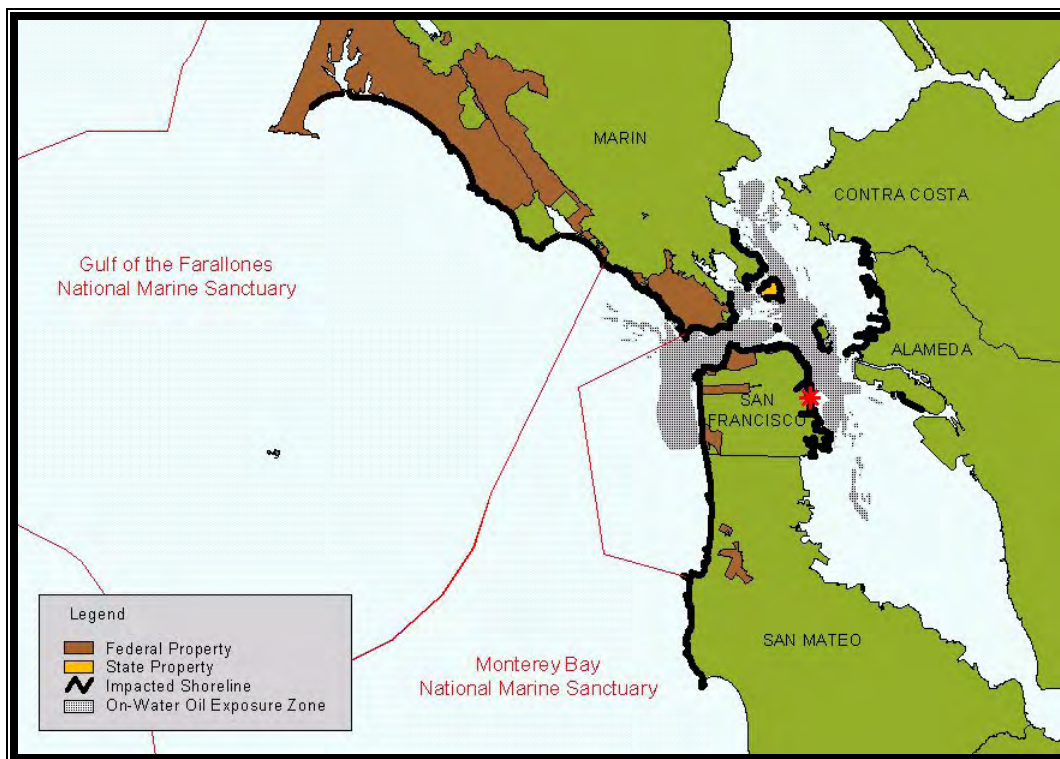


WORKSHOP RECORD

Evolving Practices and Approaches of California Natural Resource Damage Restoration Trustee Councils: Lessons Learned and Best Practices



April 29, 2004

CONTENTS

	Page
Workshop goals	2
Trustee Councils represented at the Workshop	3
Topic 1. Trustee Council responsibilities and member duties in managing recovered damages	4
Topic 2. Trustee Council composition	5
Topic 3. Decisionmaking	6
A. Decisionmaking processes	6
B. Processes for prioritizing and selecting projects	7
C. Memorializing decisions—Trustee Council resolutions, minutes, NRDAR funding	7
Topic 4. Maintaining continuity	8
A. Mechanisms for maintaining continuity and institutional memory	8
B. Administrative records	9
C. Meeting minutes	9
D. Accounting	9
Topic 5. Restoration planning	10
Topic 6. Restoration implementation	12
A. Mechanisms for restoration projects	12
B. Habitat Acquisition	12
C. Monitoring	13
D. Work performed by project implementers: oversight and accountability	13
E. Managing and distributing funds and coordinating with non-trustee implementers such as environmental groups and contractors (contracts, MOUs, grants)	13
F. Project completion reports	14
G. Joint/leveraged funding	14
Topic 7. Deferred issues	15
A. Restoration planning and project selection	15
B. Finances and accounting	15
C. Miscellaneous best practices	16
D. Guidance documents	16



WORKSHOP GOALS

On April 29, 2004, at the Bay Model in Sausalito, Cape Mohican Trustee Council members hosted a one-day workshop and shared their experiences serving on Restoration Trustee Councils, especially during the post-settlement phase of the NRD process. The goals of the workshop were (1) to enhance the effectiveness of the participants while representing their organizations on California-based Natural Resource Damage (NRD) Restoration Trustee Councils, and (2) to develop resources—including this Workshop Record—for current and future Trustee Council members. The workshop was divided into seven sessions during which topic moderators led discussions on associated issues.

