Cooperative Assessment Workshop
June 9-10, 2004
San Diego, California

Executive Summary

On June 9 and 10th, 2004 in San Diego, California, a ground breaking Cooperative Assessment Workshop was held. The workshop brought together for the first time a breadth of natural resource damage assessment and restoration practitioners (also referred to as simply damage assessment, NRDA, or NRD), representing every relevant stakeholder group including: federal, state, and Indian tribal trustees; industry and insurance companies; attorneys and consultants to both trustees and industry; and non-governmental organizations (NGOs). Representatives from 20 different companies and 28 states made up part of 170 practitioners in attendance.

The workshop was the culmination of the efforts of a multi-stakeholder work group representing federal, state, and tribal trustees, industry, and environmental groups, which met from 2001 to 2003, to develop ideas on how to better promote the cooperative assessment process. One of the products developed as a result of the stakeholder discussions is a framework on cooperative assessments, identifying some of the more important thresholds that face cooperative damage assessment process. In an effort to obtain more widespread feedback on how to address cooperative damage assessments, the stakeholder work group determined that a national dialogue on cooperative assessment would be prove useful.

The Planning Committee for the Cooperative Assessment Workshop included:

Eli Reinharz, Lisa Pelstring, Ron Gouguet, John Kern and Linda Burlington, NOAA
Robin Rorick and Madeleine Sellouk, API
Michael Ammann, Chevron/Texaco
Ralph Stahl, DuPont Specialty Chemicals
Dale Young, ASTSWMO and MA
Ken Mayer, State of California
Kerry Kelly, ACC
David Morrow and Kristin Skrabis, DOI

The Planning Committee determined that most of the "work" of the Workshop should be accomplished in multi-stakeholder small groups that would resemble groups involved in a Cooperative Assessment. It also established the following goals for the Workshop:

1. To offer participants multiple opportunities to meet and work with representatives of other stakeholders in a Cooperative Assessment;
2. To create an environment encouraging robust and honest discourse;
3. To emphasize the importance of process skills (e.g., facilitation, negotiation, communication) to the success of a Cooperative Assessment and to provide, at least, a minimal level of skill-building;
4. To develop creative, potential solutions to some of the most challenging Cooperative Assessment issues;

5. To give participants a better understanding of the motivations of other parties in a Cooperative Assessment and the legitimate concerns they bring to the process;
6. To establish a set of recommended "next steps" for further developing cooperative approaches to damage assessments.

The first day of the Workshop, June 9, 2004, speakers and panelists made presentations on a variety of Cooperative Assessment efforts and cases. They shared their views on:

- Current cooperative assessment efforts and initiatives;
- How the response process can be better integrated with the restoration process;
- When a cooperative approach is appropriate and when it is not;
- The most challenging "sticking points" or potential obstacles to Cooperative Assessment; and
- What factors accounted for the success or failure of past cooperative assessment efforts.

The small groups also met for the first time on June 9 and discussed the major goals and concerns of the various stakeholder groups represented in a Cooperative Assessment. Most of the second day of the Workshop, June 10, was devoted to working in small groups, including a morning session in which groups identified major obstacles to successful Cooperative Assessments and brainstormed potential solutions. In the afternoon session, groups developed proposals that might resolve or ease obstacles at each of four stages of a Cooperative Assessment process:

- Initiating and Committing to a Cooperative Assessment
- Managing a Cooperative Assessment
- Communicating and Coordinating in a Cooperative Assessment
- Settling and Closing a Cooperative Assessment

Lastly, the Workshop asked participants to address the issue of what should happen next to increase knowledge about Cooperative Assessment and enhance its use. Among the suggestions from participants were:

- Posting a report of the workshop;
- Sponsoring additional workshops such as regional or discipline-specific workshops;
- Developing materials on specific cooperative case studies, templates, tools and assessments;
- Increasing outreach to all sectors, especially those that have not been cooperative in the past; and
- Creating a mentoring and training program that would allow case team participants to work along side experienced practitioners.

Participants reported that they were energized by the workshop. They were able to develop new relationships with people whom they will work with in the future on both sides of the table and begin developing trust. They found the opportunity to network and develop relationships to be particularly valuable. In addition, through their work in small groups, they were able to have honest conversations without the usual posturing and to deepen their substantive knowledge of cooperative assessment.

As a result of the workshop bringing together various stakeholders in a safe and cooperative environment and the relationships established, there is the potential that some cases may now move forward in a cooperative manner. In addition, several states have indicated that they are now better prepared and energized to initiate damage assessment programs that have a cooperative assessment component associated with them. Lastly, other stakeholders are considering establishing various networking and communication forums to address cooperative assessment opportunities.

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Cooperative Assessment Workshop Report
June 9-10, 2004
San Diego, California

Introduction

Over the recent past, various cooperative approaches to the natural resource damage assessment (damage assessment) process have emerged as a means of resolving damage assessment cases in an effective and timely manner. In a Cooperative Assessment, all concerned stakeholders work as a team to assess injury and conduct restoration without resorting to litigation.

In the hope of encouraging more cooperative assessment cases across the United States, NOAA sponsored a series of individual stakeholder meetings to further explore the process. These meetings led to formation of a multi-stakeholder work group representing federal, state and Indian tribal trustees, industry, and environmental groups. From 2001 to 2003, the stakeholder work group developed ideas on how to better promote the cooperative assessment process. One of the products drafted as a result of the stakeholder discussions is a framework on cooperative assessments, identifying some of the important thresholds that face the cooperative damage assessment process. In an effort to get more widespread feedback on how to address cooperative damage assessments, the stakeholder work group determined that a national dialogue on cooperative assessment would be prove useful.

A Cooperative Assessment Workshop Planning Committee was formed and included:

Eli Reinharz, Lisa Pelstring, Ron Gouguet and John Kern, NOAA
Robin Rorick and Madeleine Sellouk, API
Michael Ammann, Chevron/Texaco
Ralph Stahl, DuPont Specialty Chemicals
Dale Young, ASTSWMO, State of Massachusettes
Ken Mayer, State of California
Kerry Kelly, ACC
David Morrow and Kristin Skrabis, DOI
Kenneth Seeley and Dolores Savignano, USFWS

The Planning Committee identified people with experience in Cooperative Assessment cases, and they were interviewed for their perspectives on what factors account for the success or failure of cooperative efforts and what should be included in the workshop for it to be useful and meaningful. The structure of the workshop was based on the information gathered from these interviews.

The Planning Committee invited representatives from every relevant stakeholder group including federal, state and Indian tribal trustees, industry, and insurance companies as well as attorneys and consultants to both trustees and industry, and NGOs. Representatives from 20 different companies and 28 states made up part of 170 practitioners in attendance.

During the first day of the Workshop, June 9, 2004, speakers and panelists made presentations on a variety of Cooperative Assessment efforts and cases. They shared their views on:

- Current cooperative assessment efforts and initiatives;
- How the response process can be better integrated with the restoration process;
- When a cooperative approach is appropriate and when it is not;
- The most challenging "sticking points" or potential obstacles to Cooperative Assessment; and
- What factors accounted for the success or failure of past cooperative assessment efforts;

The small groups also met for the first time on June 9 and discussed the major goals and concerns of the various stakeholders represented in a Cooperative Assessment.

Most of the second day of the Workshop, June 10, was devoted to working in small groups, including a morning session in which groups identified major obstacles to successful Cooperative Assessments and brainstormed potential solutions. In the afternoon session, groups developed proposals that might resolve or ease obstacles at each of four stages of a Cooperative Assessment process:

- Initiating and Committing to a Cooperative Assessment
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- Settling and Closing a Cooperative Assessment

Lastly, the Workshop asked participants to address the issue of what should happen next to increase knowledge about Cooperative Assessment and enhance its use. Many ideas for next steps were submitted in writing, some following the Workshop, and can be found on page 68. In addition, participant reactions and outcomes of the workshop can be found on page 70.

June 9, 2004 Proceedings

Welcoming Remarks

One of the facilitators for the Cooperative Assessment Workshop, Marlana Valdez from Organizational Learning Associates, opened the workshop. Marlana welcomed the workshop participants and thanked them for the work that they would embark on for the next two days.

Marlana then introduced Jamie Hawkins, Deputy Assistant Administrator for NOAA's Ocean Service. She provided some highlights of Jamie's background, noting that Jamie's experience and leadership have furthered NOAA's role as an innovator and promoter of cooperative damage assessments.

Jamison S. Hawkins, Deputy Assistant Administrator, NOAA Ocean Service, National Oceanic & Atmospheric Administration

Biographical Sketch

Jamie Hawkins opened the workshop.

Jamie pointed out that natural resource damage assessment is hard because it involves the government taking money away from the public sector. Nevertheless, damage assessment is essential to governments as it is their trust responsibility to preserve the country's natural resources for future generations of Americans.

While it is not always possible to conduct cooperative assessments, Jamie indicated that there are major benefits to this approach. Some of these benefits include:

1. Resolving liability;
2. Investing in restoration rather than potential legal preparation;
3. Enhancing predictability and certainty;
4. Reducing transaction costs;
5. Ensuring commitment and continuity;
6. Receiving positive recognition; and
7. Strengthening relations.

Jamie communicated a story of "The 4-Minute Mile," a story that shows the importance of leadership and vision. In 1954, Roger Bannister broke the world record and ran the mile in under 4 minutes. In the history of the human species, no one had been able to do that. It had been considered impossible - beyond the physical limits of the human body. Year after year, runners had come closer and closer but no one was able to break the 4-minute barrier. Not only did Bannister practice and train, he constantly rehearsed the event in his mind until he truly believed that he could do it - even though nobody before had been able. Within a year of Bannister breaking this psychological (and apparently physiological) barrier, 37 runners did it, and one year later another 300 runners had run the mile in under 4 minutes. Belief holds us back more than anything else - far more than fear; more, even, more than physical constraints.

Jamie stated that what has been holding us back is a set way of doing assessment and a "psychological" barrier similar to that described in the story. He advised participants to be creative, leave the playbook, try something different, and break down the barriers -- at this workshop and in future damage assessment efforts. This workshop is about getting more restoration for America, and what is needed is leadership and vision.

Jamie indicated that this workshop is just one step in the dialogue to promoting cooperative assessments. He hoped to hear from all of the participants regarding useful and practical solutions and next steps. Speaking for NOAA, Jamie stated that NOAA is committed to follow through on future efforts to further the cause of cooperative settlements that come out of this workshop.

Jamie concluded by introducing Allan Vance, President, ChevronTexaco Environmental Management and providing a summary of his biography. As a company that has proven itself relative to cooperative assessments, Jamie described ChevronTexaco as committed to environmental protection and excellence, committed to doing the right thing by taking responsibility for its actions, committed to excellence, and committed to achieving results that exceed expectations. Jamie said that ChevronTexaco strives to be the best they can while continuing to learn how to do things better, wants to build sound relationships with all stakeholders, and is a trusted partner. In sum, ChevronTexaco holds itself accountable to these and other values, and is recognized for doing so.

Allan Vance, President, ChevronTexaco Environmental Management

Biographical Sketch

Allan Vance pointed out the root of the conflict involved in cooperative assessment is the government taking money from the private sector. But what is important is to do the right thing for the public.

Allan said that over the last couple of years, the pendulum has begun to change directions: instead of confrontation, we're moving towards cooperation; instead of litigation, we're moving more towards focusing on restoration. He believes that if we can keep the momentum going in the right direction, the public and the environment will be that much better off.

He identified a number of "first" principles that would help move damage assessments in the right direction. These principles included focusing on the goal of restoration and working towards benefiting all stakeholders as well as minimizing the procedural/administrative/legal obstacles and transaction costs.

Allan stated that ChevronTexaco's key value is protecting people and the environment. The goal of damage assessment, restoring injured natural resources, is consistent with that key value, and ChevronTexaco looks forward to working with NOAA, the Department of the Interior, state and tribal trustees, and NGOs in finding ways to make the damage assessment process less confrontational, more cooperative, and focused on restoration.

Allan concluded that this workshop will be a success only if the participants are willing to share, candidly, their experiences and ideas. After all, everyone is in the same boat. The

public has high expectations of trustees to protect and restore injured resources, and the public expects industry to do what is right. This means that each one of us will have to work together to meet the public's high expectations.

Allan challenged the workshop participants to do their best over the next two days by getting to know each other, expressing their views, and thinking of ways to help everyone get to restoration faster and better.

Opening Session

The facilitators for the workshop, Iris Ioffreda and Marlana Valdez from Organizational Learning Associates, provided information on the interviews they conducted that provided the data used in designing the workshop and the goals for the workshop.

The Cooperative Assessment Workshop Planning Committee identified people with experience in Cooperative Assessment cases, and Iris and Marlana interviewed them for their perspectives on:

1. What factors account for the success or failure of cooperative efforts?
2. What should be included in the workshop for it to be useful and meaningful?

Interviewees suggested that a Cooperative Assessment process is improved when:

1. The group sets up a process for its operation at its first meeting or shortly thereafter;
2. The group begins its work by determining areas of agreement rather than disagreement;
3. All parties are represented at the table and the group's membership remains stable;
4. Group members already know one another, and if not, the group finds alternative methods of establishing trust relationships; and
5. The group establishes sound systems for both internal and external communication.

Interviewees said that ideally group members should have the following skills:

1. "People" skills;
2. Negotiation skills – being assertive but not dogmatic;
3. Facilitation skills – the ability to keep people focused and to move the group toward consensus or compromise;
4. "Big picture" focus and solution orientation – the ability to see others' points of view and multiple potential solutions to the problem; and
5. Personal qualities such as open mindedness, honesty, humility, and a willingness to work cooperatively, share information, and trust others.

The interviewees' goals for the workshop were:

1. To learn more about what is happening in the field;
2. To network, meeting others in the damage assessment field and learning from them;
3. To add "tools" to their toolboxes – gaining new skills for participating in Cooperative Assessments;

4. To have an open and honest dialogue that might result in new solutions to Cooperative Assessment issues; and
5. To learn new process skills, including negotiation, consensus building, and compromise.

Iris and Marlana explained that based on this information, the Planning Committee determined that most of the "work" of the Workshop should be accomplished in multi-stakeholder small groups that would resemble groups involved in a Cooperative Assessment. It also established the following goals for the Workshop:

1. To offer participants multiple opportunities to meet and work with representatives of other stakeholders in a Cooperative Assessment.
2. To create an environment encouraging robust and honest discourse.
3. To emphasize the importance of process skills (e.g., facilitation, negotiation, communication) to the success of a Cooperative Assessment and to provide at least a minimal level of skill-building.
4. To develop creative, potential solutions to some of the most challenging Cooperative Assessment issues.
5. To give participants a better understanding of the motivations of other parties in a Cooperative Assessment and the legitimate concerns they bring to the process.
6. To establish a set of recommended "next steps" for further developing cooperative approaches to damage assessments.

Iris and Marlana then went over the ground rules of the workshop, and they explained that everyone had been randomly assigned to a small group. The small groups were constituted to mirror a cooperative assessment team with a member of each stakeholder group being assigned to each group.

Opening Speaker

Lenny Siegel, Executive Director, Center for Public Environmental Oversight

Biographical Sketch
Presentation: The Public's Role in Cooperative Natural Resource Damage Assessment

Lenny Siegel has been involved with environmental cleanup issues since 1990. His experience, mainly with federal facilities, has reinforced his belief that the public is the ultimate customer since, no matter what is decided, the public will always have the final opinion.

He spoke of the importance of keeping the public at the table, of allowing them to play a role, and of listening to them and responding to their ideas. This is especially true in the natural resource damage assessment process since the public often isn't aware that damage assessment is an issue except at a highly visible site. The challenges that Lenny has observed relative to damage assessment include the fact that:

1. Damage assessment is not brought up as an issue at the outset of a cleanup;
2. When damage assessment is brought forth as an issue, the public is confused on how this new process works in conjunction with the cleanup process (rules of the game), how the various government agencies ought to work together (roles and responsibilities), and how the public can fit in this seemingly complicated amalgam; and
3. Much of the public is ignorant of damage assessment. It will take concerted education to clarify what appears to be a very complicated process and some effort to accommodate the public where and when they wish to become involved, given hectic schedules on everybody's part.

Many of the lessons learned in the cleanup process can be applied to the natural resource damage assessment process, such as:

1. Scope out public interest and participants early in the damage assessment process;
2. Develop awareness and educational material for the public;
3. Involve and maintain involvement of interested public participants;
4. Listen earnestly and respond to public concerns;
5. Communicate clearly, concisely, and often to the public the issues being faced and inform them of the decisions that need to be made before they are made;
6. Give the public a role, i.e., vest the public in the process to get them engaged, thereby educating them; and
7. Meet regularly to keep current events and concerns.

One of Lenny's suggestions is creating an advisory group. The history of environmental cleanup is one of mistrust. Forming a group involving various public interests will help build trust so that everyone (the responsible parties, trustees, and the public) can work towards the same goal and solution.

Questions and Answers for/by Lenny Siegel

Q: When you get into the complicated CERCLA and natural resource damage assessment issues, the assessment process can go on for months and days and years with just dialogue. What are your suggestions? Go away for a year at a time or have many meetings and talk about nothing?

A: Have educational sessions. As long as they know you are headed towards a decision, they will be satisfied, a good series of educational programs. You won't get huge crowds, but you will get the people who care. Don't meet every week or month; they will learn the background of the issues. They will learn during the slow period.

