

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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