- Topic 1: Trustee Council Responsibilities and Member Duties in Managing Recovered Damages; Moderator: Chuck McKinley, Office of the Solicitor, Department of the Interior
- Topic 2: Trustee Council Composition; Moderator: Tom Suchanek, Fish and Wildlife Service
- Topic 3: Decisionmaking; Moderator: Kathy Verrue-Slater, California Department of Fish and Game/Office of Spill Prevention and Response (CDFG/OSPR)
- Topic 4: Maintaining Continuity; Moderator: John Tarpley, CDFG/OSPR
- Topic 5: Restoration Planning; Moderator: Tammy Whittington, Environmental Restoration Program Manager, National Park Service
- Topic 6: Restoration Implementation; Moderator: Jennifer Boyce, National Oceanic and Atmospheric Administration (NOAA)
- Topic 7: Deferred Issues; Moderator: Nick Franco, California Department of Parks and Recreation (CDPR)



This Workshop Record is intended as a resource to help make Trustee Council approaches and processes more consistent, efficient, and effective. There was general agreement among workshop participants that cognizance of these lessons learned and best practices will benefit Trustee Councils.

TRUSTEE COUNCILS REPRESENTED AT THE WORKSHOP



One or more Workshop participants served on each California Trustee Council listed below.

- American Trader
- Apex Houston
- Avila Beach
- Cape Mohican
- Command
- Exxon/Mobil Santa Clara
- Iron Mountain Mine
- Kure
- Lake McGrath
- Luckenbach/Point Reyes Tarballs
- Montrose
- ARCO Santa Clara River Spill
- Southern Pacific RR (Cantara Loop)
- Stuyvesant
- Torch

The Cape Mohican Trustee Council Members (primary, alternate, and legal representatives) at the time of the Workshop are listed below.

National Park Service:

Tamara Whittington (Primary and Council Chair)
Daphne Hatch (Alternate)

California Department of Fish and Game:

John Tarpley (Primary and Council Co-Chair)
Michael Sowby (Alternate)
Kathy Verrue-Slater (Legal)

U.S. Fish and Wildlife Service:

Tom Suchanek (Primary)
Marge Kolar (Alternate)

NOAA:

Maria Brown (Primary)
Jennifer Boyce (Alternate)
Katherine Pease (Legal)

California Department of Parks and Recreation:

Tina Williams (Primary)
Nick Franco (Alternate)

Department of the Interior:

Chuck McKinley (Legal)

TOPIC 1. TRUSTEE COUNCIL RESPONSIBILITIES AND MEMBER DUTIES IN MANAGING RECOVERED DAMAGES

INTRODUCTION

Actions of Trustee Councils and of Council members representing Trustee organizations are governed by federal and/or state statutes and regulations. In managing recovered damages and other funds earmarked for the restoration of injured resources, Trustee Councils are accountable to the public. In handling their fiduciary responsibilities, they should develop and consistently use appropriate processes for budgeting, investment planning, reimbursing member agencies, managing overhead, and performing other fiscal duties.

LESSONS LEARNED AND BEST PRACTICES

- Each Trustee Council should identify those activities and expenses (including indirect rates) that may be paid for with recovered funds early, if possible, during the drafting of the Memorandum of Understanding (MOUs) among co-trustees. The type of documentation required to support requests for payment should also be identified. (For a good example, see Commencement Bay Resolution 2004-04.)
- Prepare annual and long-range budgets designed to provide sufficient funding for Trustees to monitor restoration implementation to completion.
- Make investment planning a high priority to ensure that recovered funds are maximized for the benefit of the injured resources.
- Select appropriate mechanisms for funding restoration projects (e.g., cooperative agreement, grant, procurement contract).
- Develop and use standardized documents and forms, including a model MOU, to conserve funds.
- In settlement negotiations, seek sufficient funding to pay for the hiring of an independent auditor to periodically review the management of recovered NRD funds. Consider contracting with a single entity to perform (annual and closeout) audit functions for several Trustee Councils.

