

# Natural Resource Damages: Settlement Negotiation Issues and Strategies

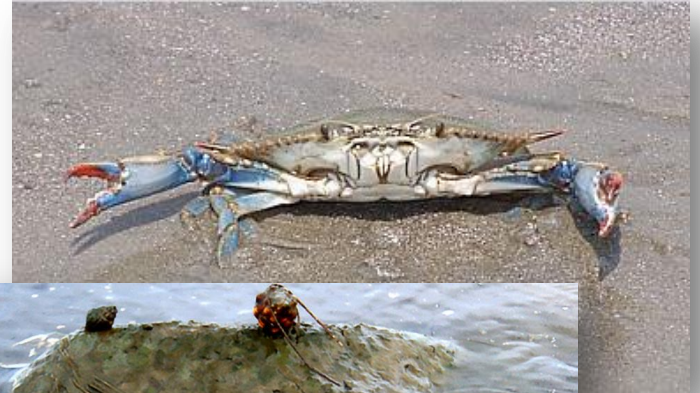
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# Natural Resources & Trustees are Broadly Defined

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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 Damages: General Dynamics

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- Federal and state government agencies bring claim as “trustees” of public resources allegedly injured by hazardous substances or oil releases
- Civil claim for damages plus quasi-administrative damages assessment
  - Residual claim for lost ecological and human use services independent of cleanup obligation
  - Trustees have burden of proof, but can gain rebuttable presumption through regulatory assessment process
    - Deck is stacked against the defense
    - However, potentially responsible parties are typically more agile, flexible and can plan further ahead
  - Settlement resolution will be subject to Public Comment and judicial scrutiny
  - Often the final “license to close” action with respect to the release/site
    - Responsible parties value certainty/closure

