SUCCESSFUL COOPERATIVE ASSESSMENT PRACTICE

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REASONS TO COOPERATE

- Why trustees pursue coop assessment
- Why PRPs pursue coop assessment
- Remain aware that they are not the same!
- PRP and trustee behavior in cooperative assessment generally consistent with their motivations and interests
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)
TRUSTEE IMPERATIVES

• It’s the Trustees’ damage assessment
  • Cooperative assessment is one element of the Trustees’ NRD
  • What does this mean?

• Do not allow cooperative assessment to compromise Trustees’ ability to pursue litigation if necessary
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
DIFFICULT TO CONTROL FACTORS INFLUENCING SUCCESS

- Trustee policy
- Corporate policy

Individual personalities
  - Good faith, honest, adversarial, sneaky?
  - Are they ‘trainable’ ?(people, institutions, can change)
SPECIFIC ISSUES AND CONSIDERATIONS

- Set Aside (Compartmentalize) Liability Defenses and Tactical Motives
- Defining Shared Objectives
- Design Process to Fit Objectives
SET ASIDE, BUT DON’T IGNORE LEGAL ISSUES
- Defenses and equities must be considered at some stage of negotiations
- Submerged tactical motives can infect positions and undermine cooperation
- Put defenses/fairness issues on the table and agree on process to address them
DEFINING OBJECTIVES

- Leave Pretenses at the Door
- Trap No. 1: We have only shared objectives
- Trap No. 2: The answers will emerge from good science
- Though science provides essential foundation, one purpose of cooperative assessments is to try to avoid exhaustive studies
- Policy and legal positions have legitimate roles, best addressed in the open
DEFINING OBJECTIVES

- What Do We Mean by “Cooperative Assessment”?
- OK to do only part of assessment jointly:
  - injury to specific categories of resources
  - all injury
  - identification/scoping of restoration options
  - comparison of alternatives
  - estimated restoration costs
  - compensatory restoration
  - interim lost values
• DEFINING OBJECTIVES

• Ok to take the process step by step
• Consensus vs. joint work and separate conclusions
DESIGNING PROCESS

• Agree Up-Front on:
  • –Decision points
  • –Who will make decisions, and how, if consensus fails
  • –Consequences of breakdown
  • –Interface between cooperative assessment conclusions and settlement negotiations
• If only part of assessment is “cooperative,” address process for separate technical work (e.g. information sharing, opportunities to comment)
DESIGNING PROCESS

• When there are serious liability or fairness issues, consider a distinct process to address them.
• –Confine such issues to negotiations; keep them out of the assessment.
• –Usually not a problem in spill cases.
• –Challenging at complex, multi-PRP CERCLA sites
DESIGNING PROCESS

- Recognize and plan for public’s role
- Consider using a mediator or other third-party neutral
  - Shared expert-evaluators
  - Choices tailored to issues
Examples of Cooperative Assessment Cases

- CA – East Walker River Oil Spill
- CO – Upper Arkansas River Basin
- CT – Former Remington Gun Club
- DE – Halby Chemical Superfund Site, Newport Delaware Superfund Site
- LA – Westchester Oil Spill, Bayou Trepagnier, Bayou Verdine
- MD – Chalk Point Oil Spill
- NY – St. Lawrence/Massena
- OR – Portland Harbor
- TX – Baily Waste Site, Tex-Tin, COL-TEX, Mobil Mining, Lavaca Bay, Port Arthur
- WA – Hylebos Waterway, Olympic Pipeline Company Oil Spill
FACTORS RELEVANT TO TRUSTEES
‘SURVIVING’ COOPERATION

- Preserve your alternatives (cover your (****))
- Be sincere about good faith (we are the good guys)
- Work as equals, but lead as Trustees!!
  - Establish directions to be followed
  - Be first to take a cut at work products- define the shape of the playing field
- Maintain independent assessment option
- Remind them we want, but don’t need cooperation.
- We need to know where we want to go before we sit down with PRPs
- Cooperation doesn’t mean sharing our planning or strategic thinking
- Maintain litigation option
FINAL THOUGHT

• Always remember it’s the Trustees (our) assessment
• Work as equals within cooperative framework, but government needs to be clear regarding our trustee obligations
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