

Natural Resource Damages

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How do you value wildlife? The environment?

Natural Resource Damages

Civil claim brought by natural resource Trustees to seek damages for injury to natural resources that result from:

- A release of a hazardous substance or oil (CWA, CERCLA, OPA)

- Any cause if injury is to resources in a national park or marine sanctuary (NMSA, PSRPA)

States have similar laws

Covered Locations/Types of Incident

Statute	Geographic Reach	Activity/Material
Clean Water Act, 33 USC 1321	Navigable waters and adjoining shorelines; Contiguous Zone	Oil and Hazardous Substances
CERCLA, 40 USC 9607	Anywhere in USA	Hazardous Substances
Oil Pollution Act, 33 USC 2702	Navigable waters and adjoining shorelines; Exclusive Economic Zone	Oil
National Marine Sanctuaries Act, 16 USC 1443	National Sanctuaries and Monuments	All causes of harm
National Park Service Resource Protection Act, 16 USC 19	National Parks	All causes of harm

Comprehensive Environmental Response, Compensation, and Liability Act (Superfund) Remedy Selection



- ▶ Created 1981
- ▶ Purpose: clean up contaminated sites
 - ▶ Polluter pays principle (owner, operator, arranger, transporter)
 - ▶ Superfund via EPA for abandoned sites
- ▶ Lesser recognized purpose: environmental restoration (NRD)

CERCLA: Bifurcation



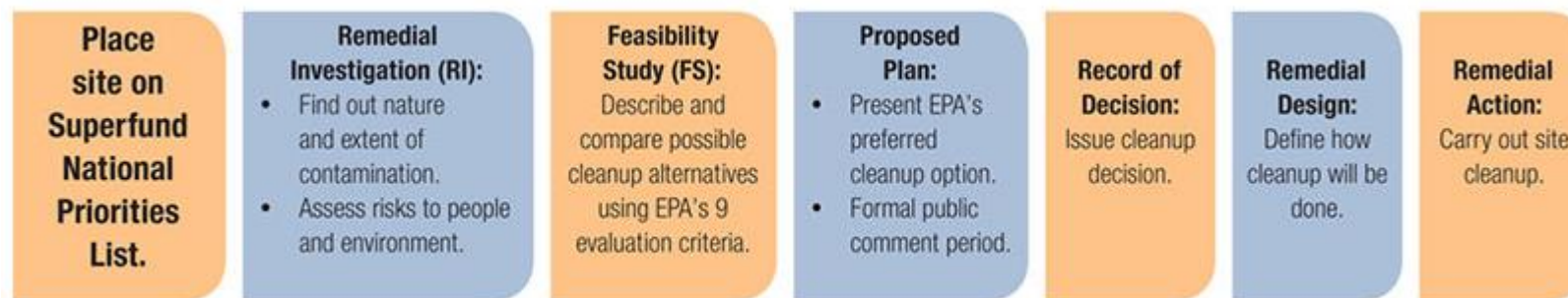
Remedy selection → remediation

Remedial investigation/feasibility study
Remedy selection: dig, dredge, fill, cap
Determining level of RISK for human health
and the environment
Primary response
EPA



Restoration

Natural resource damage assessment
Determining INJURY to natural resources
Secondary response / residual to remedy
DOI/NOAA (NOT EPA)



Getting to Restoration via a **Natural Resources Damage Assessment**



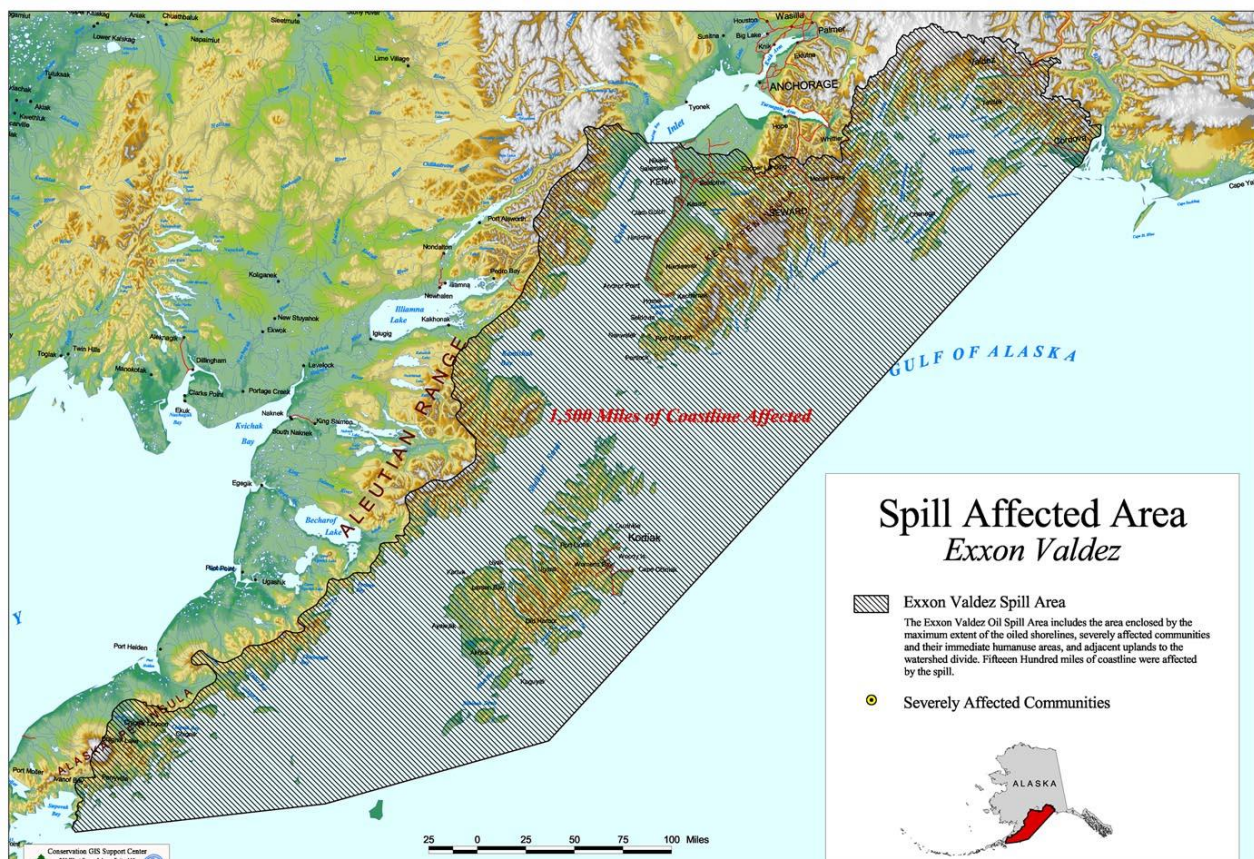
Dual Processes: Remediation & Restoration

The background of the slide is a solid light green. On the right side, there are several overlapping, semi-transparent geometric shapes in various shades of green, including a large dark green triangle and a lighter green triangle, creating a modern, abstract design.