# Who Are The Trustees for Texas?

- Federal Trustees

- DOI/USFWS
- NOAA

- Texas Trustees

- TCEQ
- TPWD
- TxGLO



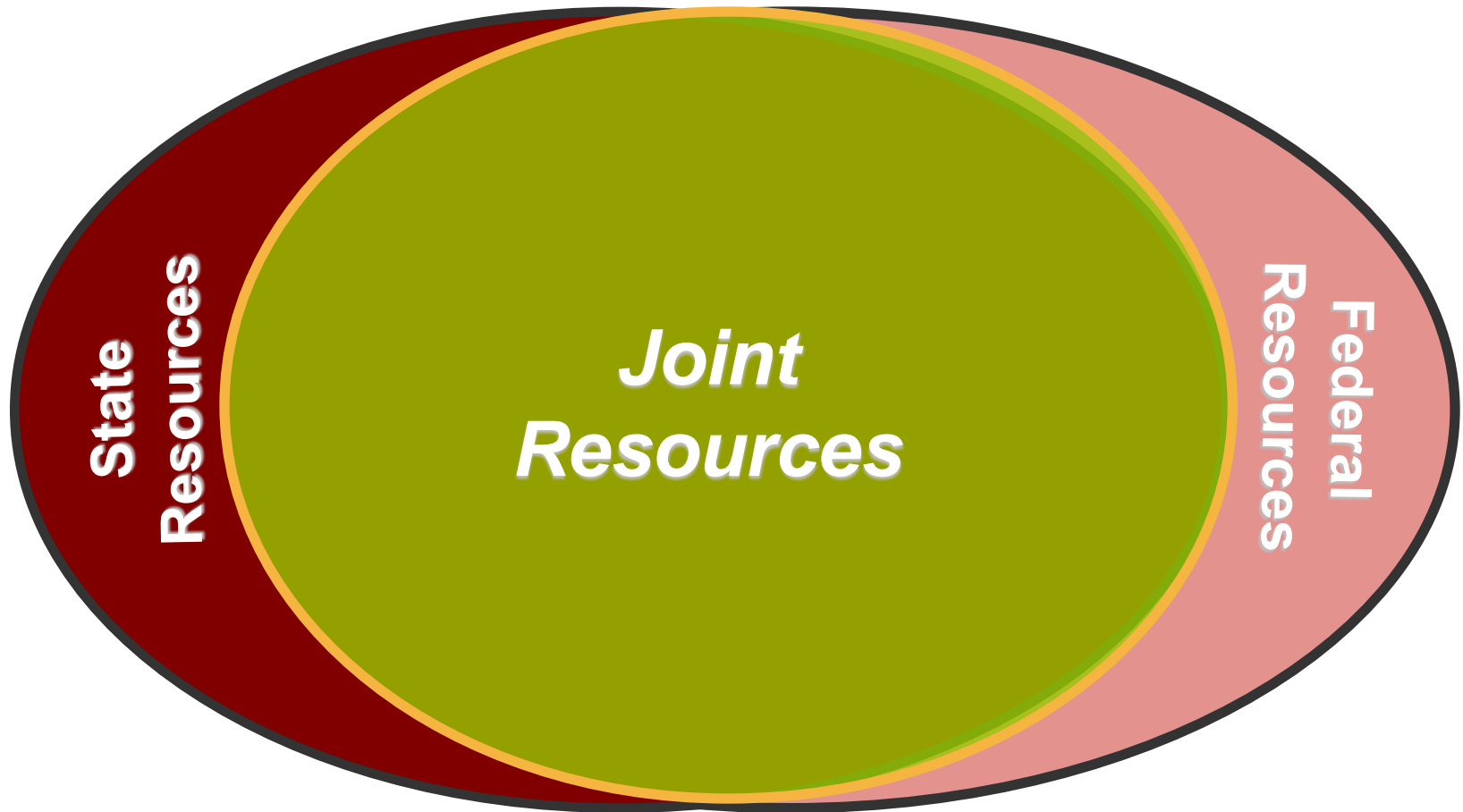
# Primary Trustee Jurisdictions

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- Trusteeship can be both 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

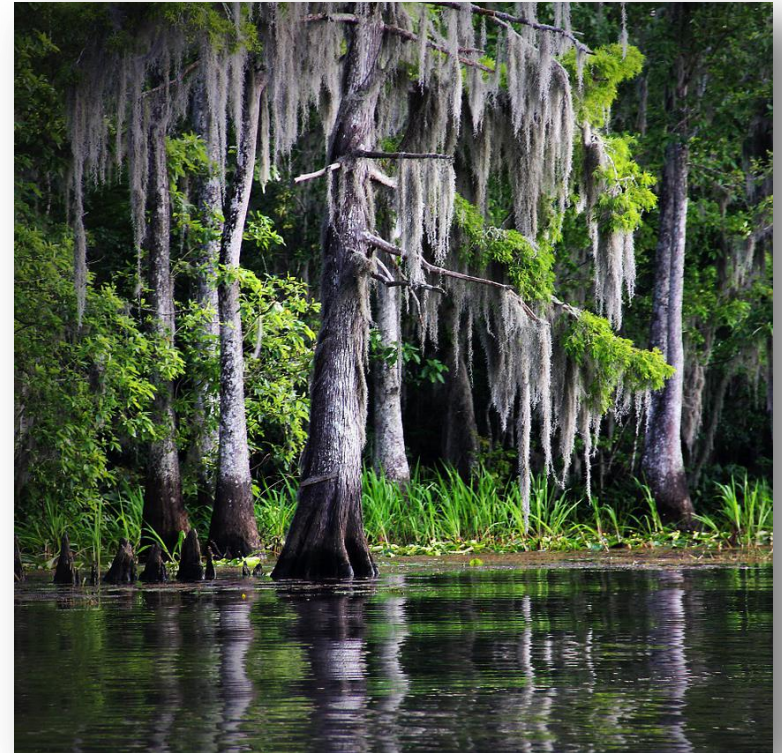
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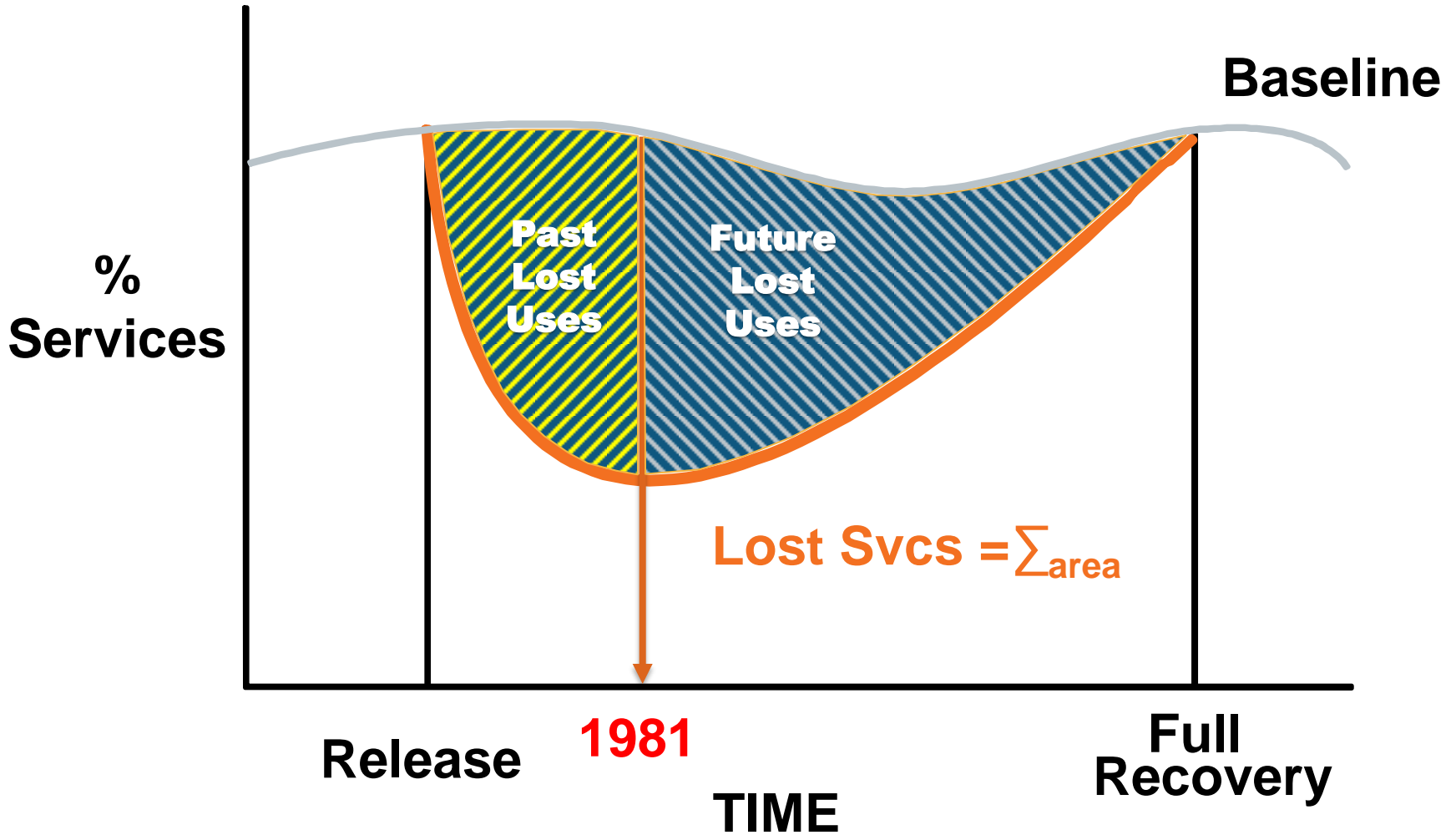
# Natural Resource Damages