Q: You keep using word "solution." Solution is a whole other idea. Natural resource damage assessment is not a solution…restoration is a solution. How does solution fit in? Also, if there is no Superfund, will it come out of assessment costs?

A: If the community wants to be involved with the solution, they need to be involved with assessments. I do tend to lump restoration and solution together; that's why the system has let us down, because of fragmentation of facilities. Most cleanup goes back to the cleanup fund. That's why, to me, it's not an issue. If you are doing the right assessments, you are already on the way to a solution, a restoration.

Q: One state trustee indicated that cooperative assessment is complicated and vague. What is meant by cooperation [as it applies to the public]? Should we develop a standard of participation?

A: There is no gold standard for cooperation, because it can take various forms, and it happens to differing degrees. The goal, I believe, is for the various stakeholder groups to understand the objectives of the other parties, and to work to achieve them as long as they don't conflict with their own interests.

The key to public participation is the belief that you will be listened to. When the decision makers do something you didn't want them to do, you will have a reason that they did that. The important question is "Is it worth my time to participate?" not "Are we cooperating?" For example, I have on my bookshelf about 6 feet of reports associated with a cleanup site. That to me is not public involvement. A lot of agencies require a lot of documentation, because they think I want it. But I don't. I don't have time to read that. I want streamlined reports. Break the rules, think out of the box. People want to see what you are doing and why you are doing it, and then you are more free to do what you want, and people are supportive. Make sure the goals are transparent.

Q: Frequently professionals speak for the community, making it hard for the mom and pop people to be heard.

A: In my experience, the mom and pop people need to learn jargon and acronyms and know the terms. They become equals. They need the educational meetings to overcome that. They are the key to structuring community advisory groups, and at the same time you need to address all the private members of the community -- churches, the private sector, etc. It does take more effort to get all the people at the table with equal status, but you will make them happier and they will be more willing.

Q: When there are multiple local groups, which should we engage and at what levels? How do you choose which groups?

A: The first thing is never to exclude people. Invite people. The way you will drive out people is to force them to come to meetings. Never let government parties decide which groups to invite; it is destructive. The mere fact that you exclude people from meetings means they think you have done it for a reason. They think you want to sneak stuff by them.

Q: Could you give concrete steps on community involvement?

A: I.D. specific contingencies that might be affected, that might be in your process when it gets underway. Also, make sure there is enough public information and education out there, not binders, but newspaper articles. Find out what they read and get the information there, like church bulletins, etc. It will be difficult, but it can be done. It is possible.

Q: How should the natural resource damage assessment process address people who are interested in gaining information for third party claims vs. data collected?

A: I guess there is no bright line between the data collected for third party claims and the other data. Can't come to any particular process with an idea of this is in and

this is out. You are constantly defining your process.

Also, I thought of another point. I spoke about the Lorax people…the tree huggers. I am the Lorax, and I speak for the trees. You are usually dealing with people who live down stream, down wind, etc. They devote their lives to protecting natural resources.

Q: Often community activists rally the community to sue the company. This also affects potentially responsible parties. How do we as professionals get them not to sue the company?

A: By doing your job well. You can't tell people not to go to court. There is always someone who has caused negligence, and people automatically want to go to lawyers. The natural resource trustees must step forward then. They also think that if no one does that, the issue will disappear.

One more comment: communities are very different. There are environmental issues, mistrust issues. You must know your audience. And everyone wants to have a say in the decisions that affect their environment. Your attitudes, your greeting at the meeting, the language and terms you speak in, the speed of your presentation, etc all matter. My advice is to learn the local culture – that will get you a good part of the way you need to go to develop the trust you need.

Q: How can we address the issues the Indian tribes raise?

A: There are hundreds of tribes; each holds to its own sovereignty. What works for one will not work for another. Some are more trustful of EPA, some are so mistrustful of the government that they don't participate. There are some young Indian activists that do try to bridge gap. This is a major cultural bridge that needs to be overcome. There is no real solution.

Panel: Overview of Cooperative and Related Assessment Efforts

Bill Conner, National Oceanic & Atmospheric Administration (NOAA)
Frank DeLuise, U.S. Department of the Interior (DOI)
Dale Young, Association of State and Territorial Solid Waste Management Officials (ASTSWMO)
Barbara Goldsmith, Ad-Hoc Industry Natural Resource Damage Group
Robin Rorick, American Petroleum Institute (API)

These panelists provided an overview of efforts that are underway in both public and private sectors.

Bill Conner, NOAA

Biographical Sketch
Presentation: Cooperative Natural Resource Damage Assessment: The NOAA Story

Bill Conner spoke of NOAA's commitment to cooperative assessment. Based on lessons learned in cooperative assessment cases, this is the preferred option. Where cooperation is not possible, the trustees can fall back on other methods.

NOAA has learned a lot of lessons over the past 15 years, having moved past the assumption that all settlements would end up at the courthouse. Reflecting on the Blackbird Mine and other cases, Bill highlighted a number of seminal lessons:

1. That the cleanup process shouldn't be viewed differently from the assessment process, i.e., integration of both processes makes good sense;
2. That the focus should be on restoration, not monetary compensation, and on what kind of restoration must be conducted to make the problem go away; and
3. That when scientists talk to other scientists across the table about the same issues, they can agree on reasonable assumptions and develop the appropriate tests and standards to reach a similar goal – the threat of a courtroom is not always the answer.

Given NOAA's experience, Bill indicated that NOAA wanted to further promote cooperative assessments. Over the past three years, NOAA gathered individual stakeholder meetings to get feedback on cooperative assessments. The positive feedback received from the individual stakeholder meetings resulted in the development of a broad-based stakeholder group that continues to provide direction on next steps in the support of the cooperative assessment effort. The input of all prior meetings and the broad-based stakeholder work group have provided input on approaches, tools, and documents (including a framework on cooperative assessments) that can be found on NOAA's web site at: http://www.darp.noaa.gov/partner/cap/index.html

Bill concluded that he was looking forward to the discussion on cooperative assessments and will be looking for ideas on how to move the process forward.

Frank DeLuise, DOI

Biographical Sketch
Presentation: Department of the Interior Natural Resource and Assessment Program

Frank DeLuise stated that there had been an evolution of thinking at DOI regarding the natural resource damage assessment and restoration process and that they have not arrived at a final solution, but are still learning. He indicated that DOI is headed in the same direction relative to cooperative assessments.

Frank described the DOI program, underscoring the administrative challenges faced by DOI. In an effort to support one of DOI's program objectives -- to increase habitat acres and miles restored -- DOI is committed to following a strategic plan and pursuing a policy of conservation through communication, consultation and cooperation (their 4 C policy). Another challenge for DOI is addressing the CERCLA complexity and respecting institutional constraints.

Identifying some example cooperative DOI cases, Frank noted that DOI needs to step out of the box and throw its playbook away. One way to do this is to get the public involved in a federal advisory committee that will address administrative damage assessment reforms. To further promote damage assessments, DOI is pursuing a *three-pronged approach*:

1. Developing tools for practitioners;
2. Focusing on getting to restoration through cooperation and partnerships; and
3. Once established, improve working relationships.

Relative to cooperative assessments, Frank noted that a challenge among stakeholders is reaching a shared vision among parties, and that such a vision is needed earlier in the process. He indicated that compromise is essential for cooperation to work -- the alternative is the court, which is not the right direction to accomplish restoration. Ultimately, what is needed is building trust so that what we do together is a better than what we do individually.

Dale Young, ASTSWMO

Biographical Sketch
Presentation: ASTSWMO State Trustee Efforts

Dale Young explained that the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is a national, non-profit organization composed of solid waste cleanup agencies and staff. ASTSWMO has a CERCLA research committee and, within that, a natural resources damage focus group that includes ten states. She gave background on ASTSWMO's goals, their history, and current projects and issues.

Dale mentioned four major goals undertaken by ASTSWMO over its history, namely, the need to:

1. Reauthorize CERCLA, citing a CERCLA position paper, congressional testimony and various stakeholder discussions;

2. Improving coordination with response agencies (EPA and the states), citing a paper on such coordination and meetings held with EPA;
3. Conducting more state trustee outreach, citing a host of ASTSWMO papers and workshops; and
4. Improving coordination with federal trustees and industry, such as promoting cooperative assessments, some benefits for which include: expediting the damage assessment process; resolving PRP liability; and reducing costs.

Relative to a meeting held with industry in 1998, Dale listed a number of industry desires when considering a cooperative assessment, namely the need to:

1. Specify trustee agencies;
2. Specify affected trust resources early and injury categories as much as possible;
3. Identify and agree on necessary studies -- Define specific restoration endpoints, i.e., primary (on-site habitat) or remedy enhancement;
4. Establish agreed framework for the cooperative assessment by entering into an agreement;
5. Determine when injury began;
6. Establish a program to communicate with the public;
7. Establish procedures for undertaking and using independent studies. Address right of parties to conduct such studies and extent to which information may be used;
8. Do not challenge/dispute results of joint studies;
9. Establish dispute resolution and termination procedures;
10. Determine source of funding for studies;
11. Allow for stipulated facts or actions;
12. Determine scope of cooperative assessment, e.g. collection of data, interpretation of collected data, and development of restoration plan;
13. To the extent practicable, identify restoration criteria in the cooperative assessment; and
14. Try to include all agencies, especially remedial programs.

She cited the Buzzards Bay oil spill as one recent cooperative assessment, but is looking to conduct a comparable cooperative effort on a CERCLA site.

Early in ASTSWMO's genesis, the member states felt a need to know the status of damage assessment programs and issues throughout the country. Dale mentioned that the range of programs and support varied greatly, with some states actively exploring cooperative assessment approaches.

ASTSWMO's efforts can be found on their web site at: http://www.astswmo.org/
ASTSWMO's publications can be found at:
http://www.astswmo.org/Publications/Revbkshlf.htm#CERCLA

Dale provided participants a recent ASTSWMO effort that attempts to collate past cooperative assessment efforts, entitled "ASTSWMO Cooperation in the Natural Resource Damages Process: Initiation, Assessment and Restoration," which also can be found on ASTSWMO's publications web page.

Barbara Goldsmith, Ad-Hoc Industry Natural Resource Damage Group

Biographical Sketch
Presentation: National NRD Policy and Practice: Overview of Industry/Trustee Activities

Barbara Goldsmith spoke about her Ad-Hoc group and its role as catalyst, coordinator, and facilitator, and how it could be used to further enhance cooperative assessments. She discussed the difficult issues still to be resolved and the advice she provides to industry regarding cooperative assessments.

Barbara talked about the history of exchange between the industry sector and trustees up to the current time. She talked about the progress made to date and current climate relative to cooperative assessments; that many folks are moving in this direction. She addressed ancillary requirements to cooperative assessments such as the need for accountability, trackability and possible future reforms.

Regarding the potential for cooperative assessments, Barbara provided advice to companies, some of which included to:

1. Anticipate probable liability;
2. Know the range of options available;
3. Be proactive and interactive;
4. Stay close to assessment process;
5. Work to define end points early;
6. Remain mindful of essential damage assessment liability principles; and
7. Know the characteristics of “good” and “bad” sites.

Robin Rorick, API

Biographical Sketch
Presentation: API Involvement in Natural Resource Damage Assessment

Robin Rorick gave a brief overview API and its efforts in natural resource damage assessments. Many of API’s members are active in damage assessment cases.

As a trade association, API coordinates the response to damage assessment issues on the part of its members. API’s focus is on national damage assessment concerns, communicating with federal and state trustee associations within the national stage. That is why API is one of the key sponsors of this workshop.

However, as a way to further promote cooperation with the people in the trenches who are actually conducting damage assessments, API is considering holding regional workshops as a platform to begin more localized dialogue. The benefits of this workshop and future comparable endeavors include opportunities:

1. To “meet and greet” prior to an actual damage assessment;
2. To develop a familiarity and level of comfort between players;
3. To get contentious issues out of the way; and
4. To further develop consistency throughout the nation among all players.

On behalf of API, Robin is looking to the results of this workshop to determine the level of interest and support in regional dialogue. The hope is that such regional communication (and hopefully this national workshop) will lead to improved working relations and sound cooperative outcomes.

Questions and Answers for/by the Panel

Q -- for Bill Conner: Can there be just one federal representative at the table rather than NOAA and/or EPA, Interior, Justice, etc.?

A -- Conner: *No. Under law and executive branch delegations, EPA has a different job than the trustees. Justice [the U.S. Department of Justice] also has a unique and specific role. Sometimes a trustee will informally delegate its interests in the natural resource damage assessment process to the trustees that have more at stake. Even then, the PRP may want all trustees included in the settlement for final closure.*

Q -- for DeLuise: What is the status for revamping and streamlining the DOI regulations? Is there any work ongoing on this?

A: I refer back to the three prong strategy. Different factions try to change the regulations when they see political opportunities. That was the old way, forcing things to happen. We have now stepped back. What is more important than timing is a "lets get it right" idea instead. We want to get so that there is nothing that is being viewed as being jammed. We want to shape regulations to practice rather than litigations, regulations that meet everyone's goals.

Q -- for DeLuise: Are the DOI tools for practitioners available or are they internal? If the latter, why? If the former, where are they available?

A: The DOI Restoration Program website at http://restoration.doi.gov/ is a good source of information available to practitioners. This website, as with most websites, is not a static document and undergoes periodic changes. Similarly the Department and each of its bureaus are developing and refining new tools that have not yet had sufficient review to be released externally.

Q -- for DeLuise: How do you get the other federal trustees, DOD and DOE, to come to the table for cooperative assessments?

A: Same as with other cooperative assessments - Show them the success of other ongoing and completed cooperative assessments and convince them that it is in their best interest to come to the table.

Q -- for DeLuise: Can the tools, handbooks and technical direction be under 25 pages total?

A: Summaries and outlines of tools, handbooks and technical direction can certainly be under 25 pages total, but it is unlikely that the entire contents of these documents could be that short, given the complexity and breadth of assessment and restoration techniques.

Q -- for Bill Conner and Frank DeLuise: If your agencies had infinitely large budgets and didn't need funding support to perform assessments, would you still cooperate? Would the nature of your cooperation change?

A – Conner: No, philosophically, the cooperative way is the right way to go.

A -- DeLuise: We are not driven at all by budget constraints! Wow, what a world that would be! Litigation and other methods from the past are such constraints. Overall, whatever it takes to get to the process of restoration, it shouldn't matter the cost, it's a quicker, more efficient, more equitable way to deal with an issue as opposed to ways that can be more inefficient.

Q -- for Bill Conner and Frank DeLuise: How do you get EPA to do this (integration of remediation and restoration] across regions? We need help.

A -- Conner: If it can happen in one region, it can happen in any region. We need to keep two things in mind: 1) The level of integration between remediation and damage assessment is evolving -- more quickly in some regions, and 2) Finding a better way depends on the specific individuals involved until the change is institutionalized.

A -- DeLuise: I agree with Bill. In implementing any new system or approach, there will always be 'early adapters' and others who take more of a 'wait and see" approach. The better we are at identifying and working with that first group, the easier the job will be in convincing the latter group.

Q -- for Bill Conner and Frank DeLuise: Can you respond to the following challenge? The term "cooperative assessment" appears to imply cooperation between Trustees and RPs. If cooperative assessments do not involve requisite public participation, won't the end result of the so-called cooperation generally just end up as dilution of Trustee claims (because agencies will just be "pulled" in one direction)?

A -- Conner: The natural resource trustees are assigned responsibility for representing the public interest in natural resource damage actions. Part of fulfilling this responsibility is for the trustees to understand what the public is interested in and combine these considerations within the legal framework using the scientific evidence to decide when it is in the public interest to settle a claim. Several approaches have been used by trustees to obtain valuable input from the public, including one-on-one meetings, public meetings, and public comments.

A -- DeLuise: "Cooperative assessment" in no way implies "co-opted assessment" nor does it remove public review and public participation from the process. Perhaps the next step in the evolution of cooperative assessments should be to figure out how to better involve the public and local entities up-front, rather than as reviewers of plans or agreements when they are nearly done deals.

Q -- for Bill Conner and Frank DeLuise: While integration of NRDA and the RI/FS is often touted (integration of restoration & remediation), EPA and state response officials often demand that NRDA related discussions and activities not slow down RI/FS and remediation negotiations and activities (even today). Have trustees found any ways to cope with such response agency demands?

A -- Conner: When done properly, there is no reason that the trustee process should slow done the EPA process. Sometimes the opposite happens. At the end of the day, if the PRP tells EPA they want a global settlement, EPA will likely agree to a schedule that makes sense for everyone.

A -- DeLuise: Restoration deals with the residual injury that remains after the response and remediation process. In one innovative ongoing damage assessment case, the trustees are trying to influence the RI/FS in their role as resource managers, while at the same time are developing an assessment plan or RCDP that lists various options depending on which remediation approach is eventually chosen. It is a challenge shooting at a moving target, but that's probably preferable to waiting to take aim when (if?) the target finally stops moving.

Q -- for Young: Under the current process and resources, isn't it impossible to do NRDA and NRD restoration within statutes of limitation in our lifetimes?

A: Yes. Absolutely! These goals are achievable.

Q – for Young: You mentioned ASTWMO involvement with CERCLA reauthorization. Has ASSTWMO been involved in Brownfield legislation, particularly as Brownfields can impact a state resource (ground water) and federal state resources (e.g. rivers impacting the Great Lakes).