TOPIC 2. TRUSTEE COUNCIL COMPOSITION

INTRODUCTION

A Trustee Council's composition and size are important to its efficiency and effectiveness. Also important are the teamwork of the members and the Trustee Council's effectiveness in delegating authority and tasks to members and subcommittees.

LESSONS LEARNED AND BEST PRACTICES

- A smaller Trustee Council typically benefits from easier decisionmaking.
- The workloads of members on a small Trustee Council may be too high.
- A Trustee Council with many members at initiation has the potential for generating a lot of ideas. Large Trustee Councils should hold regular meetings to ensure effective communication.
- Alternate agency representatives can facilitate the process if those alternates are kept apprised and given the responsibility to make informed decisions.
- Ideally, the Trustee Council Lead should be assigned permanently.
- No Trustee Council members should be merely figureheads. All members should perform a fair share of the work.
- Agency representatives and their managers should be kept current with Trustee Council business. Agency representatives should take responsibility for coordinating with their organizations throughout the life of the Trustee Council, especially early in the process.
- When agency Trustee Council representatives (primary and alternate) miss a meeting, decisions may be delayed, slowing the restoration planning process. Therefore, it may be advantageous for the MOU establishing the Trustee Council to allow remote (e.g., by telephone) participation or proxy voting.
- A Trustee Council should not delegate to agencies that do not have available staff with the expertise needed to perform key tasks.
- A Trustee Council may benefit from including accountants as members (or as support staff) to help track budgets and provide professional guidance on best accounting practices.

TOPIC 3. DECISIONMAKING

INTRODUCTION

Efficient, effective decisionmaking is vital—especially for selecting restoration projects and determining funding for those projects. Decisionmaking processes should be chosen carefully, preferably early in the life of the Trustee Council. Project selection and funding decisions must be well documented and readily available for public review.



LESSONS LEARNED AND BEST PRACTICES

A. Decisionmaking Processes

- Historically, Trustee Council MOUs have required decisionmaking by consensus, or unanimous agreement. An advantage of consensus is that it promotes a team approach to developing and implementing restoration plans. A disadvantage of consensus is that it allows for obstinacy, which can lead to delays in restoration implementation.
- If there is an impasse in prioritizing or selecting projects, the Trustee Council should defer to representatives of the agency with Trustee responsibility for the injured resource.
- Even after a Trustee agency is assigned primary responsibility for a project, the Trustee Council as a whole should continue to assist in finding solutions on project-related problems like budget shortfalls, unanticipated agency overhead, or difficulties in administering funds.
- Viewing restoration with an ecosystem perspective can help minimize disagreements over projects among the Trustees.

B. Processes for Prioritizing and Selecting Projects

- Before formal public comment is invited on the draft restoration plan, the Trustee Council should ensure that all interested government agencies and other relevant entities have been consulted and given the opportunity to provide input, especially on potential restoration projects.
- The process used by the Cantara Loop Trustee Council—a Group Multiattribute Decision Analysis Approach that involves an elaborate 9-step process that evaluates proposed projects for grant selection—provides a way to select projects based on the Trustees’ values and preferences. However, that process is time consuming and is not practical or appropriate in all circumstances. It can also lead to a false sense of numerical precision and focus the public on a number rather than on the merits of a given project.
- Some Trustee Councils have selected projects by applying the Cantara Approach selection criteria but without scoring. This informal process is quick and easy but does not document the reasons a project is selected or not.
- Other Trustee Councils have used a semi-formal systematic selection process in which projects are ranked after they are rated (e.g., high/medium/low or, numerically, from 1 to 5) under selection criteria. Such an evaluation process is easier and more efficient than the Cantara Approach, yet it can still help the Trustees explain the reasons one project was preferred over another.