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- Damages
  - Restoration costs
  - Lost use - actual and passive (compensatory)
  - Trustees' "reasonable" assessment costs (CERCLA); OPA does not have reasonableness requirement
- Trustees' assessment costs can be large component of final claim, as much as damages for injuries
- Additional costs:
  - In-house study, management and legal costs
  - Outside assessment costs



# Lost Services - Actual



# What Special Considerations Do NRD Claims Present?

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## ■ 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

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# Dual Processes: Remediation & Restoration

**Place site on Superfund National Priorities List.**

**Remedial Investigation (RI):**

- Find out nature and extent of contamination.
- Assess risks to people and environment.

**Feasibility Study (FS):**

Describe and compare possible cleanup alternatives using EPA's 9 evaluation criteria.

**Proposed Plan:**

- Present EPA's preferred cleanup option.
- Formal public comment period.

**Record of Decision:**  
Issue cleanup decision.

**Remedial Design:**  
Define how cleanup will be done.

**Remedial Action:**  
Carry out site cleanup.

## Getting to Restoration via a Natural Resources Damage Assessment



# NRD Defense

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- Causation: Liability is not “slam dunk”, and government can often establish some violation of a regulatory standard, e.g., fishing closure, consumption advisory
- Much tougher question: “So What?”
  - Quantification: how big is the problem?
  - Valuation: what is it *really* worth?
- Best Defense
  - Limit the scope of the claim
  - Share the pain with others -- including Trustees

# Utilize Privileges

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

# Resolution Strategies

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- **Know your restoration picture**

- Early Restoration Options Analysis (ROA)

- **Expedited assessment**

- Trustees need enough science to show they have fulfilled their fiduciary duties to the public