A: ASTSWMO has also established a Focus Group, the "State Response and Brownfields Program Operations Task Force," composed of state remedial program managers to oversee policy issues involved in the development and implementation of Brownfields legislation. The mission of the Focus Group is to: promote the use and effectiveness of State response and Brownfields programs; recognize the diversity of these programs; and provide research tools and training for State program development and enhancement. Currently, the Focus Group is tracking the EPA development of § 128(a) performance measures. The chairperson of the Brownfields Focus Group is Barbara Coler, CA. Further information on ASTSWMO contacts and efforts can be found at: www.astswmo.org.

Q – for Young: Results of joint studies should not be challenged. Explain, because "joint" does not mean they got it right.

A: The Trustees and Responsible Party (the Parties) should agree to share all data developed during joint studies and agree that all data collected jointly should not be challenged. However, interpretation of the data may be subject to disagreement and challenge by the Parties.

In entering a Cooperative Assessment, the Parties should agree on: 1) The scope of the cooperative assessment; and 2) The procedures for the undertaking and use of joint studies as well as independent studies outside the cooperative assessment process. The Parties should employ good faith efforts to reach consensus on the interpretation of, and conclusions to be drawn from, the data collected pursuant to a Cooperative Study. All matters to which the Parties reach consensus should be documented in writing and incorporated in the Administrative Record. If the Parties fail to reach consensus on the interpretation of, and conclusions to be drawn from, data collected pursuant to a Cooperative Study, the Parties may reserve the right to present separate and independent interpretations and conclusions. All separate and independent interpretations and

conclusions should also be included in the Administrative Record. In all scenarios, the Trustees should not give up their authority to conduct assessments on any aspect of injury or damage quantification.

Q – for Rorick and Goldsmith: Several Speakers have mentioned the Joint Assessment Team (JAT) as a positive example, but industry participation is declining. How can we reverse this?

A – Rorick: It seems that the benefits of participating in a JAT are not widely known. What can participants expect to do at a JAT? What can they learn? Who should attend? What will change? Can the same results be achieved by sending an industry rep., or should each company send their own person? An answer to these questions and others should be included into a formal invite letter that can be sent around to the companies inviting them to participate. In addition, phone calls can be made to further express the values of the JAT. Beyond that, work would need to be done with the Trades and other industry groups (like Barbara Goldsmith's) so that they could encourage their members to participate.

A – Goldsmith: Industry participation declined in one JAT due to an internal company employee transfer (Peter Jensen of Exxon Mobil). I am not aware of attrition in industry representation in other JATs. The Ad-Hoc Industry NRDA Group has helped to identify industry participants in the JATs in the past and we would be pleased to assist any of the JATs, now or in the future, beef up their industrial membership. All that it would take would be an e-mail to me (bjg@bjgco.com) telling me what specific companies or industry sectors, geographical region, discipline/NRDA experience orientation, etc. you are seeking to round out your JAT and I can then identify some candidates for you.

Q -- for all panelists: In a cooperative assessment, is the involvement of lawyers considered an indication of imminent failure?

A – Conner: I'd say no. There are certain parts that need to be documented, settlement terms, etc. I think they are healthy in the process.

A -- DeLuise: No, they are not a liability, they are part of the team always. We need them.

A -- Young: States see them as essential to the process. You must decide the level of involvement and you should settle on a case-by-case basis.

A -- Rorick: They have to be part of the process. A better question is "What level or at what time should they be included?" Including them too late or too early can throw large obstacles into the process.

Q -- for all panelists: It appears that trustee agencies and industry are well aligned on the restoration-based approach, there seems to be a missing stakeholder from this alignment – the legal council representing the states and the U.S. government. How can DOJ and State Attorney Generals have the same, shared vision aligned?

A – Conner: The Department of Justice shares the same vision and is an active participant in the Cooperative Assessment Stakeholder Work Group. I cannot speak for the legal counsel representing individual states, but I would suspect that the strongest incentives would be produced by state trustee agencies and PRPs presenting agreements in principal to the state legal representatives. That would be hard to turn away from.

A – DeLuise: Perhaps this would be best answered by DOJ and the State Attorney Generals. I know many of the lawyers in our Solicitor's Office share in the vision of using a restoration based approach.In fact, CERCLA mandates a "restoration based approach" since the most vigorous portion of the claim is what is necessary to restore, replace, or acquire the equivalent resources.

A – Young: The State Attorney Generals range of vision may vary from state to state; however, the shift towards restoration-based settlements has been on-going within the legal community at the state level for sometime. As NRD cases are settled with a restoration-based focus, a track record is being established that demonstrates that such means of settling cases can indeed meet the state's legal mandate and provide adequate restoration of resources as well as compensation for lost use. Based on such successes, a shared vision among legal teams should expand. Meanwhile, state Trustees will continue outreach to parties regarding the benefits of restoration-based settlements.

Q -- for all panelists: Integration with remedial process – How does NOAA expect to be included as they are both Trustees and technical assistance to EPA. Would NOAA expect their NRDA comments and "needs" to be included in an EPA oversight letter?

A – Conner: These are two distinct roles and need to be clearly identified in any communication with the EPA Remedial Project Manager.

Q -- for all panelists: How much flexibility do the trustees see when there is a conflict between the formal regulatory process and the cooperative process?

A – Conner: The NRDA regulatory process is optional -- to be followed at the discretion of the trustees -- under both CERCLA and OPA. Although the regulations provide the important concepts and principals under which natural resource liability can be resolved, NOAA sees a significant amount of flexibility in following the specific steps in the regulations as long as good progress can be made that is consistent with the regulatory principles through the cooperative process. We are much more interested in reaching a cost-effective outcome that is fair to both the public and the PRP than in following the specifics of the regulatory process.

A – DeLuise: The NRDAR statutes give the Federal trustees a great deal of flexibility in conducting damage assessments and restoring natural resources. There is no inherent conflict between the regulations and the cooperative approach. For example, under CERCLA, DOI was tasked with promulgating regulations outlining "the best available practices" for assessing natural resource damages, but those regulations do not preclude a cooperative process. If the trustees follow the regulations in performing the damage assessment, the assessment gains strength (a 'rebuttable presumption') in a legal or administrative proceeding. One of the aims of a cooperative assessment is to avoid having to go to court, but should the cooperation unravel somewhere along the line, the trustees' claim development would likely be stronger if they had followed the steps outlined in the regulations.

A – Young: From a state perspective, there are a number of factors that favor entering into a cooperative process, including a willing and committed Responsible Party. A Cooperative Process has flexibility in that it may entail a range of assessment methodologies, including

a "formal regulatory" process or a more "flexible" process. However, in negotiating the terms of a Cooperative Process, Trustees are generallywilling to agree to stipulations regarding simplified methodologies and injury assumptions, in lieu of a formal regulatory assessment, with the intent of expediting the settlement and achieving restoration in a more timely manner. Trustees do retain the ability to conduct a formal assessment in the event that the simplified Cooperative process does not reach settlement.

Q -- for all panelists: How would the panel (and maybe more directed to Dale Young) believe that State project managers and trustees (who see the benefit of restoration and assessment taking place in conjunction with remediation) approach expressing these views to change the opinion of political leadership and AG offices that fail to see such benefits?

A -- Young: As indicated at the Conference, one of the missions of the ASTSWMO NRD Focus Group is to enhance the ability of States to cooperatively and efficiently address the restoration of natural resources injured by hazardous substances and to promote the integration of restoration into the remediation process. In order to effectively reach these goals, Trustee agencies should conduct continual outreach to the political leadership, either state or federal, and AG offices regarding these issues. Trustees need to stress the benefits of integration, including technical, legal, and cost-saving benefits. It must be emphasized that achieving global settlements with industry, which address both remediation and restoration, provides for a win-win for industry, response agencies, Trustees, the public, and the environment.

Q -- for all panelists: How can the local authority be involved in restoration?

A – DeLuise: The trustees already have the legislated authority and the flexibility to work with local government, industry, and the public at-large to address restoration effectively. We've heard several examples throughout the CAP workshop of all parties working cooperatively to assess damages and restore the affected natural resources.

A – Young: Trustees acknowledge the value of local input in identifying and implementing restoration projects. However, Federal and state statutes and regulations provide that only certain government entities shall have the authority to bring NRD claims and oversee restoration of injured resources. Such was the intent of Congress in enacting the legislation regarding NRD. Authority has been granted to Trustees who have the appropriate expertise and ability to identify a broad range of restoration alternatives, which are not necessarily determined by municipal boundaries, but are determined by attaining maximum benefit for the injured resources.

Panel: Integrating Response with Restoration

John Meyer, U.S. Environmental Protection Agency (EPA), Region 6
Jon Rauscher, U.S. Environmental Protection Agency (EPA), Region 6
John Bascietto, Department of Energy (DOE)

This session focused on the role trustees can play in response to promote restoration.

John Meyer and Jon Rauscher, EPA Region 6

John Meyer Biographical Sketch
Jon Rauscher Biographical Sketch
Presentation – Integrating Response with Restoration

John Meyer and Jon Rauscher spoke of integrating response with restoration relative to EPA actions. In communicating their messages, they used the "All I Ever Needed to Know I Learned in Kindergarten" analogy for how trustees and PRPs may conduct successful restoration actions within, most notably, the remedial process. They also reflected on some recent cooperative cases (Brio Refining, Houston TX – a CERCLA case, and Bayou Verdine, LA – an OPA case) in making some of their points.

Both John and Jon explained the context within which EPA operates and can potentially accommodate damage assessment and restoration needs. They indicated that the CERCLA process was intended for all parties to play fair, designed with a focal point by which trustees and PRPs can readily communicate with the response agencies.

Some of the ways they suggested that trustees and PRPs can facilitate incorporation of damage assessment and restoration concerns are summarized as follows:

1. Help to engage each other – namely the response agencies, trustees and PRPs;
2. Integrate restoration concerns within the response process as soon as possible, perhaps before the remedial investigation process begins and perhaps through notices or less formal means. The response agencies must determine the appropriate level and type of notification that would be most effective, but must also keep an eye on the clock;
3. Develop effective communication and coordination mechanisms, for example, through EPA's Biological Technical Assistance Groups (BTAGs), trustee councils and PRP-formed groups. EPA noted that trustees are not always around but that opportunities need to be available to keep the trustees involved. PRPs may need to be the driving force to get all the parties engaged, perhaps through trustee funding. Perhaps also consider other team building opportunities as the remedial-restoration processes can take some time;
4. Recognize the mandate, responsibility and constraints of the remedial project managers (RPMs) and accept the fact that not everything can be addressed by the RPMs;
5. Focus on the goal, keeping an eye on what can be accomplished in the respective contexts (given the constraints of Superfund) with the aim of making the process as seamless as possible;

6. Make available to each other the resources available to effect necessary actions and decisions, for example expertise, information databases (e.g., Query Manager), testing capabilities, etc.;
7. Appropriately vet and make available relevant information to each other;
8. Engage the public early, tailoring public involvement as appropriate to the case. EPA recommended that the relevant parties get involved in public exchanges as appropriate;
9. Acknowledge and respond to each other's concerns as well as the public's as doing so will potentially overcome previous bad experiences and suspicions; and
10. Response agencies should be positively and publicly recognized for restoration success that they helped facilitate.

The bottom line is that all parties need to be talking to each other early and often, highlighting expectations and objectives that can lead to a mutually acceptable outcome.

John Baschietto, DOE

Biographical Sketch
Presentation -- Integrating Natural Resource Concerns With DOE Cleanup

John Bascietto spoke of DOE's unique position as a federal co-trustee and PRP. He discussed his organization, DOE's involvement in varied sites and their status as well as DOE issues relative to integration of restoration with restoration.

John indicated that DOE has had a policy in effect since 1997 that is intended to integrate natural resource concerns into the environmental response process. This policy allows for, among other things: establishing trustee councils, performing restoration studies, and restoring and replacing injured natural resources as part of the response phase. For a DOE site, there is a DOE trustee coordinator that serves as a liaison. A DOE steering committee also exists -- its job is to advise and consult on natural resource and integration issues.

John explained why indemnification and conservation easement issues associated with some of the DOE sites are prominent. One issue John discussed at length was the notion of Life Cycle Cost Analysis. The implications of choosing a remedy and its cost implications is an issue that must be seriously considered – it must be weighed in context, in comparison to other remedial alternatives and weighed against other relevant criteria (e.g., CERCLA remedy selection criteria).

John's presentation underscores a number of lessons learned:

1. That the integration process is highly dependent on the coordinator – his expertise and management capabilities;
2. That training is very important and must remain a constant staple;
3. That funding may need to be made available to keep the trustees involved;
4. That since the project and associated budgets are typically not integrated, we need to develop an integrated project baseline (IPB) -- IPB is the name of the process DOE' s Office of Environmental Management currently uses to plan for and manage its cleanup projects;
5. That regulatory agency cooperation is not assured;
6. That the integration process is subject to other site issues and public perception;

7. That an open-ended charter detracts from the focus;
8. That the public needs to understand what's being discussed; and
9. That we need to avoid creating expectation of "two cleanups."

Questions and Answers for/by the Panel

Q -- for Meyer: Do they allow PRPs into kindergarten? When and how would you integrate them into the process?

A: They should be the driving force for the restoration and response. The earliest stage is the beginning of the work stage, namely the remedial investigation (RI) stage.

Q -- for Meyer and Rauscher: You listed the sharing of toys that the trustees could do with EPA. What's EPA willing to share, and what listening and accommodations is EPA willing to do and make?

A – Meyer: EPA can share their investigation. In the past, there's been a fairly significant mobilization of people and equipment into the field, and we encourage them to utilize all this sample collection data there. And the trustees should have used the equipment to collect their own data.

A -- Rauscher: They don't have to mobilize twice. Improves efficiency.

Q – for Meyer and Rauscher: So you feel that EPA management is getting the message down to the staff level in regards to the relationship with the trustees?

A -- Rauscher: We constantly have to train because of turnover. We need to constantly re-train.

A -- Meyer: Managers change more often than technical people. I think the most important thing is good relationships at the RPM levels, and then management will grasp onto that.

Q – for Meyer and Rauscher: What benefits does EPA perceive that they get from cooperating with trustees? Or do they only cooperate because they have to?

A -- Meyer: EPA gets a direct benefit from the trustees' technical expertise that is especially valuable for the ecological risk assessment. Indirect benefits are also realized when the data needs of the trustees are met during the remedial investigation, and the potentially responsible party is not faced with an additional investigation expenses and actions after the EPA work is completed.

A -- Rauscher: As stated by John Meyer, EPA receives benefit from technical expertise, particularly in the ecological risk assessment. The trustees provide information on ecological receptors that can reduce uncertainties in the quantification of risk. In addition, trustees provide valuable assistance in conducting the field work for the ecological risk assessment and the human health risk assessment.

Q -- for all panelists: In the past, EPA, including Region 6, and state response officials have insisted that NRDA activities and NRD-related negotiations not slow down the response action process in any way. Do you believe EPA has changed or will change this view?

A -- Rauscher: Yeah, I think it is changing. EPA is slowing down the process as well because of its mentality. They have changed their processes. By addressing trustee issues, they have learned more about what they are doing. A lot more emphasis has been placed on quality ecological risk assessment, and having all trustees at the table.

Q -- for all panelists: What is the role of natural resource trustees in the long run?

A -- Rauscher: EPA is still learning how to best perform 5-year reviews. EPA has been through 1 or 2 cycles. I think up till now, there has been little or no trustee involvement with 5 yr reviews. More data collection is needed during the first 5-year review cycle and the trustees can play an important role in this data collection. If additional data collection does occur, this is an opportunity for trustees to get more information for their NRDA process.

Q -- for all panelists: Some EPA managers seem to have no idea what NRD stands for. What kind of in-house training does EPA provide to managers?

A – Meyer: The push is to integrate from the bottom up. I've seen positive effects, so I'm pushing up my management chain. RPMs are given lots of freedom to run projects, and I help train new RPMs try to ensure that it is a positive experience.

A -- Rauscher: There have been failures at some sites because they do not coordinate with trustees. In some instances, Federal trustees had to pressure EPA to change things.

A - Bascietto: Training and re-training should be a constant. This process of assessment is dependent on managers, and there is turnover, and training and making people aware of the two processes is essential. It is an ongoing process and we just have to do it.

Q – for all panelists: Can you comment on the compatibility of remediation of soil and groundwater to risk-based standards with institutional control and resource restoration goals.

A -- Bascietto: The question is somewhat ambiguous and therefore can't really be answered in anything other than the most general terms. It asks for a comment. My comment is that I am unaware of any inherent incompatibility between risk-based standards with the use of institional controls and resource restoration goals.

Q – for all panelists: When do you expect EPA to view non-polluting land managing federal agencies – such as the Forest Service – as NRDA trustees instead of PRP?

A – Meyer: When the law changes.

A -- Bascietto: I have no expectation in this regard. This is a question better asked of EPA or the Forest Service. All I can say is that EPA's "view" of a "non-polluting land managing federal agency's" status as a Trustee does not seem to be of any particular legal relevance. An agency is either a Trustee or it is not, based on the resources it manages, on Executive Orders appointing them a Trustee, and on the statutes pertinent to the operation of those agencies. As to the matter of "non-polluting" federal agencies being viewed by EPA as "PRPs"...they are not "PRPs" to the extent they are "non-polluting." If on the other hand, Congress directs a "non-polluting" federal agency to take title to contaminated property,

then it would appear that Congress has purposefully intended for that agency to pay the bill for cleanup; and in that sense only, such agency might be considered a "PRP."