C. Memorializing Decisions—Trustee Council Resolutions, Minutes, NRDAR Funding

- Trustee Council decisions and action items should be memorialized, either by resolutions signed by the representatives or in meeting minutes maintained by the administrative lead and approved by the representatives. Clearly documenting Trustee Council decisions will minimize disagreements and preclude revisiting issues previously addressed.
- All decisions authorizing expenditures of funds (see topic 1), including all disbursements to Trustee agencies, should be memorialized in a Trustee Council resolution signed by the voting members. The Department of the Interior (DOI) NRDAR Fund can disburse funds only to Trustee agencies. An accounting of the use of such funds must be documented and provided to the Trustee Council.
- Final meeting minutes, resolutions, and other documents memorializing decisions should be readily accessible by the public.
- Also see lessons learned and best practices for memorializing decisions under topic 4.

TOPIC 4. MAINTAINING CONTINUITY

INTRODUCTION

Typically, many people are involved in the many activities that occur from the initial response to an incident through restoration implementation. Therefore, effective communication mechanisms are vital to maintaining continuity throughout the Trustee Council process. Such mechanisms should include maintaining institutional memory through documentation and informing/educating Restoration Trustee Council members not involved in earlier phases of the case.

LESSONS LEARNED AND BEST PRACTICES

A. Mechanisms for Maintaining Continuity and Institutional Memory

- Typically, many people and several agencies are involved in the overall process from the response phase through damage assessment and settlement to restoration planning and implementation. Therefore, agency representatives on the Restoration Trustee Council should understand the reasons for decisions made earlier including during development of the Consent Decree.
- Ideally, Trustee Council members would be involved in, or at least made aware of, the process from the beginning of the case. Unfortunately, fostering such first-hand knowledge is usually not practical and is seldom the case. The challenge then becomes effective documentation, information transfer, and education of Trustee representatives as the process moves from response to through damage assessment to restoration planning and implementation.
- The key documents a Trustee Council needs to maintain continuity include the Consent Decree; Interagency MOU; meeting minutes; and records of significant actions, milestones, and decisions.



B. Administrative Records

- The Oil Pollution Act, CERCLA, or their implementing NRDA regulations provide that Trustees maintain an Administrative Record.
- A formal Administrative Record documenting major milestones and the reasons for key decisions should be kept during both the damage assessment and restoration phases.
- The Administrative Record should include the consent decree, resolutions, key documents, and Trustee Council meeting minutes. The Administrative Record should also document all significant decisions, accounting transactions, expenditures, planning reports, and the MOU and its modifications.
- Particularly before settlement of an NRD claim, there are legal questions regarding confidentiality and privileged documents. Although documenting the assessment process is important for historical purposes and Trustee Council needs, it should be done with legal guidance.



C. Meeting Minutes

- Meeting minutes should memorialize Trustee Council actions, processes and, especially, significant decisions.
- Meeting minutes should be maintained in the Administrative Record to keep the public informed regarding Trustee Council actions, for future reference, and to provide continuity when representatives change.
- Each Trustee Council should address the following issues based on the circumstances: Should the Lead Trustee or another representative take the minutes? What level of detail is appropriate? Is placement in the Administrative Record sufficient or should the minutes be posted on a website? Is it better to hire an assistant to take minutes and maintain the Administrative Record?

D. Accounting

- Accurate documentation of finances including expenditures is important and should be done carefully. Audits of representatives' and project expenditures may be appropriate (depending on the funding amounts involved).

TOPIC 5. RESTORATION PLANNING

INTRODUCTION

Trustee Councils should ensure that restoration planning follows environmental compliance (NEPA and CEQA) requirements. This is especially true during the selection of projects to accomplish the restoration goals established during settlement. A challenge for Trustee Councils is to effectively coordinate restoration planning activities with project proposers, environmental groups, project sponsors, the public, other stakeholders, and the Trustee agencies.