Major environmental event sparked the

► **genesis of NRD?**

Hint: occurred on March 24, 1989



Exxon Valdez oil spill

“...evidently we’re leaking
some oil and
we are going to be here for a
while.”

Captain Hazelwood



(.wav)

Injuries from Exposure to the Spill

- ▶ Discharged 11-31 million gallons of crude oil
- ▶ Estimated that from 100,000 to 300,000 birds were killed
 - ▶ some common murre colonies in the affected area were reduced by half
- ▶ Estimated a loss of 2,650 sea otters in Prince William Sound
- ▶ Impaired south-central Alaska's fisheries
- ▶ Birth of:
 - ▶ Eco-risk assessment
 - ▶ Natural Resource Damage Assessment





The *Exxon Valdez* Damage Assessment

- ▶ Exxon contributed \$20 million to conduct the NRDA for the spill
 - ▶ a seat at the table as the assessment was being designed and implemented
 - ▶ The federal government reneged
 - ▶ “more than sufficient”
- ▶ “Assessment War” ensued
 - ▶ Federal and State governments spent \$120m
 - ▶ Exxon spent a reputed \$70m
- ▶ Unexpected Benefit - Understanding
 - ▶ Government Scientist - Consultants - Academics

The Settlement: A Framework for Future NRD

▶ Billion Dollar Settlement

- ▶ \$900 million over a ten-year period
- ▶ \$100 million re-opener
- ▶ Bill Reilly (EPA Administrator) concluded that any settlement for less than \$1 billion was not politically viable

▶ Money would be used for restoration

- ▶ Administered by Trustee Council

Natural Resources Defined:

“Land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States, any State or Local Government, any Foreign Government, any Indian Tribe...”



Natural Resource Defined:

- ▶ land,
- ▶ fish,
- ▶ wildlife,
- ▶ biota,
- ▶ air,
- ▶ water,
- ▶ ground water,
- ▶ drinking water,
- ▶ *managed by*, Government or Tribe
- ▶ NOT private land

What is injury?

- ▶ Terms “injury, destruction or loss” not defined in CERCLA
- ▶ DOI regulations:
 - ▶ Injury is a measurable, adverse change (either long- or short-term), in the chemical or physical quality or viability of a natural resource
 - ▶ E.g., injury to fish & aquatic organisms existed because PCB exceeded tolerance levels set by FDA
- ▶ Changes to baseline conditions (i.e., but for the release)
- ▶ Identification v. quantification

Covered Injuries

- ▶ Main categories of injury:
 - ▶ Ecological injuries - injury to wildlife and habitat
 - ▶ Economic injuries - lost recreational, fishing, sailing, hunting, beach, and park use.
 - ▶ Cultural injuries?
- ▶ Includes injuries to:
 - ▶ Things - e.g., a wetland, and
 - ▶ Services they provide - e.g. food and shelter for wildlife, recreation for people