Q – for all panelists: For Natural Resource Trustees – the process slides lay out EPA's process and opportunities for Trustees to input, but to promote integration, the NRDA process should also be laid out alongside. For example when a PA/RI is done, a PAS may be completed. The RI should parallel the NRDA if trustee responsibility milestones are laid out. Then a global settlement is more feasible. This would address Rule 10 (involvement of all stakeholders) and help others to find a picture of trustees and EPA together.

A -- Meyer: Good suggestion.

A – Bascietto: There does not seem to be an actual question here. However, I will offer that the suggestion to lay out the damage assessment process in parallel has been taken by both the NOAA and by the DOE in past publications. The reality is that while we can and have laid out a parallel process on paper, implementation of a strictly parallel process has not been possible to achieve. DOE has instead offered an "integrated process" whereby integration can still be achieved even without strict parallelism.

Q – for all panelists: There are sites coming up where NRDA action may precede EPA action. How will EPA work to accommodate that?

A -- Meyer: The planned or underway restoration activities would have to be evaluated for the ability to meet the remedial action objectives developed as part of EPA's process. If the restoration activity is expected to meet EPA's objective in a reasonable timeframe, then no additional response actions would be required.

A -- Rauscher: At some sites, NRDA restoration can precede the EPA remedial action. EPA can facilitate this situation by coordinating actions between the Potentially Responsible Party (PRP), the trustee agencies and state and federal regulatory agency. As with the remedial investigation, the PRP can economic benefit by completing restoration early and linking restoration with remediation.

A -- Bascietto: That is a question for EPA to answer. However, I imagine that procedures would have to be worked out whereby trustees wishing to take restoration actions before cleanup must assure that their actions would not interfere with cleanup and vice versa. A real concern for a trustee taking restoration actions prior to EPA cleanups is that the objectives of the restoration might be delayed or otherwise interfered with by the cleanup actions.

Q – for all panelists: Restoration projects often are superimposed on CERCLA remedies. Do you see a time when Trustees will be able to not just comment, but also present their plan as part of a ROD?

A -- Meyer: It would be difficult to have enough time for the trustees to fully develop their plan prior to the issuance of the Record of Decision (ROD), especially if the selection of an particular alternative is not clear, but it could happen shortly after the ROD is issued.

A -- Bascietto: In fact DOE has been an advocate of greater coordination and integration between response and restoration. Therefore, making the NRDA restoration plan part of

the ROD and part of a "global settlement" would not be inconsistent with this approach. I do not see opportunities to codify this approach in the short term. That would likely require CERCLA reauthorization, including significant changes to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and the CERCLA damage assessment regulations.

Featured Industry Speakers

Robert Taylor, Special Counsel, National Oceanic & Atmospheric Administration (NOAA)
Dave Schwartzberg, RESTERA, LLC

Robert "Bob" Taylor, NOAA

Biographical Sketch
Presentation – A Most Uncooperative Assessment: Commencement Bay NRDA and Settling Hylebos Waterway Claims, A Trustee Perspective

Bob Taylor spoke about Commencement Bay and the Hylebos Waterway damage assessment efforts. Despite attempts early on at cooperation through funding and participation agreements, these efforts were long, drawn out and very contentious because, among other things, there were so many PRPs, so many attorneys and so many sites and site dynamics. However, there was hope for a settlement as some PRPs urged the trustees to re-engage in settlement negotiations at the Hylebos Waterway.

The challenge at the Hylebos Waterway was: settling out individual parties; the remedial allocation did not address damage assessment liability, and lacked consensus support; and there was the likelihood of a legal challenge by non-settlers. The solution involved developing an independent liability allocation that was managed through a neutral consultant and was made subject to a public review and comment process.

As a result, what developed was a novel restoration package that embodied:

1. A restoration-scaled approach, focusing not so much on monetary compensation but on the type and extent of restoration projects – based on sediment contamination and Habitat Equivalency Analysis;
2. Independent, neutral liability allocation;
3. A public and PRP review and comment process; and
4. The potential for restoration banking, that allows the project sponsor (in this case, Atofina) to sell shares in a large restoration project – as opposed to settling for numerous smaller and perhaps disconnected restoration projects.

A subgroup of Hylebos PRPs recently formed and hired a mediator to handle intra-site allocation.

Dave Schwartzberg, RESTERA, LLC

Biographical Sketch
Presentation – Hylebos Waterway: A New Approach to NRDA and Restoration

Dave Schwartzberg, formerly a Vice President at ATOFINA, has started his own firm, RESTERA, LLC. He stressed that he is here to speak on his own behalf, not for Atofina. Dave, like Bob, characterized the Hylebos Waterway along the same lines, underscoring that the difficulties are to be expected given the complications and dynamics.

Dave highlighted some of the site characteristics and history at the Hylebos Waterway, noting that it is one of the largest and most complicated Superfund sites. In an attempt to reach settlement, Dave also alluded to the elements of the restoration package outlined by Bob, emphasizing the "outside the box" proposal for and benefits of restoration banking – a business process for which ATOFINA has applied for a patent..

Dave noted the potential benefits of large restoration projects, namely that large restoration projects:

1. Should have higher ecological value since they can incorporate several habitat types that mutually interact in a beneficial manner;
2. Allow the trustees to focus their limited technical resources;
3. Are more likely to be implemented faster than several smaller projects, and they would have a higher probability to be successful long-term;
4. Generate very significant economies of scale. Since all restoration projects incur certain fixed costs, the larger the project, the lower the cost per ecological service unit generated by the project.

Dave provided a comparison of restoration banking to mitigation banking. While there are some similarities between the two banking approaches, there are several very significant differences. Some examples of the differences are:

- Mitigation Banking, as officially defined, is to be used to compensate, in advance, for an unavoidable loss, and it typically replaces a to-be-lost resource with the same type of resource. In other words, a like-for-like exchange.
- Restoration Banking, or Restoration Credit Pooling, which is a more descriptive name, is used to compensate for resource losses that have already occurred. It can be used to compensate for damage to one type of habitat, with a distinctly different type of habitat. In the Hylebos example, ATOFINA will create dendritic marsh and other types of habitat values to compensate for damages to sediments, and plans to sell restoration credits to other responsible parties who may have damage assessment liabilities related to damaging sediments in the Hylebos.

Questions and Answers for/by Bob Taylor and Dave Schwartzberg

Q – for Schwartzberg: Does it [restoration banking] work for other kinds of sites?

A: Yes, it can work well at all types of sites. Originally, I thought it would have high value primarily at complex sites, those with many PRPs. But I've learned that it can also be very helpful and valuable at small, simple sites.

Q -- for Schwartzberg and Taylor: You mentioned a patent? Can you be more specific?

A -- Schwartzberg: Since the patent hasn't been issued or published yet, I can't disclose exact details. However, I can assure all of you that it is in ATOFINA's best interests to see that the process is used at as many sites as possible, and the patent will not be a significant factor for anyone who will want to use it.

A -- Taylor: My understanding is that the patent covers ATOFINA's process of marketing

shares in their restoration project. It should not be an issue to those who want to be part of the process.

Q – for Schwartzberg: How were shares allocated? In relative proportion?

A: It's my understanding that the trustees allocated NRD liability to sites on the Waterway based on publicly available information on what took place on that site and specific knowledge of releases of substances of concern from that site. Different weightings for damages were assigned to each substance of concern based on scientific studies, regulatory levels, or other relevant factors. Then the trustees, using the data showing concentrations of concerned substances available from the remedial investigation and other sources, applied factors based on footprint, mass loadings, or a combination of the two to assign shares of liability.

Q -- for Schwartzberg: What are the limitations on the site?

A: The trustees, at least for now, are limiting potential purchasers of DSAYs (Discounted Service Acre Years) to those PRPs who have NRD liability on the Hylebos Waterway. In general, the potential buyers of restoration credits would be defined on a site-by-site basis, and it would depend on the type of damage that was done, the type, scope and impact of the restoration project, and the trustees who are responsible to obtain compensation for the damaged site.

Panel: What It Takes to Come to (and Stay at) the Table

Bill Conner, National Oceanic & Atmospheric Administration (NOAA)
Roger Helm, U.S. Fish and Wildlife Service (FWS)
Pam Lange, State of New Jersey
Ralph Stahl, Jr., Dupont Specialty Chemicals and Michael Ammann, ChevronTexaco
William Brighton, U.S. Department of Justice (DOJ)

Industry and federal and state government representatives discussed factors that drive damage assessment engagement.

Bill Conner, NOAA

Biographical Sketch
Presentation – What It Takes to Come to and Stay at the Table

Bill Conner shared his thoughts on what a cooperative assessment is, what it takes to get to and stay to the table, and how to improve the process.

In attempting to define a cooperative assessment, Bill indicated that the keys are:
1. To have a shared interest;
2. In order to meet your shared interest, working together; and
3. Overcoming the natural tension such that you can achieve a mutual understanding.

From the trustee perspective, you want to assess damages. But from the PRP perspective, its goal is to resolve liability. Each is pulling in different directions for different reasons. While not everyone can or needs to agree on everything, there does need to be at the end of the road a mutual understanding where all parties are satisfied.

In the effort to address what it takes to come to and stay at the table, Bill noted that everyone wants to see progress. He pointed to three elements that would be considered before engaging in a case, namely:

1. Incentives;
2. Trust; and
3. Cost of alternative approaches.

To stay engaged, Bill highlighted the following points:

1. There needs to be progress. Otherwise participation is sacrificed;
2. Participants need to be upfront at all times;
3. The expected outcome ought to be known;
4. Have a mechanism to deal with disagreements as they crop up so the process and participants do not get frustrated; and
5. Assess the costs relative to the benefits of alternative approaches.

Bill referred to some examples of restoration projects (costs and units of effort) that, viewed with some perspective, could benefit parties in making a decision as to whether conducting

more studies is necessary or, whether it would be better to assume certain facts and focus on pursuing the restoration project.

Roger Helm, FWS

Biographical Sketch
Presentation – What it Takes to Come to (and Stay at) the Table

Roger Helm laid out what he thought was essential for a successful cooperative assessment. Roger noted that having fewer people involved, with clear and supportable benefits, who act in a straight forward manner will help to facilitate a cooperative assessment.

In determining when to engage in a cooperative assessment, Roger highlighted the following points as essential:

1. Trust and willingness of the respective parties; and
2. Knowing nuances of the case (CERCAL and OPA).

He noted that unlike OPA cases, CERCLA cases have real but less visible injuries, involving usually more than one PRP, and the case is likely to last for a longer time, and for which funding and costs are uncertain.

To stay engaged, Roger suggested that both the trustees and industry remember :

1. The alternative, i.e., going to court is not a desirable option;
2. That the damage assessment regulations and various administrative policies endorse cooperation – the trustees are required to drive the process and industry can help ensure trustee involvement;
3. That restoration and resolution of liability can be achieved sooner;
4. The obvious funding and cost reduction benefits; and
5. The opportunity for greater industry influence and responsibility in the damage assessment process.

To further promote cooperative assessments Roger noted that the following may be helpful:

1. Increasing shareholder awareness;
2. Noting the possibility of Superfund listing;
3. The possibility of fixed liability on financial statements;
4. Public awareness may also help.

He indicated that where insurers and foreign companies are involved, although not excluding domestic companies, it would be productive if:

1. There was a company manager that stayed at the table, not just a company representative – either a consultant or lawyer; and
2. Clear and practical performance criteria were established.

To improve the probability of entering into and successfully managing a cooperative assessment, Roger mentioned that it makes good sense to build on existing and new

relationships (e.g., through the Joint Assessment Team venues) and improve communications skills (i.e., have respect for each other and avoid such things as destructive labeling, mind reading, magnification, and imperatives.

Pam Lange, State of New Jersey

Biographical Sketch
Presentation – Navigating the Road to Restoration

Pam Lange used a road trip analogy in describing cooperative assessments. She underscored the need to be respectful and straightforward (avoid surprises) and the roles and responsibilities that various participants (namely trustees and attorneys) do and can play in a productive manner.

When considering a cooperative assessment, Pam noted that the respective trustees and industry ought to:

1. Define their goals;
2. Determine what is needed, i.e., data, sampling, etc.;
3. Get in-house consensus;
4. Define the deal breakers;
5. Determine an acceptable schedule and who has control over that schedule; and
6. Identify major milestones.

Upon deciding on the above, she suggested that trustees and industry collectively come together and determine whether they can agree on:

1. A meeting structure;
2. Respective roles and responsibilities;
3. A means to document potential the deliberations and decisions;
4. How to address disputes.

When engaging in a cooperative assessment, she identified the need for the respective parties to:

1. Come to agreement on goals, the process and common definitions;
2. Identify milestones; and
3. Discuss schedules.

Ralph Stahl, Dupont Specialty Chemicals
Michael "Mike" Ammann, ChevronTexaco

Ralph Stahl Biographical Sketch
Mike Ammann Biographical Sketch
Presentation – Getting to, Staying at, or Leaving the Table

Ralph Stahl spoke on behalf of both Mike Ammann and himself based on their experiences of what has worked what hasn't.

In discussing what it takes to get to table, Ralph indicated that the answer for industry lies in the following questions:

1. What is the benefit of a cooperative assessment process? The answer to this question is reflected in the company's business reasons, their culture and philosophy, and their experience.
2. Did the trustee do their homework in selecting my site? If not done, you need to figure out what is missing, and do it for them. You also need to be mindful of the folks you are interacting as to whether they are credible and reasonable.

If you passed these hurdles, you are now at the table and the industry challenge is to:

1. Determine the nature of the relationship with the trustees. If the relationship is non-existent or unsound, industry must determine how best to develop or judge the relationship prior to moving forward. Ralph stated that industry might want to avoid attorney involvement at first, letting them participate later and as needed;
2. Determine the focus of the assessment. Is the focus on restoration or monetary compensation? Ralph noted that the participants should not start discussions on monetary issues, although they will likely come up later in the process;
3. Determine how the process will be structured. It's important to develop a road map that identifies key questions and decision points – a road map that is not bogged down, is flexible, and allows innovation;
4. Be open to creative solutions;
5. Be able to manage uncertainties. Ralph suggested a good question to ask is "Do we really need to get everything pinned down, or can we move on?";
6. Be willing to share risks;
7. Conduct only those studies needed for restoration planning;
8. Understand the needs & expectations of respective "constituents;" and
9. Be sensitive to "costs", whether money, resources, or time.

Ralph also indicated that there are reasons for terminating a cooperative assessment, namely if:

1. There is a loss of trust and/or credibility;
2. There is a change in personnel, i.e., for the worse;
3. There are unrealistic expectations for restoration;
4. There are unsupportable assessment costs;
5. There are too many cooks; or
6. The assessment is moving at a glacial pace.

Bill Brighton, DOJ

Biographical Sketch
Presentation – What It Takes to Succeed at Cooperative Assessment: A Negotiator's Perspective

Bill Brighton spoke from his perspective as a lawyer, negotiator and litigator. He stated that this process is a negotiation and a legal process. He advised setting aside, but not ignoring, legal issues, instead dealing with them separately.

Bill asked the rhetorical question of how one should go about considering a cooperative assessment. He noted that it's just a negotiation. It helps to talk to those folks that have had successful experiences and to borrow from those experiences and carry forward those principles when encountering more potential cooperative sites. He underscored that at the end of the day, you still need to deal with legal and policy issues as well as get public acceptance. He noted that it helps to filter out what can be agreed upon and what can't, looking always at possible compromises – which is not a technical process at all [as most scientists would like to think].

Bill highlighted several threshold requirements and elaborated on the nuances of these thresholds for potential cooperative assessments:

1. Set aside, but don't avoid, legal issues. Bill noted that legal issues must be considered at some stage in the process, and that it may make good sense come to some agreement on how to address these issues early in that process. Short of this, the cooperative assessment can be undermined;
2. Define shared objectives. Bill noted that not all objectives are shared by the scientific teams and that while science provides an essential foundation, legal and policy positions have a legitimate role and should be addressed early on and in the open. He acknowledged that it is okay to conduct only part of the cooperative assessment jointly, to conduct it in phases, and to consider either consensus forums versus joint efforts that allow for separate conclusions; and
3. Design a process to fit the objectives. As part of the design process, Bill highlighted:
    a. The importance of agreeing up front on the decision points, who and how decisions will be made, the consequences of a breakdown, and the interface between cooperative assessment (if only part of the assessment is cooperative) and potential settlement negotiations;
    b. That where there are serious liability or environmental fairness issues, it is important to agree on a process to address them, confining such issues to negotiations;
    c. The need to recognize and plan for the public's role in the selection of restoration projects; and
    d. The option to use a mediator, neutral party or other facilitator when appropriate.

Questions and Answers for/by the Panel

Q -- for Conner: You said both sides have risks. Explain?

A: Risks to trustees of entering into a cooperative assessment, if it doesn't pan out then it is a dead end to your investment. Then you are not in best position if you must litigate, if the whole thing is on the rocks. You've used up lots of time -- years and months. And you must find a presentation method that is appropriate in a court room which could be different from what they have. So they will have to re-do.

Q -- for Lange: What approach have you used if any to mediate technical issues of disagreement?

A: There is a dispute resolution process we [New Jersey] have laid out. A step-by-step process that we have developed that goes up the chain, but also we do not always stick to it.

Q -- for Stahl: Explain the SEC's reporting.

A: Once we agree verbally, I have to inform our internal legal staff in charge of financial reporting. If the settlement is less than $10,000,000, we don't have to report it as a line item to the SEC, but we do have to report it in our overall report - in other words, it may not be a line item but part of a larger roll up of expenses. This has to be done whether we have made the commitment in writing or by verbal exchange.