LESSONS LEARNED AND BEST PRACTICES

- For some cases the Consent Decree should define the restoration project(s) to be implemented (e.g., when the responsible party (RP) is to perform the project(s) or when the project(s) are relatively small). However, Trustee Council members should understand that defining restoration projects and approaches in a Consent Decree will limit flexibility for dealing with changes that arise later, and it may lessen public involvement.
- Restoration project proposals should be evaluated as early as possible.
- Each proposal should provide a clear definition of the project. The Trustee Council is likely to benefit from providing potential proposers with a standard format (template) for use in proposing projects.
- Restoration projects may be proposed by anyone, including the public (e.g., in public scoping meetings). Technical Advisory Groups (TAGs) are often good sources for project ideas and restoration approaches.
- Trustee Councils should track all administrative costs including the time and funds spent working on the Trustee Council. Such information can help in estimating costs on future cases.
- Trustee Councils should try to find constructive roles and communication forums for interested parties.

- The Trustee Council's approach to handling a public meeting should be based on the specifics of the case.
- A project sponsor who performs some of the "leg work" (e.g., finding supplemental project funding) can save the Trustee Council much time and effort.
- All potential costs (including administrative and oversight costs, overhead, and agency fees) should be included in the total settlement amount sought.
- Trustee Councils can sometimes use non-profit organizations (e.g., NFWF) to administer contracts or to solicit project implementers.
- Trustee Councils should consider using contractors or consultants expert in the field to write Restoration Plans (RPs) and NEPA documents—particularly when the workloads of Trustee Council members preclude the sustained involvement needed. A good contractor selection process, including appropriate evaluation criteria, is essential.
- Outreach to other agencies should be done at the restoration planning stage.
- Trustee Councils should explore the development of regional restoration plans.

TOPIC 6. RESTORATION IMPLEMENTATION

INTRODUCTION

In addition to developing the restoration plan and selecting restoration projects, Trustee Councils are responsible for overseeing restoration implementation including identifying who will do the work and evaluating performance. Oversight of the restoration implementation work and ensuring accountability are important Trustee Council roles.



LESSONS LEARNED AND BEST PRACTICES

A. Mechanisms for Restoration Projects

- The Trustee Council should consider using a contract, grant, or a cooperative agreement to accomplish the restoration project before selecting the most appropriate mechanism. If a contract is the mechanism selected, whether to use a competitive or sole-source procurement process should be considered.
- The Trustee Council should consider endowments for funding maintenance of habitats. When possible, restoration funds should be used as a seed source for such endowments.

B. Habitat Acquisition

- Habitat acquisition, protection, and enhancement may be an appropriate restoration project.
- Trustee Council involvement will be needed in preparing and reviewing conservation easements and land acquisition transactions.
- Identifying who holds title to the land (both short and long term) is important for both habitat acquisition and management.
- Some Trustee Councils may benefit from obtaining special expertise for habitat acquisition including how to acquire, hold, protect, and manage lands.
- The respective roles of The Nature Conservancy (TNC) and other nongovernmental organizations, the California Coastal Commission (CCC), and CDFG's Wildlife Conservation Board (WCB) in the land-acquisition process should be determined carefully. Points of contact for these groups should be established.

C. Monitoring

- Monitoring plans should be part of the restoration project and included in statements of work and requests-for-proposals.
- The Trustee Council should consider setting aside funds with which to contract a consultant to perform monitoring projects.
- Monitoring protocols and success criteria (performance standards) for projects should be strict and well defined. Baseline data is needed to effectively monitor a project and determine whether restoration meets the success criteria.

D. Work Performed by Project Implementers: Oversight and Accountability

- An agreement with an agency to implement a project must clearly define the work to be done. Whether a project is performed by a government project implementer or a contractor, the same performance standards and degree of accountability should apply.
- Restoration implementation by the responsible party (RP) often has advantages (e.g., cost savings and court-enforced performance).
- Because oversight and accountability are important, restoration projects should be tracked closely.
- Annual reports should be prepared to keep the public informed on the progress of restoration.
- To establish performance criteria for experimental projects, independent experts may be needed to develop criteria and to “ground-truth” performance. Expertise and objectivity are needed to assess success and help resolve problems.
- Important implementation issues that must be addressed include preparation, content, frequency, and distribution of reports; field inspections; and providing public information on websites.
- Having a consultant oversee a project in which the Trustee Council supplements inspections provides another level of accountability and responsibility, although additional costs and administrative effort are a concern. The level of accountability needed must be balanced with increasing administrative costs.
- Staged (progress) payments to a contractor should be based on project performance.
- If a project is not properly implemented/maintained, performance bonds or other security measures may require the return of payments with penalties. Contracts should require that reimbursements be made to the Trustee Council for contractor failure to perform. Such a requirement could reduce litigation.