Who can bring NRD Claims? Trustees

- ▶ Federal Trustees

- ▶ DOI/USFWS
- ▶ NOAA
- ▶ DOE/DOD



- ▶ State Trustees

- ▶ TCEQ
- ▶ TPWD
- ▶ TxGLO



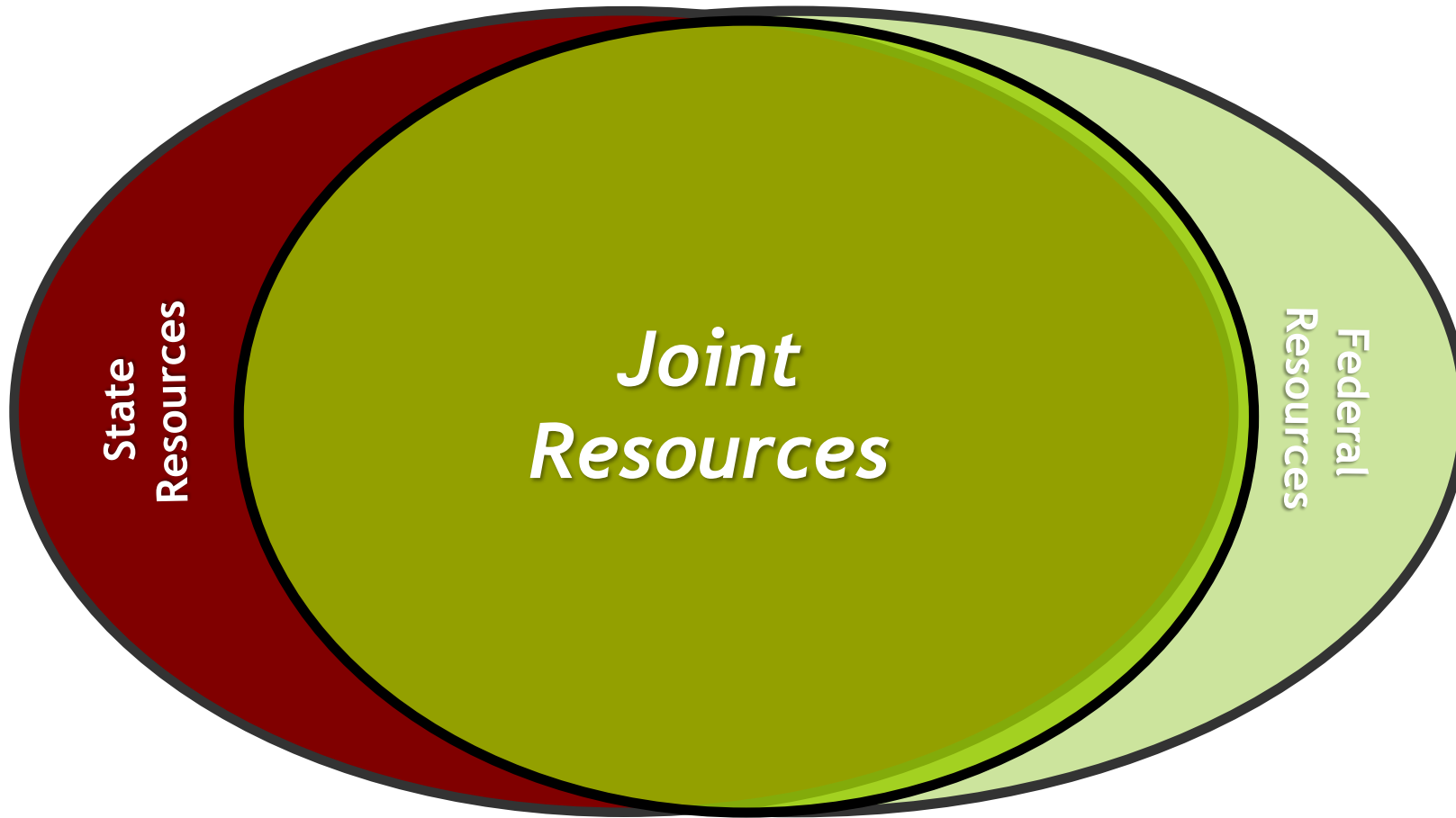
- ▶ Tribes

- ▶ NOT EPA

Primary Trustee Jurisdictions

- ▶ Geography and resource-based
- ▶ Texas trustees
 - ▶ groundwater, surface water, soil, sediment, air, state-owned and submerged lands
 - ▶ state-protected fish and wildlife
- ▶ NOAA - coastal resources
- ▶ USFW/DOI - migratory birds, T&E species, certain anadromous fish and mammals

Natural Resource Trusteeship is Shared



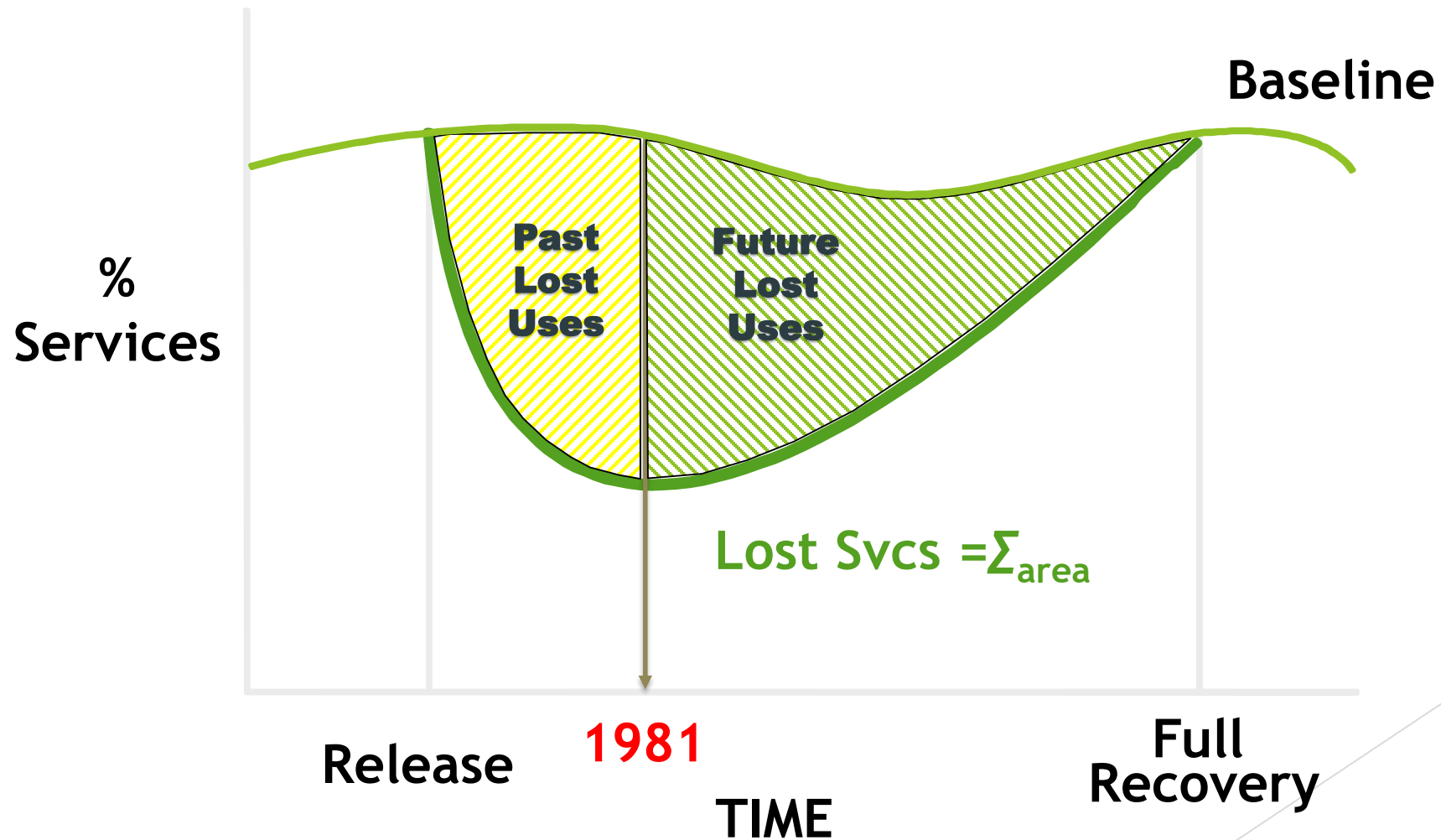
To what are Trustees entitled?