Q -- for Stahl and Ammann: How can trustees influence corporate philosophy to act cooperatively in a damage assessment case?

A -- Stahl: I laid that out in our presentation. Be open minded, take risks, don't get hung up in process, come to the table with restoration in mind, etc. etc which was outlined in our presentation.

A – Ammann: I also encourage you to think out of box. Use rules as guideposts and a road map but we need to do that more efficiently without being bogged down in the process.

Q – for Stahl and Ammann: You showed the responsible party reviewing the pre-assessment before a Cooperative Assessment is formalized thereby independently determining if the data indicating potential injury is convincing. Better, I believe, to agree on a Cooperative Assessment before one starts the pre-assessment.

A – Stahl: The situation varies depending on the persons involved. In one case I got the pre-assessment letter only after it filtered down from our CEO. In another instance, I got a phone call that became, more or less, the "preassessment."

A – Ammann: It would be a major shift in the "process", but if trustees and the PRP could sit down and jointly review the case and the available data in advance of a pre-assessment screen or in place of the pre-assessment screen, that could help expedite the process. One thing that conducting a joint pre-assessment would do is to ensure that accurate information is used to determine whether to move forward with an assessment, and if, so, what to focus on. Sometimes information included in a pre-assessment screen is out of date or erroneous.

Q -- for Brighton – We have heard from DOI and NOAA and industry on their principles of NRDA and how they want to conduct restoration based NRDAs. Does DOJ have NRDA principles? Does DOJ want to settle restoration-based NRDAs?

A: DOJ isn't a trustee and is not supposed to be making policy for how the trustees run their NRD programs. DOJ has a strong interest in NRDA being addressed early on.

Q -- for Brighton: Is DOJ willing to raise the limit under which administrative settlements can be undertaken?

A: I cannot speak to DOJ's position on that here.

Q – for Brighton: When a PRP comes forward and addresses all NRDA liability at a multi-party site, what incentives would DOJ give to acknowledge their proactive posture?

A: While cooperation naturally breeds kindly feelings, the question of what specific settlement incentives or concessions are appropriate inherently needs to be determined case-by-case, based on the full set of relevant facts. For that reason, it would be inappropriate to suggest a list of potential concessions in the abstract.

That said, this is certainly an interesting hypothetical – one I would love to see come to pass! The closest real-world analogue that I am aware of is the proposal by ATOFINA with respect to the Hylebos Waterway portion of the Commencement Bay Site in Washington, which Bob Taylor and David Schwartzberg described at the workshop. Under that proposal (which has not yet been finalized into a settlement but has been discussed publicly), ATOFINA would implement a large habitat improvement project that, based on the Trustees' assessment of the amount of "discounted acre-years" needed to offset the natural resource injury in the Waterway and a settlement allocation prepared by the Trustees with opportunities for input by the PRPs, significantly exceeds the equitable share attributable to ATOFUNA. DOJ and the Trustees are working with ATOFINA on an innovative arrangement that would allow the company to sell shares in the restoration project to other PRPs, so as to recover the costs in excess of its "share" (and perhaps more) as efficiently as possible and, we all hope, without litigation. While this potential settlement is still in negotiation, it provides a good conceptual example of the kind of incentive we may be able to offer in the circumstances posited by the question.

Q – for Brighton: In recognition that Cooperative Assessments represent a mutual sharing of risk between trustees and RPs, to what extent is DOJ willing to accept some risk in the development of its consent decrees?

A: This question seems to be talking about two very different kinds of risks. In a cooperative assessment, the parties often agree to share the risk that, by making agreed-upon assumptions or stipulations that avoid time-consuming and expensive studies, they may be either over- or under-estimating the amount of restoration or other compensation that is appropriate. That shared risk would necessarily be reflected in the substantive terms of settlement – the projects to be implemented or payments to be made – in a consent decree. While I am not sure what the questioner had in mind by "risk in the development of [a] consent decree," he/she presumably was thinking of something additional – risks of a legal character beyond those borne by the parties in a cooperative assessment.

As noted above, that is a difficult subject to discuss in the abstract. Certainly, even the most cooperative party should not expect major changes to legal provisions that have stood the test of time and become standard in CERCLA and/or OPA settlements. There may, however, be room in particular cases for further sharing of risk on such issues as how to define successful performance of a restoration project or the frequency or duration of post-construction monitoring obligations.

Q – for Brighton: My experience has been that technical specialists from both trustee and industry can quickly reach settlement but when DOJ and state Attorney Generals begin discussing the consent decree the cooperation stops – how can DOJ and state AGs remove this pattern?

A: The parties' technical specialists and lawyers are experts in different sets of issues, and the parties must reach agreement on both sets of issues before there is a "settlement." Thus, if the technical specialists reach agreement on the type and amount of restoration work to be performed but the parties have different notions about the scope of the covenants not to sue that should be included in the settlement agreement, there is no deal until the latter issue is worked out. Since the cooperative assessments that have been performed to date have typically begun with a focus on technical issues, the lawyers have sometimes needed to play "catch-up" after the technical experts were finished with the issues they cared about most. One way to reduce the delay from this type of sequential negotiation is to engage the lawyers on both sides earlier in the process. To be sure, a couple of speakers at the workshop cautioned against this solution, apparently out of fear that lawyers may be resistant to a cooperative approach and may impede the assessment. I believe such fears to be overstated; certainly, the government's lawyers have no possible incentive to prolong negotiations needlessly. In any event, the lawyers must be involved eventually, so keeping them on the sidelines necessarily risks the kind of delay that the questioner is concerned about. (A second potential source of frustration to the technical specialists is that lawyers tend to be particular – some might say "picky" – about how even technical requirements are written, so they may want to "clarify" language the technical specialists consider perfectly understandable. A good reason for this difference is that the consent decree will ultimately be interpreted by a judge, who will read it from a lawyer's or lay-person's perspective and may be prone to misunderstand technical writing. In the end, I can only urge patience on this point.)

Q – for Brighton: Does DOJ feel it is appropriate to negotiate technical issues on behalf of trustees? What is the attorney-client relationship between DOJ and trustees?

A: In environmental cases, DOJ routinely negotiates technical issues on behalf of our client agencies. Of course, we almost always do so in close consultation with the affected agency or agencies and typically rely on the technical expertise of agency staff. Nonetheless, DOJ lawyers are expected to exercise independent judgment and to raise questions (internally and subject to the attorney-client privilege) when an agency position seems inadequately supported, even on a technical matter.

In this respect, DOJ is in a different position than private lawyers, who are generally obligated to adopt and defend a client's position so long as it does not require the lawyer to violate ethical codes. The Attorney General has final authority over the resolution of federal claims above a certain size, and DOJ's responsibility includes both representing the particular federal agency or agencies involved in a case and representing the interests of the United States as a whole. As noted, especially in environmental cases, DOJ works closely with the client agencies, relies on them for expertise, and gives them considerable deference on technical and policy issues that are within their specific areas of responsibility. Nonetheless, either DOJ's broad responsibilities to the public or its specific responsibilities to other agencies, when more than one is involved in a case, may require DOJ to examine a client agency's desired position critically and, sometimes, to insist on changes.

Q -- for all panelists: What advice would you give to an RP engaged in a cooperative assessment that is dragging their feet?

A -- Ammann: Tell the PRP to talk to Bill. Pay now or pay them later. Convince the PRP to get with it, and move in the right direction.

A - Stahl: Put it in business terms, and then you can get them to move around.

A - Helm: Direct them to DOJ. DOJ is a two-way hammer.

A -- Lange: The only thing that feet dragging results in is higher costs for the RP. Liability increases as damages accrue and the cost of field work and document production go up with each subsequent mobilization to collect data.

Q -- for all panelists: What happens if the CAP process falls apart? Has your litigation position been compromised because you didn't do a litigation quality damage assessment?

A -- Brighton: We should have a compromise litigation if we have done in right. You might have to go back and re-do data because things have changed.

A -- Helm: Sometimes different data is needed. It puts you in awkward position.

A -- Lange: New Jersey has not had any experience in this to date, however, litigation need not be compromised but could certainly be more expensive if certain proofs are needed for litigation. If the State prevails, those costs would be borne by the RP.

Q -- for all panelists: Has an NGO or any other community group been at the table? If not how do NGOs get to table?

A -- Brighton: You have to distinguish what issues are appropriate and being discussed. If it's restoration, then the public should have a large say in it. During litigation and other finalization pieces, the public doesn't belong there.

A -- Conner: I agree with Lenny's points this morning and I agree with the way damage assessment has been done. Under both OPA and CERCLA, we could use to have more input from the public and the community because you might be missing the point at the level of the local community. Because the trustees are supposed to be representing the local communities, the trustees need to be communicating with the local community members. It's a tough one to figure out.

A -- Helm: We are served if we speak with as many as possible whether NGO's or whatever. Regional restoration plans must be available and we need to be working cooperatively with the people, and this should be part of the process the trustees should be going through the whole time. It's very valuable.

A -- Stahl: It's very valuable – restoration is not final, so we should talk in public.

A -- Lange: Unsure by what is meant of "at the table". NGOs do not sit down at negotiations with RPs. They can be key in identification of restoration projects that are worth pursuit due to the specific knowledge that they can bring to a discussion.

Q -- for all the panelists: When is cooperative assessment not worthwhile?

A – Helm: It wouldn't be worthwhile if a bunch of trustees want to take you to court. If they are set on taking you to jail or suing you, then why bother?

A -- Brighton: We are really into resolving things, so if we can resolve to do things out of court and cooperatively, we would like to do that, it's our first choice. Environmental cases are very challenging. Relying on a judge is a perilous enterprise, so if parties are able to talk that out, then that is great.

A -- Stahl: One time to step back is if all the trustee folks are not on the same page. You might not want to be there during that sorting out.

A -- Lange: If an injury is diminimus, negotiating a CA may be more expensive, if there are specific rules/regulations in place -- again negotiation may be moot.

Q -- for all panelists: Do you agree that company representatives and not just outside counsel should be at the table in cooperative assessments?

A -- all panelists: All agree – couldn't agree more.

Q – for all panelists: I have seen a form Proposed Cooperative Assessment Agreement. Is this form agreement frequently used for Cooperative Assessment? Are agreements required or is a work plan sufficient?

A – Helm: I haven't seen the form and don't know if its used frequently. A work plan maybe sufficient, but without an umbrella agreement, things may 'fall apart' if there isn't detailed specificity and due dates in the work plan

A – Stahl: I've not received a form yet. Only twice have I received anything in writing related to joining a cooperative NRDA.

A – Ammann: I have not seen a specific, boilerplate, but in most cases, particularly at CERCLA sites, some sort of funding and participation agreement is needed. In oil spills, it may be possible to avoid that step. But some kind of participation agreement will usually be needed. The agreement can be structured to deal with phases, with subsequent participation agreements being prepared if the parties think they can still work together in the next phase of the assessment.

Q – for all panelists: Who pays for the Cooperative Assessment? Is funding shared between the PRPs and the trustees?

A – Helm: Mostly the PRP, but Trustees likely would be responsible for conducting and maybe funding some of the work.

A -- Stahl: This is tricky. I have not paid up front for any cooperative assessment to date. We do agree to fund the work, but only after we agree on the scope, etc. Even then we don't pay up front.

A – Ammann: If the parties agree to proceed with a cooperative assessment, then the RP should agree to fund the trustees participation. Usually, the RP will pay as the process moves along—no up-front payment. The parties should develop a scope of work for the

cooperative work and the trustees should develop a budget and be willing to document their work as part of their invoices.

A – Lange: Although cost may currently be shared by virtue of the various resources (meaning personnel, time, equipment use) needed to conduct cooperative assessments, it is clear that the RPs are liable for all the costs of assessment.

Q – for all panelists: What are the panelists' perspectives on third party neutrals? What works, what doesn't? What types of models/experience have been tried – legal, technical, facilitation vs. mediation?

A – Helm: Too little experience to comment, except that the more parties involved the greater the need to document decisions and clearly communicate intentions.

A – Stahl: I haven't used 3rd party neutrals before. Others have tried it and it can be a good approach provided the PRP really can't get the process moving any other way.

A – Ammann: No experience in using 3rd parties. Involving a 3rd party could be a good idea to keep the cooperative process going if it is broken. But by that time, it may be too late.

A -- Lange: NJ does not deal with third party disputes.

Cooperative Experiences – The Good and Not So Good

Ron Gouguet, National Oceanic & Atmospheric Administration (NOAA)
Dan Wall, U.S. Fish & Wildlife Service (FWS)
Steve Hampton, State of California
Mark Davis, Coalition to Restore Coastal Louisiana
Michael Macrander and Anthony Palagyi, Shell Global Solutions
Linda Burlington, National Oceanic & Atmospheric Administration (NOAA)

This session focused on the accomplishments and special challenges of past cooperative damage assessment efforts.

Dan Wall, FWS
Ron Gouguet, NOAA

Dan Wall Biographical Sketch
Ron Gouguet Biographical Sketch
Presentation – Cooperative Damage Assessment: Observations of a Couple of Field Hands

Dan Wall and Ron Gouguet presented their perspective on the cooperative assessment process from their years of experience. They provided a synopsis of the intent of natural resources damage assessments.

They emphasized that there is a real opportunity for all the parties to use a single, integrated process to address remedial and damage assessment issues since both risk and injury assessment follow a similar path, albeit they have different thresholds. They indicated that working within the remedial process to address damage assessment issues will minimize redundancy in data collection and optimize the quality of the data.

Dan and Ron provided some important caveats to a successful cooperative assessment, namely:

1. Competency is a must on all sides, technical and otherwise; and
2. It is important to weigh the needs and costs of data against potential damages, early and often.

Regarding the latter point, they pointed to the benefits of an approach that has been successfully used in cooperative cases in Texas and Louisiana, “The Reasonably Conservative Approach to Natural Resource Damage Assessment.” The thinking behind this approach is that by making reasonable, conservative estimates of natural resource injuries and losses using information obtained for other purposes, you may save additional time and money on injury assessment studies. Less uncertainty brought about by more studies usually reveals less injury.

Interestingly, they provided some thoughts on how trust may be built after negative past experiences when new personalities are at the table. In determining whether trust should be granted, they suggested some signals that may be useful, such as whether the person with whom you are negotiating:

1. Concedes the obvious or is willing to compromise;
2. Lets science, or the facts, drive the process;
3. Can adjust to uncertainty;
4. Can maintain a focus on the goal of restoration, i.e., the underlying process is not structured for litigation or exploitation;
5. Is willing to find a solution to a problem;
6. Can work together, i.e., is ready to share information, provides respect, acknowledges concerns, unites with respective stakeholders, talks in a straightforward manner, etc.;
7. Can allow the experts to reach conclusions in their area of expertise; and
8. Can minimize formality.

Doing otherwise could be cause to distrust the player.

Dan and Ron showed some examples of their restoration results noting that more restoration could occur if people are willing to break down the barriers.

Steve Hampton, State of California

Biographical Sketch
Presentation – Past Cooperative Experiences– Successes, Challenges, and Lessons Learned

Steve Hampton focused on the challenges and lessons that some of the states learned. In David Letterman fashion, his presentation listed the top ten things that can go wrong in cooperative assessment. While he indicated that there are a lot of positive developments in the damage assessment arena, sometimes it is more instructive to look at what went wrong in past cases to help mitigate future cases. In short, Steve highlighted the following problems in past assessment efforts:

1. Unrealistic expectations and a lack of understanding;
2. Folks (sometimes management) that enter the assessment late, who need to brought up to speed, and who question the process and its conclusions;
3. Using the assessment as a vehicle to fund research or additional work;
4. Refusing to pursue cost-effective studies that resolve outstanding questions;
5. Too much time and money expended on meetings that are unproductive;
6. Poorly organized working groups;
7. Arguing every fact and minutiae of the case, thereby stalling progress;
8. Lack of agreement, even on the most obvious of facts;
9. Nobody with decision making authority is present at the table, e.g., company people; and
10. The attorneys caveat or minimize the conclusions made on the case.

Steve was optimistic that with solid project management, even tough cases can be resolved cooperatively – folks involved in a case need to actively participate, be creative and be reasonable.

Mark Davis, Coalition to Restore Coastal Louisiana

Biographical Sketch
Presentation – CAPs, Communities, and Stewardship: An Outsider's Thoughts on the Role of Damage Assessments in Resource Stewardship

Mark Davis spoke from the perspective of an atypical player, as a representative of an NGO. He stated that there are times when it is useful to have more than the PRP, the consulting agencies and government representatives in the room. It is helpful if you have someone at the table who can put the case in the right context, and, sometimes, that is the NGO. The good news is the CAP process is an incredibly good process, and provides a different way of getting things done, and getting them done together. He referred to the joint remediation and restoration work that is being conducted at Bayou Trepagnier in Louisiana. He provided lessons learned from his experience in Louisiana.

Mark offered some observations that may be helpful in shaping more effective cooperative assessments as follows:

1. Be clear on why everyone is there to minimize confusion;
2. Get the right people to the table to ensure full engagement;
3. Be clear on everyone's authority to ensure commitments are real;
4. Share the information and technical expertise so as to shape future actions;
5. Establish ground rules but no preconditions for the assessment process so as to avoid surprises;
6. Make sure that no one has to surrender their rights to get to the table; otherwise it is not longer a cooperative process.

Mark underscored the fact that the cooperative assessment process is attractive where the right ingredients are available. It is not something that will work in every situation. And it is not one size fits all.