E. Managing and Distributing Funds and Coordinating with Non-Trustee Project Implementers such as Environmental Groups and Contractors (Contracts, MOUs, Grants)

- The Trustee Council should require that a work plan, including a budget, be developed for each project. That work plan should outline annual tasks and define reporting requirements.
- Contracting with a firm to perform a project through a sole-source procurement (non-competitive solicitation) may be preferable to competition. However, such an action must be justified and approved by the contracting officer. If several firms can do the work, it may be necessary to solicit competitive proposals.
- The Trustee Council should address how it disburses funds to successful grantees from the NRDAR fund or from a State account. There are substantial restrictions and potential overhead charges that should be considered.

F. Project Completion Reports

- Trustee Councils should require implementers to submit final reports describing project accomplishments (and failures) and require distribution of these reports to the public.

G. Joint/Leveraged Funding

- There is a major need for Trustee Councils to identify opportunities for collaboration on restoration implementation projects.

TOPIC 7. DEFERRED ISSUES

INTRODUCTION

During the workshop, participants identified issues for which there was not adequate time for discussion. These issues were documented but deferred with the hope that they would be discussed later, possibly in a subsequent workshop. They fall into four general categories: Restoration Planning and Project Selection, Finances and Accounting, Miscellaneous Issues, and Guidance Documents.

A. Restoration Planning and Project Selection

- Further discussion to define, for better understanding, the concept of nexus to the injuries when developing and selecting restoration projects.
- Some form of standardization or better guidance on restoration project selection processes should be developed. Included in that discussion should be a review of ranking processes and of the relative weights of the various criteria.
- Trustee Councils should share scopes of work for restoration planning so that models can be used and best practices identified in scoping future planning documents.



B. Finances and Accounting

- The Commencement Bay Trustee Council's accounting document should be reviewed and possibly used as a model by future Trustee Councils.
- The mechanisms Trustee Councils use to track funds and manage budgets should be reviewed to identify best practices.
- There should be some discussion to establish new mechanisms or to identify current mechanisms to reduce or eliminate the overhead administrative costs most agencies charge when receiving funds. Options might include some process to deliver funds directly to non-profit partners instead of through agencies, when legal.
- Guidelines should be established for administering and distributing funds including how to use vehicles such as grants, direct transfers, and cooperative agreements.

C. Miscellaneous Best Practices

- Trustee Councils should have access to information on the various approaches used both in restoration planning, including the writing of restoration plans, and in implementing those plans.
- The National Park Service's Restoration Office should share its contractor selection criteria with other Trustee Councils.

D. Guidance Documents

- A comprehensive "Guidance Document" containing a bibliography of relevant documents, outlines, instructions, and forms should be prepared to assist agencies and new Trustee Council representatives. Such a guidance document would be useful and relevant because there are commonalities in Trustee Councils related to representation, responsibilities, recordkeeping, accounting, restoration plans, CEQA and NEPA document preparation, permitting, land acquisition, conservation easements, and endowments. See CDFG-OSPR's working document for an example.
- Guidelines on methods Trustee Councils could use to reduce administrative costs and overhead on projects would be helpful.
- Written guidance defining restoration implementation criteria would be valuable for Trustee Councils. That document could help a Trustee Council determine who should implement selected projects, when they should do so, and how.
- A model or template of a restoration plan should be developed to improve consistency among Trustee Councils.
- A guidance document should be developed to assist Trustee Councils in meeting restoration compliance needs under NEPA and CEQA.
- A guidance document should be developed to assist Trustee Councils in the processes for habitat acquisition as part of restoration implementation. This guidance should describe processes for acquiring and managing conservation easements.