Practice

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- Natural Resource Damage Assessment Generally
- Legal Underpinnings of Cooperative Assessment, CERCLA and OPA
- Risks/ Benefits to Trustees and PRPs, Respectively
- When does Cooperative Assessment make the most sense

Goal of NRDA

- Under OPA-90 (Oil Pollution Act), the CERCLA (Superfund), and the other NRD statutes, natural resource damage assessments (NRDAs) are conducted by government officials designated to act as “trustees” to bring claims on behalf of the public for the restoration of natural resources injured due to hazardous substances.
- Goal: To make the public whole for oil and hazardous substance-related losses of natural resources through restoration, replacement, or acquisition of the equivalent of injured resources and the services they provide.

Cause of Action for CERCLA and OPA NRD Liability

- “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.”
 - CERCLA §107 (a) (c)
- “...or loss of use of.”
 - OPA § 1002(b)(2)(A)

Elements of Claim for NRD

- Release (CERCLA)/Discharge (OPA) of
- Hazardous Substance/Oil
- Which causes injury to
- Natural Resources
- Under trusteeship
- Resulting in damages (quantify service losses/restoration costs and convert to dollars)

Regulatory Bases for Cooperation

- CERCLA, 42 U.S.C. § 9601 *et seq.*
 - No statutory obligation
 - Expressly authorized by regulation (see 40 C.F.R. § 300.615; 43 C.F.R. § 11.32(a)(2)(iii)(A)), but not mandated
- OPA, 33 U.S.C. § 2701 *et seq.*
 - No statutory obligation
 - Cooperative process was developed in part in response to the adversarial assessments associated with the Exxon Valdez spill
 - Regulations require that Trustees invite RPs to participate in the NRD assessment (15 C.F.R. § 990.14)
 - Regulations provide criteria for the Trustees to use to determine nature and extent of cooperation. (15 C.F.R. § 990.14c(4))

Differences between CERCLA and OPA Cooperative Assessment

- Recent versus historical event
- Number of PRPs
 - Oil spill, generally one party, three is a lot!
 - Large CERCLA Cases can have hundreds
- OSLTF available to Trustees in OPA cases

TRUSTEE MOTIVATIONS TO COOPERATE

- Achieve restoration faster
- Obtain upfront funding
- Iteratively educate PRPs
- Reach settlement faster (move on to other matters)

PRP MOTIVATIONS TO COOPERATE

- Obtain insight into trustee assessment
- Influence trustee assessment
- Reduce net transaction costs
- Reach settlement faster (get matter off their books)

Potential Risks to Trustees

- PRP strategic manipulation of cooperative process
- Unrealistic PRP technical input precluding meaningful progress
- Failure to adequately study and assess in reliance on PRP representations
- Unproductive use of staff time
- Undercutting of Trustees' lead role in assessment

Potential risks to PRPs

- Assessment creep (expansion of scope)
- Trustee unwillingness to accept technical input from PRP technical consultants
- Potential impact on cleanup standards
- Cooperative process transforms into one where PRPs are essentially funding the Trustees' pre-litigation studies

GENERAL FACTORS FOR SUCCESS

- Focus on science and restoration
- Establish common goals, be flexible
- Agree to framework for cooperation
- Plan ahead, communicate regularly
- Share data
- Consider consensus in decisionmaking
- Learn requirements/limitations of other parties

SOME SPECIFIC ISSUES AND CONSIDERATIONS

- Set Aside (Compartmentalize) Liability Defenses and Tactical Motives
- Defining Shared Objectives
- Design Process to Fit Objectives

Elements Which Seem To Influence Success of Cooperation

- Scale of the case
- Number of PRPs, cohesiveness of PRP group
- Number of Trustees, cohesiveness of Trustee Council
- Individual/ Corporate personalities/ philosophies