- ▶ ONE full recovery for injuries to natural resources
 - ▶ Problematic: overlapping jurisdiction
 - ▶ May cause friction between Trustees where all do not join in action or agree on result
- ▶ Injury above baseline
 - ▶ Focus on environment absent the contamination
 - ▶ Purpose is to make the public whole
- ▶ Actual damages

Baseline

- ▶ Baseline is the condition the natural resources would be in, if the contaminant release did not occur
- ▶ 3 Key Points:
 - ▶ Baseline is the yardstick that natural resource injuries are measured by. It is the starting point for measuring injury.
 - ▶ Baseline is also the end point - it is used to measure full recovery.
 - ▶ Baseline is rarely a pristine, preindustrial state.

Lost Services - Actual



Injury Determination: NRD Assessment

▶ 3 Phases:

- ▶ *Phase 1: Pre-Assessment* - data collection, literature review, and site evaluations led to the Sept. 27, 2010 Notice of Intent to Conduct Restoration Planning
- ▶ *Phase 2: Injury Assessment* - quantify injuries and identify possible restoration projects with the goal of developing a restoration plan
- ▶ *Phase 3: Restoration* - implement restoration plan and monitor effectiveness
 - ▶ Primary restoration: returning impacted resources to the *status quo*, which includes “no action” or natural recovery options
 - ▶ Compensatory restoration: addresses losses from the date of injury until recovery is completed

How to injuries become damages?

- ▶ Assessed injuries must be converted into “damages.”
- ▶ “Damages” are the cost of restoration projects
 - ▶ Restoration project costs include work to plan, design, construct, operate and maintain the project
 - ▶ Project work may be done by a liable party, at its own expense, or
 - ▶ Project may be completed by Trustees with funds paid by liable parties

How to injuries become damages?

- ▶ “Damages” are the cost of a restoration project of the right type, size, and location.
 - ▶ First, injury is measured in units: e.g., the number of lost habitat acres, lost stream miles, lost recreational trips, lost kilograms of fish, lost wildlife fledglings, etc.
 - ▶ Next, the injury is multiplied by the unit cost of the restoration project(s) needed to restore the resource to baseline, and compensate for interim loss.

What is the measure of damages?



- ▶ Cost of work to restore natural resources to baseline conditions (“Primary Restoration”)
- ▶ Cost of restoration to compensate for temporary losses arising before restoration is complete (“Interim Loss”)
- ▶ Compensation for lost existence value, if any
- ▶ Reasonable assessment costs

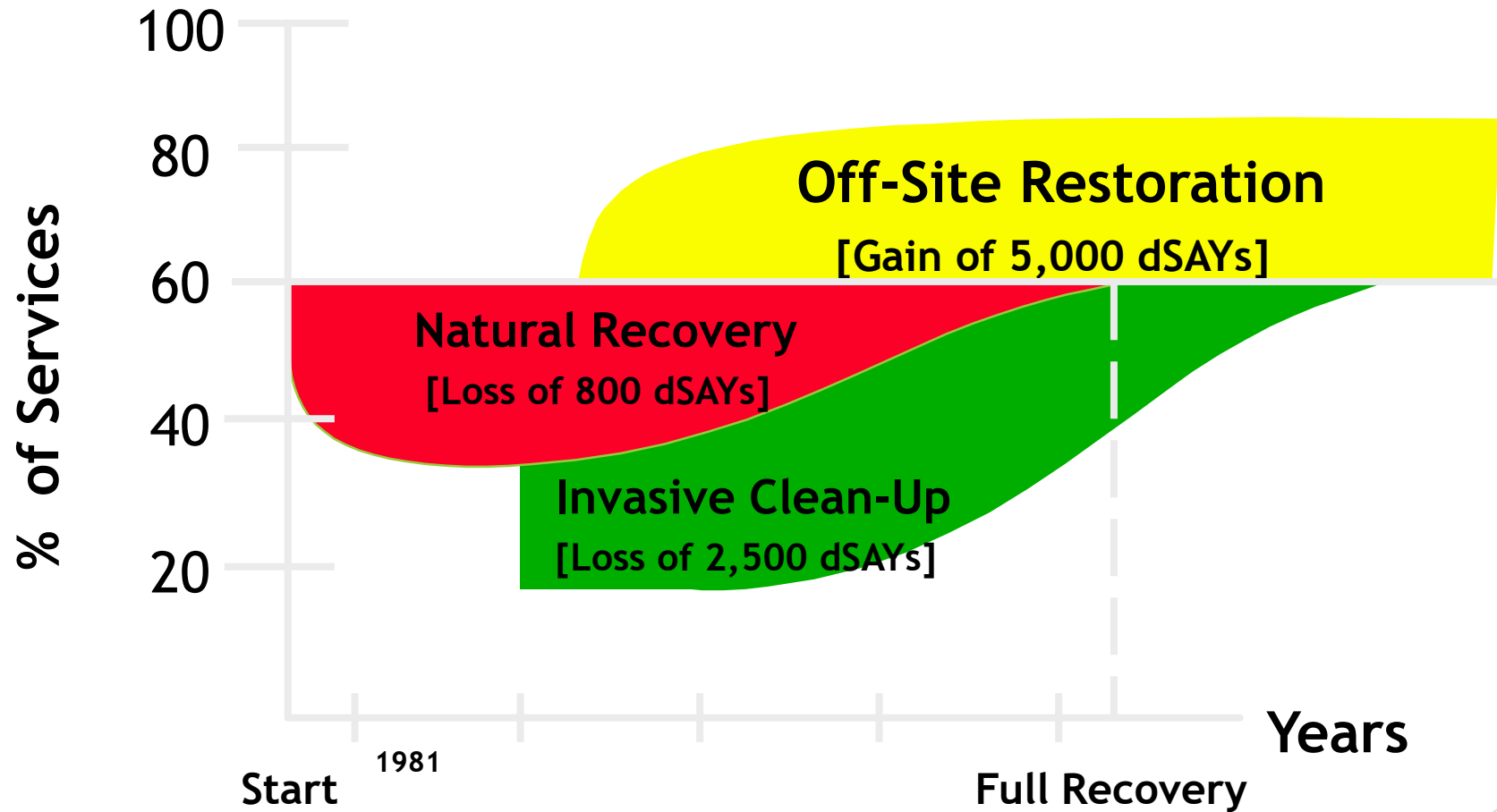
What can money be used for?