Mark highlighted that the public must have the capacity to know what's going on; that in planning public involvement, trustees and PRPs must recognize the public's desires and constraints.

Michael Macrander and Anthony "Tony" Palagyi, Shell Global Solutions

Michael Macrander Biographical Sketch
Tony Palagyi Biographical Sketch
Presentation – Cooperative Damage Assessment Lessons Learned

Michael Macrander presented. He looked at the strengths and weaknesses in cases that both Tony and he conducted. He suggested that it is critical to maintain a focus on the resources and not get sidetracked by ancillary distractions. He alluded to some obvious tensions for PRPs (precedent v. expedience) and trustees (sufficiency of settlement v. expedience) alike, noting that there are real opportunities, if folks are creative, for sensible restoration projects and for which the benefits are obvious.

Michael emphasized a number of important points that could enhance cooperative assessments, such as:

1. Ensure commitment;
2. Find common ground, i.e., concede the obvious, seek points of agreement, do what makes sense based on the facts.

Michael made a case for using reasonably conservative assumptions (refer to presentation by Dan Wall and Ron Gouguet) when appropriate. He stated that there are limitations to science; that large amounts of money and effort can be expended doing studies that will not be definitive. The question that all parties should ask themselves is how and to what extent a proposed study provides further insight. In light of this, it is important to have credible work groups.

Michael noted some lingering problems. In closing the "deal," he figures that clearly half the level of effort (a disproportionate amount of time and cost) is devoted to drafting documents and finalizing the deal (i.e., settlement). He also stated that often trustee oversight and monitoring costs are too expensive.

Michael also made a case for PRPs providing a lead role in cooperative assessments. He stressed that cooperative assessment should mean more than just "PRP pays." However, Michael underscored the fact that failing a cooperative assessment process means litigation, which is a place that most people don't want to go.

Linda Burlington, National Oceanic & Atmospheric Administration (NOAA)

Biographical Sketch
Presentation – Cooperative Approaches to Resolving NRD Liability: What Works

Linda Burlington provided an attorney's perspective in the cooperative assessment process, proving some assessment of needs and benefits.

She listed some of the elements of a successful cooperative assessment that the audience had heard in some of the previous presentations, such as:

1. Focus on science and restoration;
2. Establish common goals;
3. Agree to a framework for cooperation;
4. Plan ahead;
5. Communicate regularly;
6. Be flexible;
7. Share data;
8. Make decisions through consensus; and
9. Learn the requirements and limitations of other parties.

She also highlighted some of the common tripping points that could unravel a cooperative assessment such as: traditional mindsets; focusing on disagreements; letting process rule; and surprise unilateral actions. She said that "just thinking out of the box" can alleviate these problems.

Linda also pointed to some of the more challenging issues facing settlement agreements that could stand to be better clarified, namely:

1. Reservation of rights;
2. Covenant not to sue;
3. Contribution protection;
4. Signatories, i.e., numbers and delays;
5. Reopeners; and
6. Stipulated penalties.

She hoped that these issues would serve as fodder for future discussion, at this workshop and elsewhere.

Questions and Answers for/by the Panel

Q – for Davis: What legal claims were you considering asserting on behalf of the community?

A: We were considering (and still would) a challenge to the adequacy of the proposed remediation (at the time NRDA was a separate issue) which the Louisiana Department of Environmental Quality had released. There were several legal theories but most notably, there is a broad public trust responsibility imposed by the Louisiana constitution that requires a NEPA-like consideration of public interests as part of making a significant decision. We believed the record developed by DEQ and the RP in this case failed to meet that standard.

Q – for Gouguet and Macrander: How did the trustee and RP attorneys react to having an NGO at the settlement table [regarding Bayou Trepagnier]?

A – Gouguet: The NGO was not invited to the settlement table per se. The NGO participated in the cooperative assessment with the idea of providing its interests and concerns on the direction and conduct of the assessment. At any time that settlement issues needed to be discussed, the trustees and PRP reserved the right to hold such discussions separate from the NGO. This was understood and accepted by the NGO. At the same time, if the NGO's concerns were not seriously and adequately addressed, they reserved the right to walk away from the cooperative assessment and pursue other avenues.

A -- Macrander: There is always trepidation where there is potential to set a precedent. This has been a careful stepwise process. So far, we've continued to move forward.

Q – for Macrander: What specific actions are you taking to encourage other members of your industry group to take the cooperative assessment approach?

A: The proof is in documenting success stories. We have presented the positive results of our experiences at conferences and workshops.

Q --- for Macrander: If we encountered a reluctant PRP, what steps do you recommend to "bring them around" to the cooperative approach?

A: The first step is to be truly cooperative yourself. That means to be willing to engage non-threateningly on matters of science and process management. It means to be sensitive to the concerns of the PRP(s) and to make serious efforts to control costs.

Q – for Burlington: Are there other cases you are working on where NGOs could be included at the discussion/settlement table?

A -- Burlington - There are cases I have where an NGO could be included, but most of those cases are small oil spills in remote locations, so there is little public interest. On other cases, the PRP would have to be comfortable with the idea to include an NGO.

Q – for all panelists: How do you deal with a trustee who believes the PRP's ONLY role is to pay the bills?

A -- Wall: The question implies to me that the PRP is not being offered adequate participation in development of the settlement. Obviously, this is counter to a cooperative settlement strategy and should be rectified. It seems that the PRP has the leverage ($$$) to demand, rightfully, that their needs are met throughout the process. By this, the PRP, and all stakeholders, are afforded an equal voice at the table. Withholding the money, or threatening to withhold the money until the problem is resolved, would be an appropriate measure in this situation.

A -- Macrander: We have actually received requests where trustees suggested that we fund an assessment in which they determined what studies were needed, designed the studies, hired the contractors, implemented the studies, interpreted the results, and designed any necessary restoration. To those particular trustees, this was a "cooperative assessment." I would suggest that such an approach is, by definition, not a cooperative assessment at all.

Ultimately, the proof on all sides of a cooperative assessment is in the performance. To be at the table a PRP has to demonstrate that they can listen to and hear the concerns of the trustees, can debate responsibly and productively, can be responsive to needs for timely and appropriate data and can produce credible interpretation and action plans. If a PRP can perform responsibly and credibly, in general they have the ability to move much more quickly and effectively to get the work done. PRPs who respectfully decline the funding only approach then demonstrate that they can be a productive member of a cooperative team will tend to produce success stories.

Q – for all panelists: Why would you call Restoration Monitoring and Trustee Oversight an add-on, when it is considered an essential part of an effective restoration project – in fact, has been for many of our success stories in LA, TX, NY, DE, VA, WA, etc.

A – Davis: Needless to say, I would not consider those things to be add ons. Indeed, they are often at the heart of ensuring that whatever is agreed upon actually works. They are also vital to getting past certain impasses where there are disagreements about a proposed action—see below.

A – Hampton: Monitoring can be a confusing word. Let's make a distinction between biological monitoring of a particular restoration project and administrative oversight of a project or suite of projects. Each project should include a budget for biological monitoring. Assuming the restoration plan includes a suite of several projects, the budget for administrative oversight is best "added on" to the sum of the individual project budgets. Administrative oversight may include managing contracts, keeping the public informed,

reviewing project implementation and biological monitoring reports, and developing the Draft and Final Restoration Plans (if they were not already completed and paid for prior to settlement).

A -- Burlington - This question must have been intended for an industry panelist. However, I would not call Restoration Monitoring and Trustee Oversight "add-ons." They are simply a part of restoration implementation.

A – Gouguet: I agree with Linda.

A -- Macrander: We recently reviewed a draft document that estimated monitoring costs for forested wetlands to be 85% of the cost of implementation and documented oversight costs to be an average of 13% of implementation. Given those numbers, there can be cases where nearly one of every two settlement dollars is spent on monitoring and oversight. Just as is the case with everything else in the cooperative process, what may be absolutely necessary monitoring and oversight to one party may be add-ons to another. The reality is frequently somewhere in the middle. We should bear in mind that all the monitoring and oversight in the world will not produce one more stem of marsh grass or hatchling or benthic invertebrate. Monitoring and oversight may, indeed, guarantee that the above are accomplished or document that they were accomplished but they are not dollars that are spent on restoration. Conservatism is typically built into nearly all assumptions from the estimation of injury to the projected benefits and potential for success of a restoration project. To then include extensive needs for monitoring and oversight casts doubt on the relevance of earlier assumptions. Generally PRPs want as much certainty as they can get and may be willing to increase the scope of a restoration project to minimize the potential for reopeners and what they may pay in administrative costs. We should seek to find the comfort zone where the emphasis is placed on restoring the resources.

Q – for all panelists: How does the assessment team get beyond the one or two entities or parties on the team that no matter what the results may demonstrate, the party will not accept the results because their belief or thoughts on the issue are not supported. However, understand the dissenting party or parties were part of the group that developed and approved the methods to be used to answer the assessment questions.

A – Davis: First, you may not get beyond it. There are limits to what can be done via the CAP approach. But where there is room for movement this may be a situation in which the monitoring, trustee oversight and reopeners can be crucial. In our case, there are still some issues that we believe the trustees and the PRP's understanding or assumptions about what is driving risk is incorrect. While we hope we are wrong about those risks, we also recognize that there is no way to resolve those issues now, only time will tell. Accordingly, we have dealt with these through monitoring and reopeners. If it turns out we are wrong, then it won't matter to the cleanup, if we are right then there is a prescribed process for addressing it. The bottom line needs to be the health of the system, not who wins or loses a round at the table.

A – Hampton: That's a difficult situation. Sometimes the dissenting party can be appeased by alternative language (e.g. caveats) in the summary and conclusion, even though it doesn't really affect the results. This is especially true if the party is a trustee that is concerned about the implications for non-spill-related management issues. If the conflict involves interpretation of the data for use in calculating damages, you've got a much more

direct conflict, which will presumably lead to compromise, court, or further studies. We've conducted some studies where, prior to the study, we've agreed exactly how the results will feed into a specific parameter in a predetermined model. E.g., if the result is x, we will use x here in this model. Of course, people can still argue that x wasn't determined properly...

A – Burlington and Gouguet: In this situation, the assessment team should first attempt to reach consensus with all parties. However, if no consensus is reached, perhaps the team could put that one issue aside and continue work. In one particular case, one party did not agree to either the method used or the results of the application of the method. However, once that party realized that the results would have an insignificant impact on the ultimate restoration, the party agreed to the restoration and indicated in the administrative record for the case that it did not agree to the method or its result, but agreed that the underlying concerns would be addressed in the restoration.

A – Macrander: Ditto to the above.

Entering Into a Cooperative Assessment
First Small Group Meeting

Prior to dividing into small groups, both Iris Ioffreda and Marlana Valdez gave a short presentation on group process issues. They pointed out that most groups rush to work on the content issues without giving any thought to process, but often what dooms a group are process issues – people feel ignored, that they aren't being heard, or that the decision making process is unfair, that some group members' behavior is unacceptable, etc. The pre-workshop interviews confirmed that establishing a process for the group's work and understanding group dynamics is critical to the success of a cooperative assessment. Those interviewed said that in past cases in which cooperative efforts had collapsed, the breakdown could be attributed in great part to "people issues" or problems with the group. At the outset, groups should develop a common goal or vision, create an explicit set of rules for functioning, determine how decisions will be made, and set up a communications plan. These issues are discussed in more detail in the OLA Handout.

They also explained that groups go through predictable stages of development, and that some group dynamics can be attributed to the group's developmental stage. In the "forming" stage, the group focuses on issues of inclusion and leadership, and interactions are polite and tentative as trust among group members is low. In the "storming" stage, teams may split into polarized subgroups, express general dissatisfaction with the group, and reject leadership or authority figures. In the "norming" stage, the group begins to develop a sense of cohesiveness and sets up structures and rules to help it function more effectively. Finally, in the "performing" stage, the group functions smoothly with mutual problem solving and cooperation and an emphasis on productivity. Groups can get stuck at any of these stages, so it is important for leaders to know how to assist the group in making a timely move to the next stage.

Finally, they discussed group behaviors that support and hinder group effectiveness and asked participants to watch for those behaviors in their small group discussions (refer to handout).

During this first afternoon of the workshop, the small groups charted the most important goals and/or interests as well as concerns specific to each stakeholder group represented in a Cooperative Assessment. They did not report out these results to the full workshop; however, the main findings of the groups are outlined below. (Some groups subdivided major stakeholder groups into smaller units.)

Common Goals and Interests

All groups had the following goals and interests in common:

- Buy-in to a common vision and end goal, providing a degree of certainty;
- Meaningful and appropriate involvement;
- Timely and cost-effective process, providing a sense of progress;
- Linking restoration and remediation, encouraging a single, streamlined effort;
- Sharing data;
- Supportable, reasonable and fair damage assessment;
- Funding and cost management/accounting;

- Public scoping, participation and buy-in;
- Adequate and appropriate restoration;
- Resolution of liabilities without resorting to litigation;
- Recognizing respective accomplishments; and
- Preserving, and enhancing relationships with other stakeholders, including the public.

Goals/Interests and Concerns Specific to Stakeholders

Small groups also developed lists of goals/interests and concerns specific to individual stakeholder groups. While participants agreed that all stakeholders had many common goals, there was greater divergence in their primary concerns about Cooperative Assessments. (See table on next page.)

PRP Goals/Interests	PRP Concerns

• Clear goals and end-state vision, maintaining focus.
• All PRPs at table with meaningful involvement.
• Fair, cost-effective, timely, flexible, defensible, and more predictable process.
• Coordinate restoration with remediation.
• Public buy-in.
• Cost management.
• Liability resolution/global settlement – avoiding litigation risks.
• Paying equitable share relative to other PRPs.
• Recognition of environmental outcome.
	• Unrealistic or pre-conceived trustee expectations (e.g., expectation that PRPs are cash cows); hidden agendas.
	• Uncertainty in terms of:
	  ○ Cost -- expense of assessment could exceed expense of restoration; avoiding paying for another PRP's liability or for more restoration than is necessary; cooperation ends when money is on the table or PRP's lose meaningful input.
	  ○ Time -- waste of time if process is unsuccessful or trustees fail to commit or are not united; process bogging down in minutiae of regulations.
	• Consequences of failure – PRPs may still be liable and may have compromised their litigation position; PRPs are open to further public disclosure; information and studies may be used against them in litigation; orphan share issue, etc.
	• Having adequate information before making a decision to engage in a cooperative assessment.
	• Possibility of inadequate or inappropriate representation, management and decision-making.
	• Involvement in and validity of the assessment, e.g., trustees decide to fund unnecessary studies.
	• Inability to think out of the box, i.e., to be creative and flexible, to come to a compromise, etc.
	• Needs and scope of public input; lack of a unified public.
	• Possibility of compromising corporate reputation, perhaps promoting poorer public perception.

Trustee Goals/Interests	**Trustee Concerns**
• Adequate, effective, and timely restoration to compensate the public and environment, i.e., complying with trustee obligations and maintaining trustee rights. • Reasonable and unified trustee position to address collective trustee interests and avoid/minimize conflicts. • Integrate restoration into the remedy when possible. • Adequate and early information to identify injury categories and provide for restoration opportunities – require restoration nexus to injuries. • Options to jump-start and justify restoration,	• Understanding what cooperation may mean. • Compromising legal authority and loss of control of the process. • Motivation or bad faith of the PRPs or other participants. • Concerns over the assessment -- lack of adequate staff resources and funding, collecting insufficient, untimely or unreliable data (bad science) that questions defensibility of the assessment, not appropriately valuing the injured resources and addressing restoration, exposing weaknesses in the case, etc. • Consequences of failure -- delay in cleanup

PRP Goals/Interests	PRP Concerns
e.g., using reasonable conservative or protective assumptions . • Document relevant actions and decisions. • Public interest and potential buy-in. • Defensible and acceptable global settlement, including protecting legal options such as reopeners and addressing long-term operations and maintenance of restoration projects. • Recover costs and receive up-front funding when possible and appropriate. • Maintain good relations.	and restoration, reduced or loss of ability to pursue claim if process fails, waste of time and agency resources if process fails, etc. • Coordination and management concerns – may take more effort (at least up front) due to varied understanding by the stakeholders of the process and facts, turnover of players, failure to follow-through on commitments, others without authority to make decisions and commitments, lack of competency in building consensus and process management, etc. • Public perception of collusion with industry • Setting a bad precedent if poorly founded deal is made. • Inability to be flexible and innovative.
EPA Goals/Interests	
• Incorporate restoration into larger public community plan. • Provide and receive support to/from the trustees relative to integration and resource support. • Act as a mediator between all parties • Cost recovery.	
Goals/Interests Specific to Environmental NGO's and the Public	**Concerns of Environmental NGO's and the Public**
• Comprehensive and holistic assessment and restoration. • Understand the goals and the respective processes (remediation/restoration) -- provide basic education. • Holding PRPs accountable for injuries • Fair and meaningful participation – the earlier, the better. • Opportunities for input and meaningful responses to public input. • Transparency. • Global settlement that results in effective and timely remediation and restoration, perhaps consider alternative options, i.e., green technologies and ecological re-use. • Recoup lost revenue or property value loss.	• Managing expectations -- "Sweetheart" deal for PRPs, lack of trust. • Not aligning community interests with the assessment goals. • Injury nexus may be relaxed, compromising restoration on behalf of the public. • Potential for less transparency than with formal process – concern about being excluded. • Concern that information will not be distilled in a way that is understandable to the public • Process may not be sufficiently adaptive or be able to balance uncertainties. • Statute of limitations may run without some tolling arrangement.