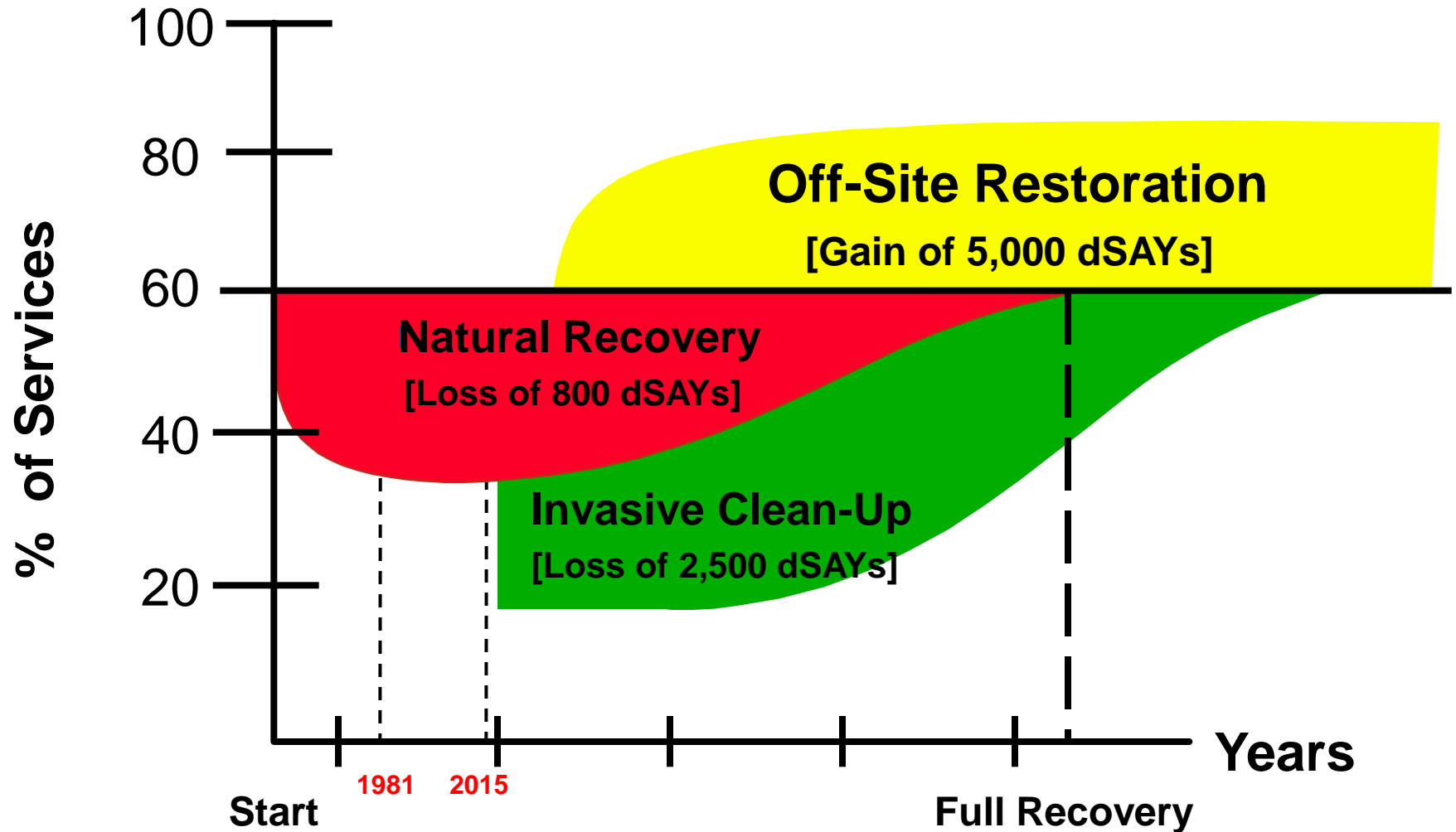
# Restoration – The Sooner, the Better!

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# Key Tool: Habitat Equivalency Analysis (HEA)

...but don't get caught up in the "equivalency" part



# Some Key Strategic Decisions

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- Go it alone or as a group of potentially responsible parties?
  - Joint defense agreement
  
- Engage in a cooperative assessment with Trustees?
  
- Conduct a restoration options analysis?



# Cooperative Assessment

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- Trustees and responsible parties work together to generate the science for the assessment
- Responsible parties fund the work
- Less likely to strictly follow the assessment regulations

# Cooperative Assessment: Pros

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- Availability of responsible party funding and cooperative posture can expedite the process
- More opportunity to achieve robust science when all viewpoints are engaged in the process
- Can more easily identify and forego unnecessary science
- Potential for common vision of restoration
- Potentially better synchronization with science being done for the remedial investigation
- Cost reduction

# Cooperative Assessment: Cons

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- Can spend a lot of time and money on a cooperative process and still disagree
- Could end up “showing your hand” to your litigation adversary
- Worse, can strengthen Trustees’ case
  - Trustees are typically cost-constrained, and introducing responsible party funding can lead to studies that otherwise would not have occurred

# Cooperative Assessments: Key Considerations

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- What are the dynamics of the people/parties who would be working together? Can they be “cooperative”? Are they trustworthy?
  - Intra-Trustee dynamics
    - Trustees may be weighed down by lowest common denominator
  - Trustees-responsible parties dynamics
  
- Are the Trustees “ready”?
  - Technically
  - Bureaucratically/from a process perspective
  - Politically
  
- Magnitude of likely disagreements

# Restoration before Remediation is Complete?

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## 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

# Strategies

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- 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

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- 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