The cost or value to “restore, rehabilitate, replace, or acquire the equivalent” of the injured natural resource and their services.

- ▶ Cost of restoration and/or replacement
 - ▶ (actions taken with respect to the same resource or type of resource)
- ▶ Acquisition of an equivalent resource
 - ▶ (actions taken to replace the equivalent of the services to humans/environment provided by those resources)
- ▶ Assessment costs (includes attorneys' fees)

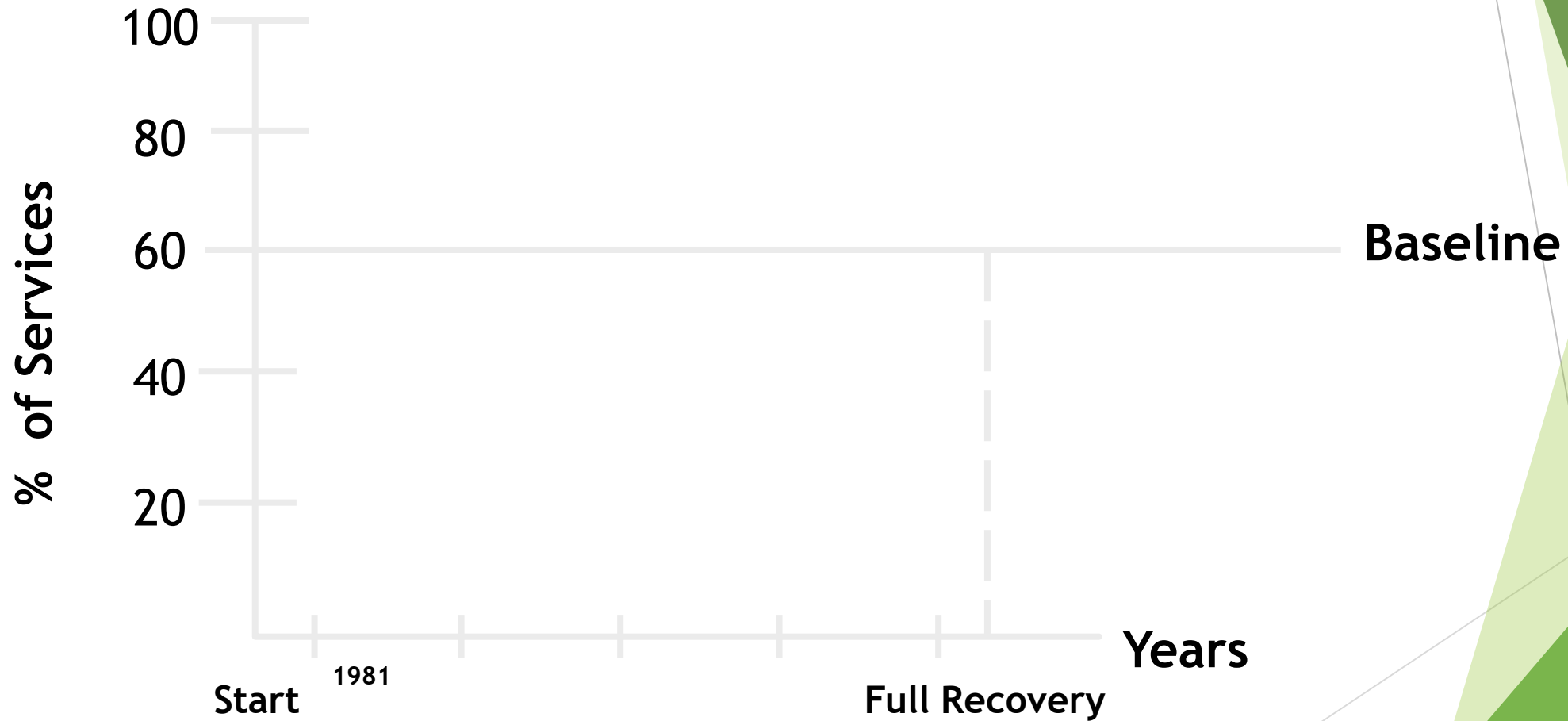
Ecological Bitcoin:

Habitat Equivalency Analysis (HEA) - Eco-Econometric Measure



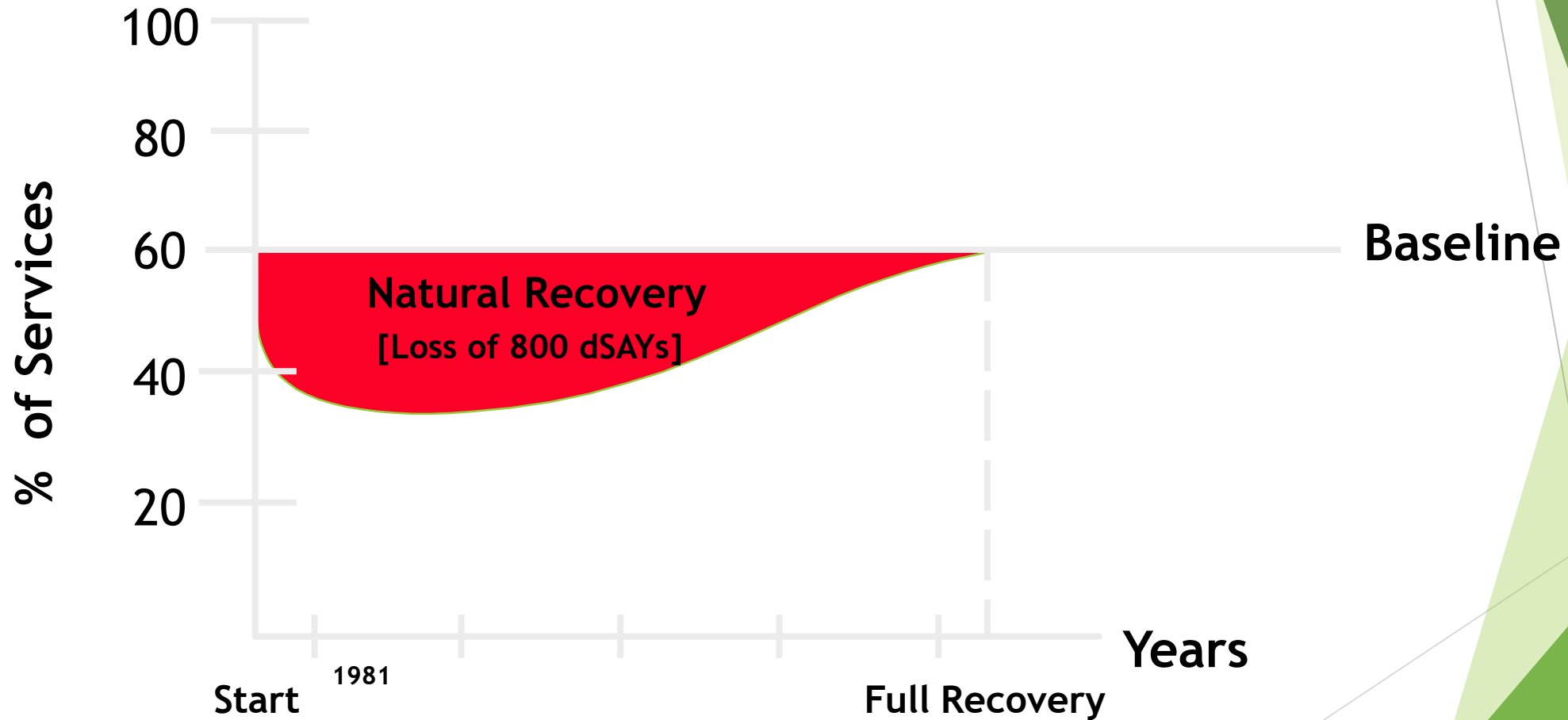
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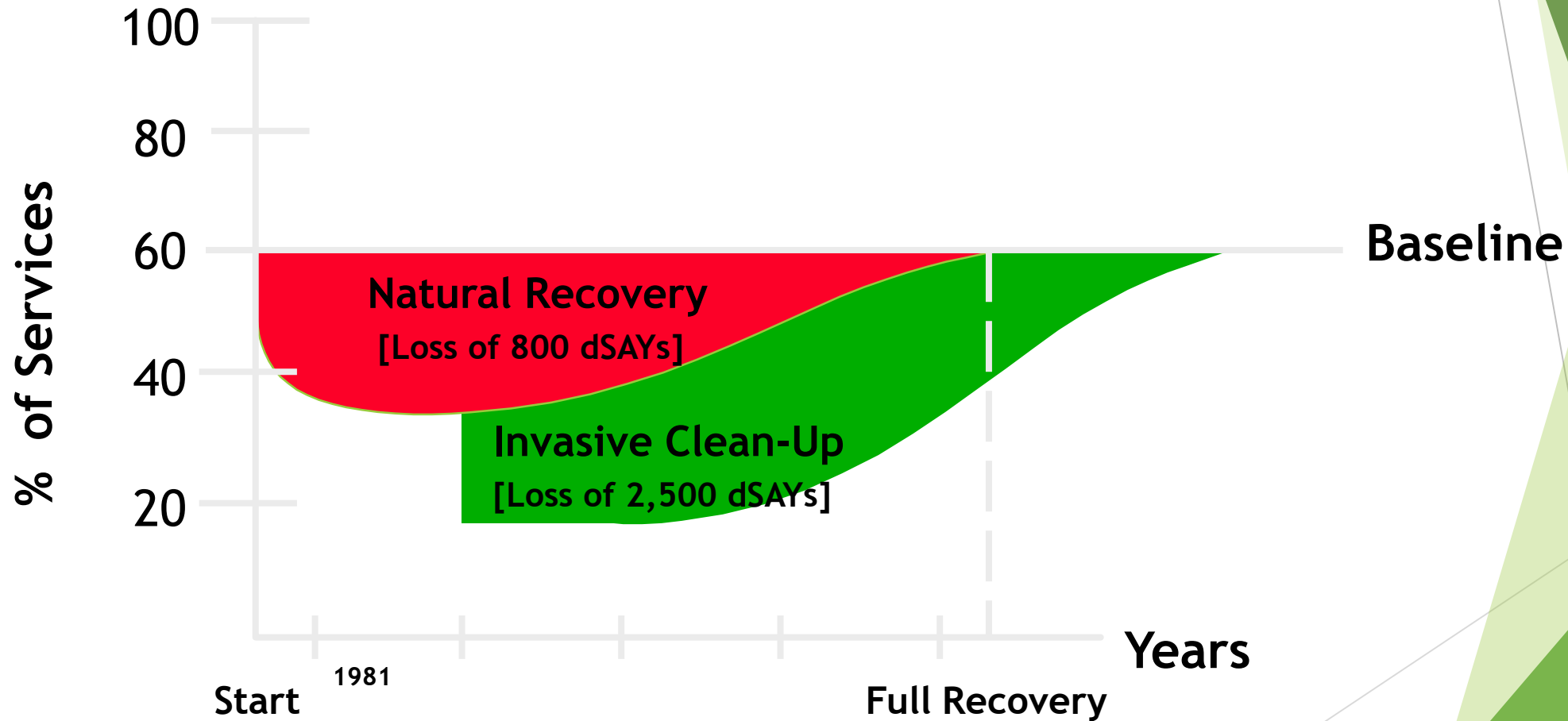
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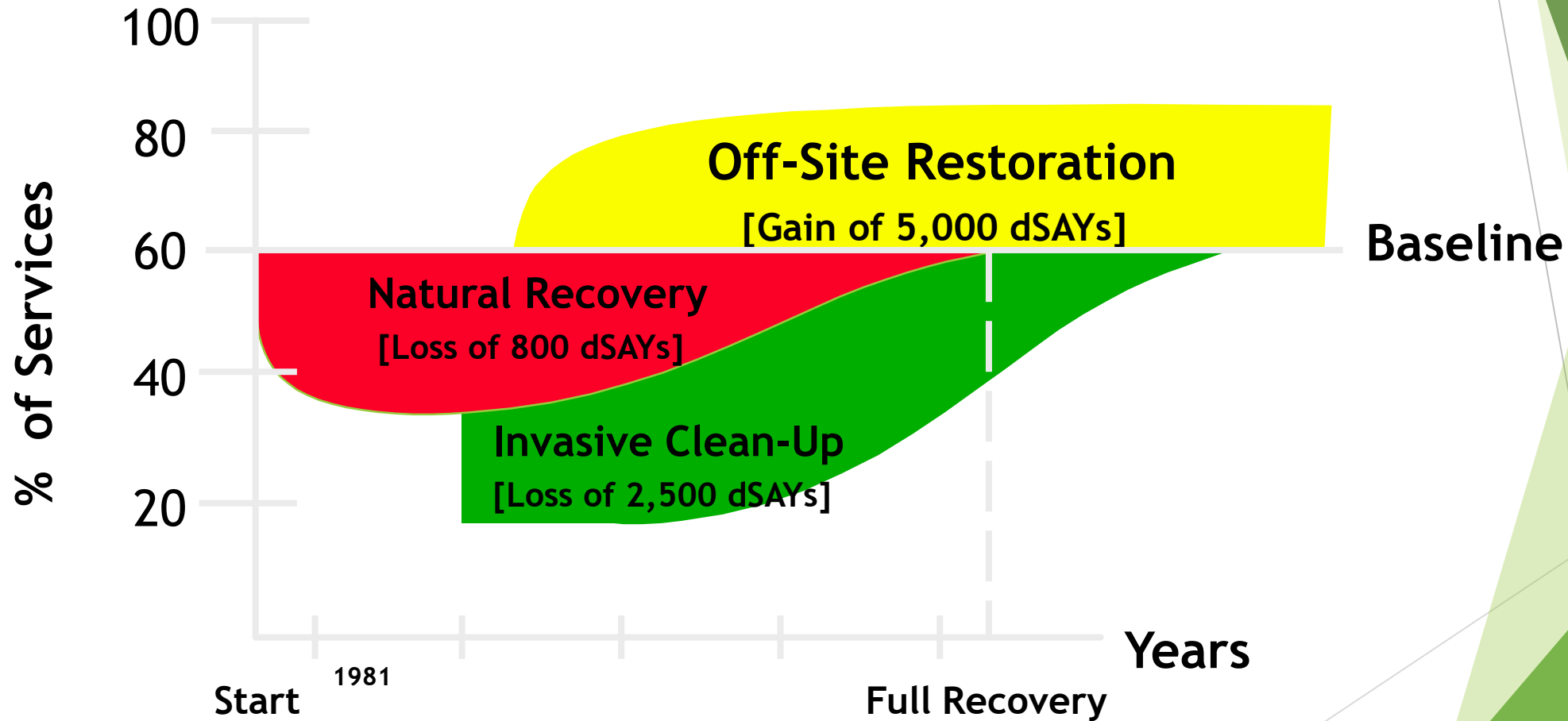
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Scaling Injury to Restoration is Necessary and Complex