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Marlana Valdez from Organizational Learning Associates welcomed participants back to the second day of the workshop proceedings.

Before moving into small groups, workshop participants attended a presentation by:

Carlton Moore, Interim Administrator, Office of Spill Prevention and Response California Department of Health

Biographical Sketch

Carton Moore compared Cooperative Assessment to similar stages in the California divorce process. Divorces generally fall into these categories:

1. Summary dissolution – An agreed-upon divorce in which no issues are contested. This type of divorce is easy to obtain; sometimes a court appearance is even unnecessary;
2. Mediated divorce – A case in which the parties disagree on issues, but commit to working with a neutral third party to come to consensus on the issues and avoid litigation;
3. Litigation – Everyone strives to avoid litigation because the outcome is so uncertain. It is often used as a scare tactic to move the process along; and
4. Pre-nuptial agreements – Signing a contract in advance of the marriage that will protect your assets if the marriage fails. Even though the parties agree on the contract when they sign it, the validity of pre-nuptials is frequently litigated at divorce.

Cooperative Assessments work similarly:

1. Summary dissolution – This works well for small cases such as minor oil spills. Because the damage is not significant, these cases can usually be resolved without the intervention of a neutral 3rd party.
2. Mediation – Cooperative Assessments fall into this category. It is frequently used in larger cases and works well. All parties who need to be at the table are there, and they have the opportunity to define the issues, dialogue, and agree on the damage and how to accomplish restoration. It is important to remember that this approach is time-intensive.
3. Litigation – When the State of California files a case, it shows that the State is ready to move to the next level and push the case forward. It also forces all parties, including the State, to get serious about gathering data and resolving the case. Filing a case does not mean the parties have stopped communicating, nor should they stop communicating once the case is in litigation.
4. Pre-nuptial agreement – Participants should remember that early agreements may not hold up throughout the process, for example when technical specialists agree on an issue early in the process and other parties “undo” their agreement later on. Also, parties should be careful about what they agree to because early ill-advised agreements may come back to haunt them.

Concluding, Carlton Moore said that the Office of Spill Prevention and Response has a ten-year track record with NRDA, CERLCLA, and Cooperative Agreements. They attempt to maintain a standard policy throughout changes in leadership and government officials. This policy is:

1. The polluter should pay;
2. Damaged habitats should be restored;
3. Animal habitats should be restored; and
4. All of the above should be accomplished in a professional and scientific manner using a cooperative process whenever possible.

Questions and Answers for/by Carlton Moore

Q: What do you consider good elements in a pre-nuptial agreement?

A: This is my answer, and I'm sure an RP will have their own answer. But, it has to be built on trust and it must benefit all parties. You must fine tune it, make it as strong as possible. You want to agree with as much as possible, and if you don't agree on things, have a provision. Stipulate those issues on which you agree. Keep in mind you don't have to sign if you're not sure where this is going to go in the future.

Q: What is the position on settlements v. litigation?

A: I'll leave you with the thought that anything is open for discussion, you must do a cost/benefit analysis, and you should always do what's best for the environment. Just getting the thing settled is in the interest of most every party. They want the fastest, most cost efficient solution, but they don't give away the farm. Keep some information for when they take you to court. BALANCE is the keyword. Our department has a good track record of negotiation.

Q: Do you have a policy of estimated recovery during assessment for CAP?

A: Yes, we do, it's right in the statute.

Making Cooperative Assessment Teams Work
Second Small Group Meeting

Prior to starting the small group work on the second day of the workshop, Iris Ioffreda and Marlana Valdez gave a short presentation on negotiation. They discussed five individual modes or styles of conflict management -- competing, accommodating, avoiding, collaborating, and compromising. While everyone uses all five approaches at different times in negotiating conflict, most people inherently work from one or two of the approaches. People with a competing style try to satisfy their own concerns in the negotiation at the other person's expense. Those with an accommodating style attempt to satisfy the other person's concerns at the expense of their own concerns. Those who avoid conflict sidestep disagreement without trying to satisfy either person's concerns. A collaborative approach attempts to find a win-win solution that completely satisfies both parties' concerns. Finally, a compromising style is an intermediate approach, working to find a solution that only partially satisfies both people's concerns. Different approaches are appropriate, depending on the situation, and they discussed both the advantages and disadvantages of each. (For more detail, see the OLA Handout.)

They also went over the primary negotiation models and discussed in more detail the principles of the Information Based negotiation model. Information Based negotiation focuses on understanding the underlying needs and goals of the parties and using that understanding to craft solutions that satisfy both parties' needs. Parties spend extensive time in preparing for the negotiation – examining the conflict from the other side's perspective, distinguishing "positions" from "interests" to uncover the other party's real needs, and developing a negotiation plan with as many proposals as possible. This approach also differs from traditional adversarial bargaining in that early interactions with the other party are devoted to establishing rapport and asking questions rather than taking hard-line positions. (For more detail, see the OLA Handout.)

The small groups then reconvened and worked on the following problem:

1. Using the matrix of goals/interests and concerns that your group developed in yesterday's session, discuss and then chart:
    a. Goals/interests or concerns that the various constituencies/parties have in common;
    b. Goals/interests or concerns of the constituencies/parties that conflict.

After charting common and conflicting goals and concerns, choose the two issues for which there is the greatest divergence of opinion among the constituencies represented and rank them (e.g., greatest level of conflict, second-greatest level of conflict).

2. Beginning with your top-ranked issue, discuss how you might resolve it.
3. Choose one member of your group to make a report to the full workshop.

The small groups chose one area of conflict to report to the larger group. Several groups identified ***data collection*** as a major potential stumbling block – how much data is needed to determine the extent of damage, what kinds of studies are sufficient, and how to establish a baseline. These groups proposed agreeing to a "but for" principle, bringing in a third party with no financial stake in the outcome to determine the extent of necessary data,

and focusing on restoration rather than measuring damage (focusing on the end point) as methods that might reduce data collection conflicts.

Several of the groups focused on the question of ***"fairness"*** in a cooperative assessment. These groups proposed educating the players about legal aspects of the case and openly and honestly discussing problems and underlying motivations as means by which the parties might more fully explore the concept of fairness.

Two of the small groups chose the issue of ***finality vs. reopeners*** as their most contentious issue. These groups suggested that parties should rank the importance of injuries and act conservatively in their proceedings to avoid reopeners.

Other major obstacles discussed by the small groups included:

- Determining an adequate level of restoration;
- The inherent tension between the need to establish an end point early in the process and the need for ongoing flexibility;
- The inherent conflict between the goals of full restoration and cost-efficiency;
- Surmounting trust issues, in both the initiation and management of a Cooperative Assessment;
- Situations in which a party might be both a Trustee and a PRP; and
- Coordinating among multiple parties, including multiple Trustees

Below is a listing of the issues that each group discussed as well as their proposed solutions. (The issue each group chose to report out is underlined.)

Top Issues	**Proposed Solutions**
Deciding whether or not to enter into a Cooperative Assessment.	A phased approach in which there is initial agreement only on the overarching goals of the parties and a broad outline of the process.
Restoration to unspoiled state vs. restoration to "but for" conditions.	• Education [on what is actually required by the damage assessment process]. • Look to leverage NRD restoration with other restoration opportunities under other venues.
"What is needed to make the public whole?"	• Agree on a conceptual model. • Bring in third party (such as a mediator) to help resolve concerns. • Use data quality objectives.
What is Fair? The issue touches on the: • Type and scope of the assessment and restoration that is needed. • The appropriate level of compensation, i.e., Are costs reasonable?	Important that each stakeholder define their view of fair. Solutions on appropriate assessment and restoration activities included: • Educate all stakeholders on the framework to be used and accepted, i.e., minimally that the resource must be adequately restored. • Let the focus of the assessment and the questions and data needed to answer the

Top Issues	Proposed Solutions
	questions (i.e., science) dictate the process through consensus. • Make sure that all stakeholders have meaningful input. • Compromise (e.g., through use stipulations, use outside experts with no stake, etc.) to mitigate fairness concerns. • Determine a conflict resolution process/mechanisms, e.g., facilitators, mediators, etc. Regarding the appropriate level of compensation, most folks agreed that reasonable assessment and oversight costs must be paid. Trustees are held to this standard through internal financial controls and possible external audits.
Conflicting goals. PRPs want to know where the process will end up before committing to a cooperative assessment. Other stakeholders do not want to be locked in to an endpoint before the studies and process are completed.	Conduct a pre-assessment step before the start of a Cooperative Assessment. At a pre-assessment meeting, discuss the overall vision for the process. Once the PRPs determine whether to fund the base work, all stakeholders could make subsequent decisions on whether or not to continue using a cooperative approach.
Extent of public involvement in negotiations	• Observer status [for public representatives] • Regular briefings • Public hearings/availability sessions • Representative present for larger group • Confidentiality agreement
Dual Trustee/PRP conflict, e.g., DOD/DOE.	Consider participating in trustee councils.

Explicit or hidden agendas.	It's important to try to expose those hidden agendas and do it early on.
	• Find out if it is an institutional problem or just a participant.
	• If it is an institutional problem, that will stop the whole process.
	• If it's an individual, then:
	  ○ Education is needed.
	  ○ In some cases, perhaps the person could be reassigned to a different project or embarrassed into cooperating.

Conflicting interests (quick vs. full resolution) and personalities.	• Agree up front on questions needed to be addressed. • Agree on what level/type of information is needed to answer the questions. • Maintain honest and respectful dialogue. • Consider a safety valve to get rid of a "bad" actors – need to compromise or collaborate
"Building Trust"	• Need to develop accepted "trust" set.[principles or groundrules] • Find ways to communicate. • Do some background investigation about the

Top Issues	Proposed Solutions
	other stakeholder. • Frequent commitment to meet and honor past agreements. • Encourage little "check-ins" (Don't let it fester). • Trustees should be encouraged to meet and develop a unified direction and voice.
Integrating NRD and restoration.	• Education on the two processes, i.e., what is possible and what is not. • Improved coordination
Baseline	Relative to the question of baseline, there is the potential for over- or under- quantifying injury, resulting in too much or too little restoration. The following agreements could be made: • Agree to "but for" principal. • Agree that some degree of injury has occurred. • Agree to quantify injury only qualitatively and focus on restoration projects.
Interpretation of data and how to use the data.	• Bring decision makers into the process early. • Maintain continuity of membership in the Cooperative Assessment group.
Type/extent of the injury needed.	• Work from common data set. • Try to set boundaries on injury – spatial and temporal extent, injury categories. • Services losses – can be addressed by restoration focus. • Leave money to end.
Tribal resource concerns. Revolves around sense of: • Distrust. • Valuation disconnects. • Cultural resources. • Privacy concerns.	No solutions suggested.
Memorialize agreements, i.e., Is memorializing agreements necessary/possible?	It is possible to memorialize agreements through various means; from meeting minutes to more formal agreements. Stipulations could be documented in any form. Benefits include: • It shows everyone that the process is moving forward, and creates momentum for moving forward and working together, increasing buy-in. • It generates more certainty and clarity. Without it, there can be some misunderstanding at meetings – people ask, "What did we agree to?" • It keeps track of what has been decided, and prevents backtracking over issues that have already been discussed and decided. The

Top Issues	Proposed Solutions
	documents can be used to show progress. This documentation can expedite a case and provide materials that can be released to the public. Negative aspects include: • It could actually slow the process down, since it takes more time to document and to produce documents. • It can also highlight an area of conflict. • If the Cooperative Assessment process breaks down and there is no final agreement, the attorneys for both parties don't want to be bound by what was written down. If the parties agree to individual steps along the way but can't get a final, global agreement, some stakeholders may feel that it is being unfairly penalized.
Potential loss of control and how to manage that.	It is important that all parties have a constructive method for managing the process. Ways to achieve this include: • Have an agreement up front on how discussions will be conducted and how to reach agreement. • Get an understating of that, either in writing or oral. Agreements should address such issues as: • Participation – who, when, at what level, etc. • Decision making, i.e., who, how, by what methods (e.g., consensus), etc. • Cost sharing. • Indemnification.
Need for formal agreements, i.e., Are formal agreements needed to cooperate?	• There is a need for something in place early on, but that might be can vary considerably. • Discuss this issue with the respective legal advisers and if/when they need to come into the process. • Understand the rules by which the process will operate.
Finality vs. reopeners. This issue is very controversial since the PRP is most concerned with finality and closure whereas the trustee wants the option to reopen the case and asks many "what if" questions.	• Taking a conservative (protective) approach to try to minimize the need for a reopener down the road. Consider: • Agreeing on ranking importance of injuries. • Looking for restoration projects that address multiple injuries.

Approaching Cooperative Assessment's Major Challenges
Third Small Group Meeting

On the afternoon of June 10, the small groups were asked to examine major challenges pertaining to one of four stages of the Cooperative Assessment process and to brainstorm potential solutions to these challenges. The groups were provided with questions to guide their discussion. (See the OLA Handout for full text of Small Group Assignment).

After evaluating and further refining their brainstormed solutions, each small group reported to other groups who had been assigned the same stage of the Cooperative Assessment process (their "section"), and the section prepared a joint report to the full Workshop.

The various group discussions overlapped each other with respect to the topics outlined. The summary provided below attempts to synthesize highlights of the discussion based on the topic rather than the groups in an attempt to be more logical and avoid redundancy.

The stages of the Cooperative Assessment process assigned to small groups were:

Topic 1	Initiating and Committing to a Cooperative Assessment
Topic 2	Managing a Cooperative Assessment
Topic 3	Communicating in a Cooperative Assessment
Topic 4	Settling and Closing a Cooperative Assessment

Initiating and Committing to a Cooperative Assessment

Pivotal to engaging in a Cooperative Assessment is building a shared vision. Stakeholders can develop a shared vision by:

- Making a commitment to the Cooperative Assessment;
- Explaining their interests and expectations, not just their positions;
- Understanding the consequences of not cooperating, such as the cost of litigation or the delay in restoration, as the driver to cooperate; and
- Identifying common ground as part of the framework for working together.

To implement a common vision, it is important to:

- Decide who should be participating (at the table), especially where multiple stakeholders are involved and in the event that future stakeholders are identified;
- Agree on the goals and scope of the assessment; including how it might be optimally integrated into response efforts;
- Develop agreement on how best to coordinate, i.e., defining roles and responsibilities of existing as well as future participants, identifying decision makers, etc.; and

- Determine any legal or policy concerns (e.g., liability, Statute of Limitations, confidentiality, public participation, etc.), and how/when these concerns ought to be addressed;

It was suggested at this stage of a Cooperative Assessment that a phased or incremental process might be the best approach, i.e., addressing manageable or fundamental elements that could progressively be agreed upon, perhaps addressing the low-hanging fruit first. The step-by-step process could vary based on case circumstances. Some groups considered that informal understandings that would be memorialized later in writing could work depending on the level of prior working relations and trust. Other groups thought that various types of written agreements might be appropriate.

In addressing written agreements, a sound start to a Cooperative Assessment might be developing a Preliminary Agreement – an Agreement in Principle. Based on the parties accepting a common vision, the Agreement in Principle could identify issues that might be considered most critical. The details associated with this agreement could be worked out and memorialized as the need arose, thus serving to jump-start the Cooperative Assessment. Other, perhaps less critical issues could be addressed at a later time and as the need arose. Ultimately, potential elements of a Cooperative Assessment that might needed to be addressed through any potential agreement include:

- Purpose and approach
- Participating parties
- Authorities
- Funding
- Financial organization and structure
- Allocation
- Independent studies
- Public information and notices
- Stipulations
- Dispute resolution mechanisms
- Reservation (rights/claims)
- Limitations releases
- Modifications
- Confidentiality
- Signatories
- Termination and withdrawal

Because trust is such an issue, and there is fear on both sides of the table of giving up too much too soon, a phased approach with incremental steps helps build trust and confidence in the process among the parties. If the parties participating in a Cooperative Assessment can focus on the solution, not the origin of the problem, their chances of success are much greater.

The groups agreed that there were many incentives for the parties to come to the table including:

- Truly committed and motivated stakeholders.
- An efficient, timely process with lower overall cost than traditional alternatives.

- Avoidance of litigation.
- Shared burden and control.
- Earlier site characterization, restoration accomplished sooner.
- Opportunity for global closure, i.e. final settlement of all issues involved in the case.
- Upfront funding for trustees and better cost accounting for PRP's.
- The host of available alternative and informal dispute resolution mechanisms that may address the dispute more effectively.
- Good public relations for all.

There were no questions for this topic

Managing a Cooperative Assessment

In developing a plan to carry out the common vision, a unique suggestion was for stakeholders to view the existing damage assessment regulations as guidelines (or "advisory only"), as these regulations are optional.

Discussion on this topic also noted that the success of an assessment hinges on the makeup of the stakeholder group. Challenges faced and possible solutions suggested include:

- Ensure that stakeholder representation is adequate and fair -- All the stakeholders need to be adequately and fairly represented, and that representation ought to be understood and clearly documented;
- Ensure that stakeholder participants are capable --- Participants must be capable and prepared. Where preparation (education) is lacking, there needs to be opportunities for the appropriate training, including access to respected practitioners. The group suggested an NRD primer at the beginning of a Cooperative Assessment.; and
- Ensure that decision makers are participating and efficient decision making mechanisms are in place – Decision makers and decision making mechanisms need to be clearly identified relative to the type of decision and level of authority required to approve each decision. Attempting to improve the quality of decision making within Cooperative Assessment teams, the groups suggest using cost/benefit analyses, making sure that the decision makers are present at the table, and staying focused on the ultimate goal.