Injury



HEA

Restoration



When is an NRD claim brought?

- ▶ Statute contemplates AFTER remedy is complete
 - ▶ Not ripe under 113(g)
 - ▶ Residual claim
 - ▶ Because NRD includes damage as a result of implementing the remedy
 - ▶ E.g., dig, dredge, cap creates more environmental damage
- ▶ But see more cases where remedy and restoration are progressing in parallel

Restoration - The Sooner, the Better!



Restoration before Remediation is complete?

Complication

- ▶ CERCLA § 113(g)(1) provides:

In no event may an action for damages...be commenced...before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study

- ▶ NGOs may oppose a pre-Record of Decision (ROD) settlement and will have an opportunity to object during public comment period

Solutions

- ▶ Reopener
 - ▶ Uncertainty disfavored by responsible parties
- ▶ “Strict” reading: Trustees can *settle* before the ROD but not bring suit

What kind of liability do PRPs have?

- ▶ Strict
- ▶ Joint and several
 - ▶ Contribution claims if other PRPs not party to action
 - ▶ Challenges to causation
 - ▶ Challenges to divisibility of harm

Potential NRD Defenses

- ▶ Petroleum exclusion (as to CERCLA only)
- ▶ Releases and damages wholly before December 11, 1980 - CERCLA 9607(f)(1)
- ▶ Claim premature - before EPA selection of final remedy - CERCLA 9613(g)
- ▶ Impermissible attack on a CERCLA remedy - CERCLA 9613(h)
- ▶ Lack of standing to sue on behalf of injuries to private party rights
- ▶ No punitive damages - *Ohio v. Dep't of Interior*, 880 F.2d 432 (D.C. Cir. 1989)
- ▶ Baseline - liability only for loss of service but for defendant's release
- ▶ Statute of limitations
 - ▶ Non-NPL sites - 3 years from CERCLA regulations or discovery of loss and its connection with the release
 - ▶ NPL sites - 3 years from after completion of remedy (+ O&M)
- ▶ No double recovery
- ▶ Acts of God, War, Act or Omission of Third Party
- ▶ Federally permitted release

Special Considerations for Parties

► For the Trustees

- Producing litigation-quality science -- without the typical deferential arbitrary and capricious standard of review
- Making small injuries into big damage numbers
- Paying for the assessment -- without Superfund
 - Typically mitigate risk of non-recovery by focusing on claims supported by consumption advisories

► For PRPs

- Transaction costs that may easily exceed any provable damage
- Uncertainty and scale of potential damages

* Interaction between the Remedial Investigation and the Assessment/Restoration processes

Utilize Privileges

- ▶ NRD process is “in anticipation of litigation”
-- all common law privileges apply
 - ▶ Attorney-Client Communication Privilege
 - ▶ Work Product Protection
 - ▶ Joint Defense Communications

How do these cases usually turn out?

- ▶ Rarely litigated
- ▶ Settlement → consent decree
 - ▶ Lodged with court
 - ▶ Public comment
 - ▶ Finalized
- ▶ Money into special restoration account with respective trustees

Strategies

- ▶ Do the “right thing”
 - ▶ Power of a positive message
 - ▶ Deck is stacked against defense
 - ▶ Find people in the Agencies who are also interested in doing the right thing and able to see and effectuate it
- ▶ A win-win is truly possible in most cases
 - ▶ Trustees should be more interested in ecological benefit than monetary cost to the responsible parties
- ▶ Value of eco-entrepreneurship in an NRD context
- ▶ Shifting eco-risk-driven cleanup liability to NRD restoration or vice versa
 - ▶ *Note: Human health-driven cleanup cannot be shifted

Strategies

- ▶ Recognize the differing interests and objectives of the Trustees
- ▶ Quickly comprehend your client's greatest weaknesses
- ▶ Lead by initiative (avoid reactive postures)
 - ▶ Reactivity motivates bureaucratic responses; initiative more likely to stimulate altruism
- ▶ Power of a great project
 - ▶ A great restoration project covers a multitude of sins
- ▶ Embrace the science
- ▶ Time value of money
- ▶ Restoration benefit must be properly documented and acknowledged

The background features abstract, overlapping green geometric shapes in various shades of green, creating a modern and dynamic feel. The shapes are primarily triangular and polygonal, with some areas appearing more translucent than others.

Ecosystem Services Concepts at Work

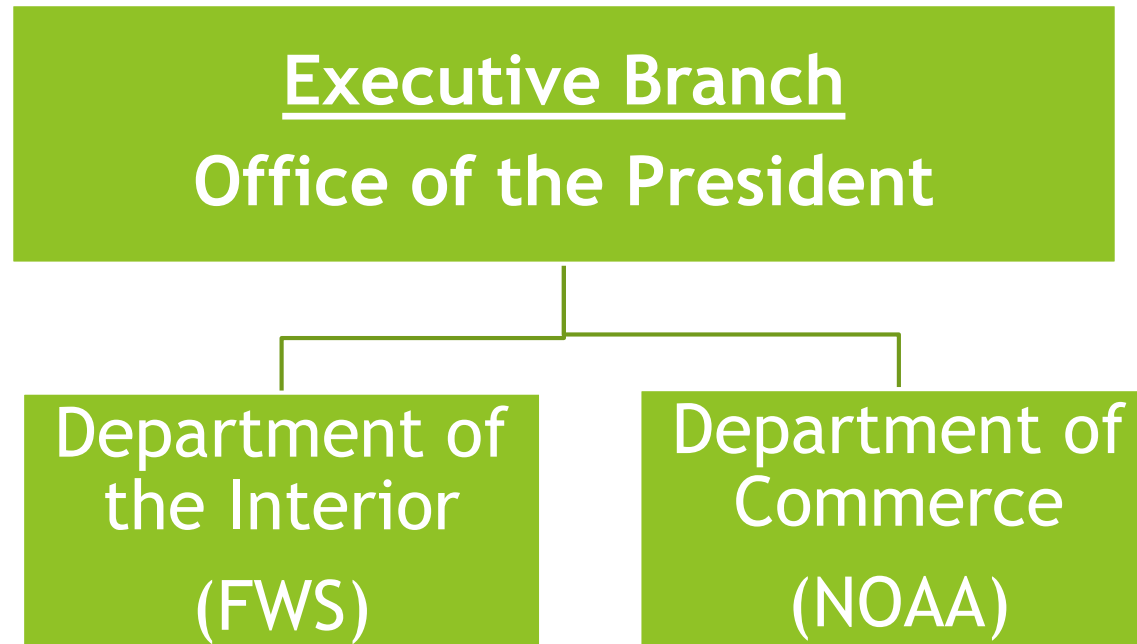
Overlapping Regimes of Endangered Species Act and NRD Protections

Endangered Species Act

- ▶ Endangered Species Act (1973), amended.
- ▶ Purpose: Protect and recover imperiled species and the ecosystems upon which they depends
- ▶ Approx. 2,200 species listed as threatened or endangered
 - ▶ “Endangered” means the species is in danger of extinction throughout all of a significant portion of its range
 - ▶ “Threatened” means the species is likely to become endangered within the foreseeable future’
 - ▶ Most, but not all, protect species are domestic
 - ▶ ESA implements U.S. participation in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

Endangered Species Act - Implementing Agencies

- ▶ National Oceanic & Atmospheric Administration (NOAA) and United States Fish & Wildlife Service (FWS) work together to manage ESA-listed species
 - ▶ NOAA has jurisdiction over 147 species
 - ▶ FWS



ESA - Implementing Tools

- ▶ Section 4 - Listing of Species; Critical Habitat Designation; Recovery
- ▶ Section 6 - Cooperation with States
 - ▶ Federal encouragement of states and funding; some states more protective
- ▶ Section 7 - Interagency Consultation
 - ▶ E.g., critical habitat designation
- ▶ Section 8 - International Cooperation
- ▶ Section 9 - Prohibited Acts
 - ▶ No “take” without a permit
- ▶ Section 10 - Permits for Endangered Species & Habitat Conservation Plans
 - ▶ Scientific research or to enhance propagation and survival
 - ▶ For otherwise lawful activities causing an incidental “take”
- ▶ Section 11 - Penalties and Enforcement
 - ▶ Civil and criminal

Natural Resource Damages and Endangered Species

- ▶ Adverse impact of the release can be to the species or the habitat
- ▶ No special provisions for endangered species under NRD statutes



Brian Watson, Virginia Department of Game and Inland Fisheries

The endangered James spiny mussel



The endangered Roanoke logperch



Purple cat's paw mussels, tagged and ready to be put back into Killbuck
Photo by USFWS



Key questions in an NRD case involving endangered species

1. Who is the trustee for that resource?
2. How do you assess?
3. How do you restore/replace/acquire equivalent?

Key questions in an NRD case NOT involving endangered species

- ▶ If endangered species were not impacted by the release, could offsite restoration impact an endangered species?
 - ▶ National Environmental Policy Act regulations require Trustees to consider the “degree to which the project may adversely affect endangered or threatened species or their critical habitat.”