These and other factors can increase the level of effort up front; however, there can be considerable time and cost savings down the road. The groups suggested that using outside project managers and facilitators may go a long way to mitigate upfront concerns.

Funding can ensure that some of these challenges can be met, either through the PRP's or some cost-sharing arrangements. For PRP funding, it was suggested that PRP's advance funding to the trustees or develop a regular reimbursement schedule, and also provide budgets and anticipated schedules.

An important concern early on in the assessment is how the response and restoration process ought to be addressed. One approach is to consider both response and restoration as occurring on parallel tracks at the same time. A bow tie model was used to illustrate this concept As the assessment progresses, stakeholders will refine ideas about

what planning must be accomplished and how much restoration is needed. With the bow tie model, there is no linear process, no beginning and end – just a continuing re-assessment of the process at each step. This concept and practice also will mitigate the impression of a disconnect between the response agencies and the trustees. This model seemed to be a good metaphor for "thinking outside the box."

To improve the quality of decision-making relative to information considered in the assessment, stakeholder participants in a case should agree on:

- What kind of data to collect and how it could be used prior to beginning any data collection efforts;
- What defensible requirements (standards/criteria) and screening levels (technical/legal) would be applicable to assessing injury and implementing restoration;
- Acceptable endpoints for injury and success outcomes for restoration;
- An information data sharing mechanism, one that could also create a common data set, e.g., web-based system;
- Further data needs using: the collective resources of the stakeholders; expedited assessment approaches (e.g., Habitat or Resource Equivalency Analysis), quality controls (e.g., Data Quality Objectives) as appropriate, etc;
- If contemplating independent work, develop rules of the road for such work;
- How data will be interpreted;
- How best to address uncertainty, e.g., using conservative assumptions, through sensitivity analyses, stipulate to findings, etc; and
- A workable, streamlined documentation process.

There were no questions for this topic.

Communicating in a Cooperative Assessment

One of the most difficult issues under this topic was the question of when and how to incorporate the public, and NGO's in particular, in the damage assessment process. Among the issues the groups highlighted were:

- Not knowing who the public is, who really represents them, and where they actually stand on NRD concerns. Pre-scoping public interest may address these questions.
- The general public, and some NGO's, are not well-versed in NRD issues. Because damage assessments tend to deal in complex legal, scientific and technical issues, this is a significant stumbling block for their involvement. Engaging the public more directly in educational and information sharing workshops is one solution.
- There was disagreement among groups as to the timing of public involvement, i.e., early or later, in certain stages only, etc.
- There was also disagreement as to the role the public should have above current legal requirements, as part of Trustee Councils, meeting observers, etc.
- Of particular concern were potentially confidential or otherwise sensitive issues aired to the public. There were instances in which such issues were provided to the media as a weapon by one stakeholder against another. One possible solution to this problem is the use of confidentiality agreements where necessary as well as making the process more transparent to the public.

- Another issue was managing public perceptions and expectations, and preventing or dealing with 3rd party lawsuits. Some groups suggested that creating a public participation plan would help to create realistic public expectations and reduce 3rd party lawsuits.

A second area of focus under this topic was related to improving communication among the damage assessment team. This challenge encompasses everything from finding a time to meet to understanding each other during and after meetings. Beyond some simple mechanisms that could be used to improve communication with each other, this challenge also involves a lack of basic communication skills (e.g., active listening and respectful discourse skills) that may lead to misunderstandings among team members, misinterpretation of other stakeholders' perspectives, motives, and mission. This could ultimately cause the Cooperative Assessment to endlessly circle the same issues, stall, or even fail.

Some solutions the groups came up with for this problem included:

- Teambuilding – spending time together to develop rapport and understand team dynamics, starting with social interactions;
- Training;
- Using a neutral facilitator;
- Establishing a common vocabulary (translation among disciplines);
- Establishing ground rules, especially concerning managing conflict;
- Setting up a meeting [or conference call] schedule, and taking minutes of the meeting [or call] in a way that allows every participant to see the notes and agree to them during the meeting;
- Identifying and adopting common goals;
- Designating a "lead" representative for the respective stakeholder groups to speak for the respective stakeholders involved in the process;
- Using schedules and deadlines to structure the process;
- Acknowledging and keeping track of uncertainty or disagreement, and setting these issues aside until they are either further clarified or can be addressed; and
- Asking everyone to assume a certain level of trust until proven otherwise.

In the discussion it was also noted that sometimes the issues that confound agreements are individual and not group issues, such as failure to understand personality types different than one's own, or troublesome team members who block consensus.

Commentary on this topic revolved around the balance of better integrating the public and their concerns and keeping the assessment process streamlined. The need for communication training was highlighted. In the effort to allow the public an opportunity to review documents and appreciate the issues at hand more effectively, one solution mentioned was synopsizing relevant documents for easier public consumption. The release of information in documents, however, must also be weighed against concerns over confidentiality. Another notion was to think beyond public meetings, which may not the best venue for outreach and public feedback.

Settling and Closing a Cooperative Assessment

A number of issues can derail the agreement at the very end of the process, including writing up the final settlement document. Many of the challenges of the settlement stage as well as potential solutions were identified as follows:

Obstacles	Solutions
A. Surprises – undisclosed issues (Settlement terms that we thought were understood but apparently are not).	Good recordkeeping/meeting minutes – anticipates problems, and allows for constant checking in and confirming that everyone is on the same page. Get all information on table.
B. Allocating risk (How do you share risk among private and government participants in implementing a restoration project?	Mutual acceptance of risk with some reasonable cap.
C. Chain of command changes. (Everything is going fine, and then a change of management).	Keep supervisors informed on regular basis and address their concerns as they arise.
D. Legal/technical communications.	Have lawyers involved/informed throughout process – present at critical meetings.
E. Management sign-off.	Keep supervisors informed on regular basis; if management doesn't agree, keep it brief and remind them of their earlier commitments.
F. Public approach.	Timely public outreach early, often, and transparent. Need formal and informal consultation and trustees must make it clear they are listening.
G. Change of circumstances (e.g. the PRP goes bankrupt or is bought out by another company that doesn't believe in restoration).	Move quickly before there are changes. Use a phased approach. Reach agreement in writing and move on to implementing the next phase.
H. Agreement on financial security.	Be creative. Have creative lawyers involved. Raise security issue early so it's on table.
J. Reopeners and penalties.	Address early in process; do not leave until the end.
K. Trustee costs.	Prompt disclosure.
L. Judicial input (How do we assure that we have made	Create a good record, i.e. do all of the above.

deal that the judge isn't going to shoot down?).

M. PRP allocation How do we allocate share of liability?	Do this early, involve trustees -- PRP allocation is an on-going process.
N. Contractor selection for implementation of restoration.	Early screening of contractors – investigate and learn background.
O. Monitoring issues.	Implement data quality objectives/clear goals. Provide NRD credits for monitoring. Consider performance bonds.
P. Drafting details.	Lawyers.

There were no questions for this topic.

Closing

As a closing, volunteers were asked whether this workshop had changed their thoughts about cooperative assessment. Below are some example quotes from the feedback received:

Participant:

“I just wanted to tell you that I am not alone in thinking last week's conference was great. Really, out of all the conferences, workshops, meetings I've attended (and I've been to countless), this one will stand out in my mind.”

Participant:

‘‘Thanks again for the invitation to participate in the NRDA workshop last week. In my 10 plus years practicing in this area, the workshop was by far the most productive and forward looking NRDA-based forum I have participated in to date.”

Participant: –“It hasn’t changed my perspective, I’m a firm believer in it. It broadened the issues that we will be thinking about the next time we get into negotiating. I really liked my group. Maybe the lawyers could sit down early and say ‘Hmm, these are issues we will be dealing with. Let’s prepare how to deal with them.’ We all seem to be on the same page, which should make things easier.”

Participant:

“Thank you for a productive workshop; the dialogue between stakeholders in the NRD process was especially useful in helping to shift my personal paradigm on cooperative assessments.”

Participant:

“The biggest "take home" message that I got out of the CAP workshop was the idea that cooperative assessments need not be all or nothing. By parsing the assessment out into smaller, more manageable pieces both the RP and Trustees can slowly gain trust and establish a relationship…”

Participant:

“This subject is a very good example of the blend of science and legal thinking that characterizes environmental practice.“

Participant:

“I've always been of the opinion that bringing resources together from the government and private sector in a spirit of cooperation to resolve issues relating to any environmental issue/site has a better chance of resulting in an agreement/settlement that is technically sound and cost-effective than that of an adversarial approach that is always on the brink of litigation. I'm not naive to think that this can work all the time and that, even under the best

of "cooperative" arrangements, there won't be disagreements and, in some cases, unresolvable differences. However, I believe that as we mature in this environmental arena, we become more experienced in finding ways to compromise issues (without sacrificing principles, legal obligations and/or environmental integrity) and - perhaps most importantly – we develop an openness and frankness that fosters trust. I think the efforts by organizers and participants last week to encourage this "openness/frankness" was the main ingredient in the stimulating and "meaty' discussions. I believe from a personal standpoint, it is our obligation - if we truly believe in the "cooperative approach" - to move it from the 'experimental' stage (@ a workshop) to 'production' (@ a site).

I firmly believe that we (all that have confidence that the cooperative approach is worth the effort) must pass the word to our respective constituents/clients - especially those in the "trenches" - that meaningful efforts toward cooperative assessments must be given a fair chance. It would be a shame if we slip back into the 'business as usual' mode without giving this process a reasonable opportunity to succeed."

Participant:

"I personally benefited from the workshop by listening and understanding the private sector's perspective of NRD in the smaller breakout sessions. On many subjects the Trustees and private parties were in agreement, but the lack of trust between the Trustees and private parties was very evident. So for me, in future meetings with private companies I will try to foster a level of trust with the private companies. In the initial portion of the NRD actions I will try to be more open with the responsible parties and not as conscious about long-term, litigative-sensitive discussions where we are just posturing for a lawsuit."

Participant:

"Thank you for inviting me to participate in the workshop. I found it a very rewarding experience, and I gained a lot of insights. I think that it achieved the basic objective of increasing the likely success of cooperative assessments in the future."

Concluding Remarks

Excerpts from the following concluding remarks were offered by Eli Reinharz:

One of the underlying themes for this workshop was that we all, either as individual practitioners or as organizations, go into any natural resource damage assessment with a shared goal. That is, we all want to restore the affected resources. 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 parties 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, I believe that the challenge for all of us now that the workshop is concluded is to "turn words and ideas into action." This theme was introduced by the

welcoming speakers (Jamie Hawkins and Alan Vance), discussed by the panelists and all of you to various degrees, and echoed in the music you listened to throughout the workshop breaks and reception.

The key to the success of this workshop, and the challenge to all of our organizations and each of us is that we all must make the commitment 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 you and others to take the words and ideas you provided here today 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 being.

With this final thought in mind, we want to thank the all the folks on the workshop planning committee and the facilitators who have helped to make these two days a success. We also want to thank you, the participants, for your time, effort, commitment and courage in further promoting cooperative damage assessments. We hope you take the "Words and Ideas" identified today to heart.

Thank you!

Next Steps

Participants at the workshop were asked what they thought the next steps should be in terms of moving forward the Cooperative Assessment process. Below is a summary of their thoughts.

1. Post a report of the workshop

   Response: A timely and accessible report of the workshop was promised at the workshop. This report serves as a compendium of the workshop.

2. Provide information on possible policies and approaches (including tools and documents) as well as case highlights (issues/stumbling blocks/resolutions) that could serve as additional insight on how to effectively address Cooperative Assessments. Develop a “best practices” manual “blessed” by representatives of key stakeholder groups to get the process started. Advertise the success stories.

   Response: This is a very good suggestion. The NOAA CAP web site (http://www.darp.noaa.gov/ -- link onto the Partnership tab) as well as other web sites (ASTSWMO web site publication page at: http://www.astswmo.org/Publications/Revbkshlf.htm#CERCLA) serve, in part, as clearinghouses for profiling cooperative assessment efforts – including case updates. You may wish to refer to the Framework and Compendium to the Framework found at the NOAA CAP web site that serves as an initial cut in thinking about the possible conduct of a Cooperative Assessment.

   As cases resolve, we encourage stakeholders to provide case highlights and updates for web posting. When cases resolve, especially the success stories,

agencies do their best in promoting them in the media. However, we need to do a better job to make these success stories more widely available.

Please also bear in mind that cooperative assessments, like assessments in general, take many forms. A cookbook approach that is sanctioned by stakeholder groups in general will not work. It is really up to the stakeholders involved in a case to determine the appropriate boundaries and ultimate approach suitable to a Cooperative Assessment.

3. Create a mentoring and training program.

   Response: There are damage assessment training programs provided by various agencies, both formally and informally. For example, you can find such training at the U.S. Fish & Wildlife training facility in Shepardstown, West Virginia (http://training.fws.gov/). NOAA also has conducted training in select areas (e.g., Habitat Equivalency Analyses) on request.

   The idea of mentoring is a good one. The reason, in part, for the first day's session of the workshop was to introduce participants to those folks that have been in the forefront of conducting Cooperative Assessments. While there is no formal mentoring program *per se* as yet, we would encourage you to contact these experts to help guide you in the pursuit of future Cooperative Assessments.

4. Continue outreach to all sectors, particularly to EPA, DOD and DOE, mining companies, etc. Institute an annual meeting with all the sectors.

   Response: Efforts are underway to engage the vast array of other potentially affected stakeholders and have periodic discussions on issues of mutual interest.

5. Sponsor more workshops, perhaps regional workshops (pared-down version of the national workshop), workshops focusing on better educating specific disciplines or groups (e.g., science for attorneys, law for scientists, policy implications, NRD for response agencies like EPA and the states), or workshops on various NRD facets (CERCLA-specific). For these workshops, consider gaming scenarios, role plays, simulations, case study dissection, and further team building.

   Response: This is a very sound suggestion. One approach to getting Cooperative Assessments underway (i.e., to break any psychological barriers) is to continue the dialogue in various ways. As noted during the welcoming remarks of the workshop, NOAA and API are committed to pursuing this dialogue and are seriously exploring the idea of regional workshops. The format of the workshops will likely follow the needs of the workshop participants and will employ the techniques that are best suited to address such needs.

6. Set up statewide trustee council.

   Response: While this is an intriguing idea, it may not be practical to do this due to funding and legal concerns. However; there are state associations (e.g., ASTSWMO, NAAG, etc.) that could serve in some capacity for advice on damage assessment issues.

7. Have information exchange networks, e.g., among lawyers, companies, NGOs, etc.

   Response: This too is a good idea and another way to encourage dialogue on Cooperative Assessments as well as other topics. Such networks do exist, albeit limited. We would encourage various stakeholder or discipline groups to consider this idea and let us know of their existence.

8. Suggest industry describe the business advantages of Cooperative Assessments. This industry-to-industry communication would have much more credibility than anything trustees or response agencies could say. Such descriptions would also be invaluable to non-industry types when dealing with reluctant PRPs.

   Response: This is an idea worthy of exploring, not only with industry but other stakeholder groups as well. We do need to hear from all the stakeholders their perspectives and encourage them to promote the advantages and perhaps cautions when engaging in Cooperative Assessments.

9. Look for potential CAP sites. Consider establishing a community advisory group.

   Response: Without Cooperative Assessment cases being implemented on the ground, dialogue on this issue will wither. Fortunately, that has not been the case in the past. The workshop was intended to encourage you to consider pursuing Cooperative Assessment cases. Based on the feedback we have heard, the workshop has potentially energized a number of you to seriously consider moving some cases forward in a cooperative way.

   As we consider more Cooperative Assessment cases, we ought to be open to all ideas that could further facilitate the assessment, including the idea of establishing a community advisory group.

Participants' Evaluation of the Workshop

Participants reported that they were energized by the workshop. They were able to develop new relationships with people with whom they will work in the future on both sides of the table and to begin developing trust. They were able to have honest conversations without the usual posturing and to deepen their substantive knowledge of Cooperative Assessment.

Participants felt that the following aspects of the workshop were most useful:

- Meeting and interacting with a wide variety of NRDA practitioners from government, industry, and NGOs and establishing personal relationships.
- The breakout/small group sessions. Working together outside the context of a particular site helped all participants understand the perspectives of other parties and more openly listen to the interests and concerns. It was educational to discuss the process in a safe environment, and to hear various perspectives without posturing. It was exciting to work out solutions to common problems faced in Cooperative Assessments.
- Learning from all the knowledgeable parties at the workshop. Gaining a broader perspective, and much deeper knowledge about cooperative assessment.

In addition, the following are reported results from the workshop:

- A number of cases (half a dozen or so at least, and some potentially significant in size) are potentially moving forward in a cooperative venue as a result of stakeholders in those cases having met at the workshop.
- Several states have indicated that they are now better prepared and energized to initiate NRDA programs that encourage incorporating a Cooperative Assessment. component.
- The workshop on cooperation served as a springboard for other workshops, encouraging cooperation, for instance, the June 23-24, 2004 Wildlife Habitat Council Conference focused on EPA Region 2 and 3 in Philadelphia, PA.
- Participants are incorporating the findings of the workshop into their own workshops, as well as planning to educate their constituencies on NRD based on what they learned at the workshop.
- Some participants will provide a link to the cooperative assessment portion of the NOAA website on their organization's website to promote learning about the topic.
- Different stakeholders are considering establishing various networking and communication forums to address cooperative and other opportunities in NRDA.