

Public Claims and Damages Arising from Environmental Harms to Our Rivers, Bays and Estuaries

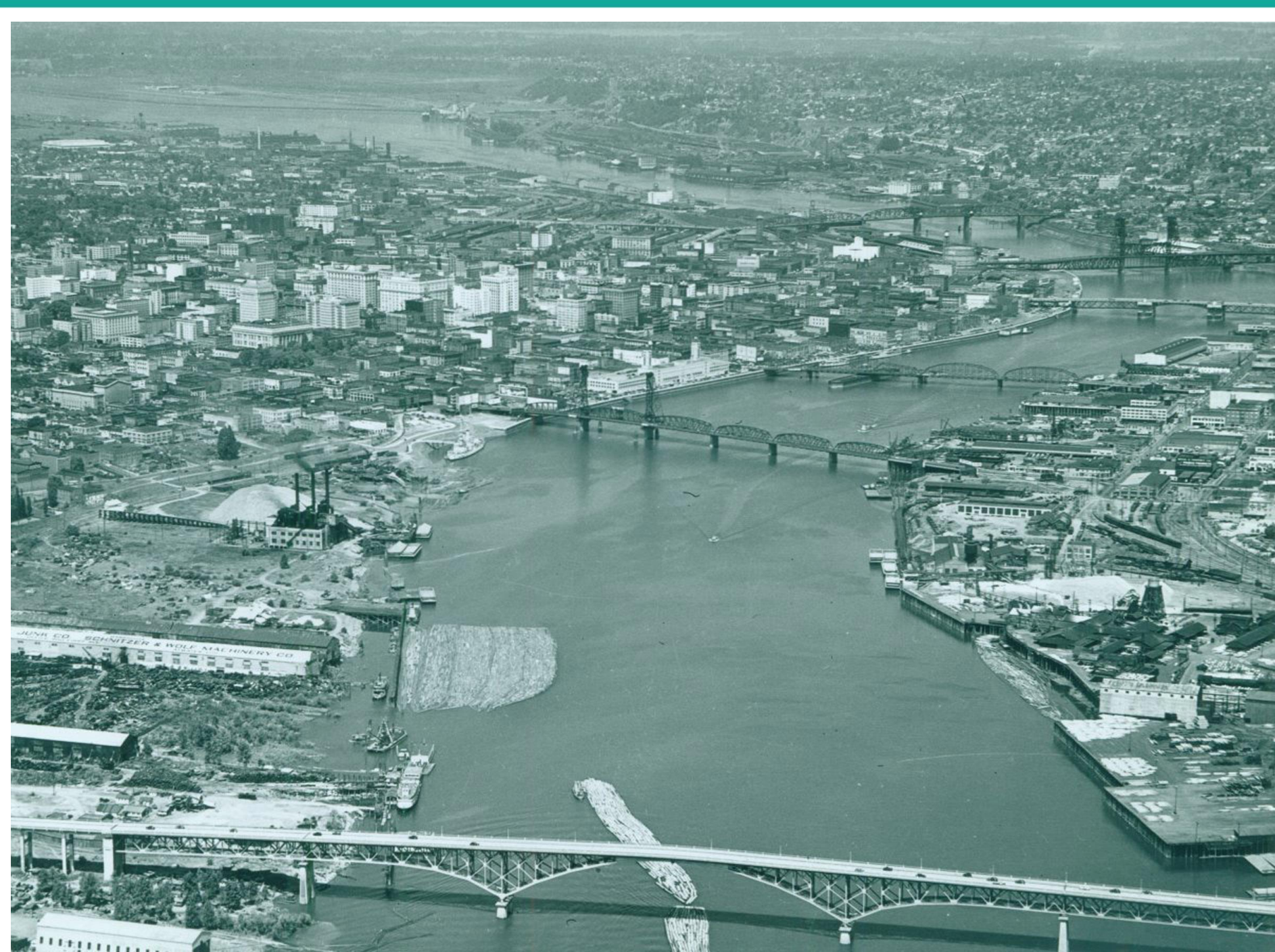


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Complexity of Rivers, Bays and Sediment Sites

- Risk Based Cleanup: Human and Ecological
- Chemical Processes, Volumes, Mass Loading, & Fingerprinting of the COCs Driving Risk
- Fate & Transport of COCs into the River
- Bathymetric Data and Dredging Issues
- Hydrodynamics, Deposition, and Scour Zones
- Secondary Risk Drivers & Remedy Cost Drivers
- Modeling, Remediation, OU's and SMUs
- Orphan Shares, Sources and Liabilities
- THEN, you get to NRD...
 - Timing, Baseline and Causation
 - Damages to Resources
 - Interim Losses of Services



An Example of Public Injuries and Harms

PASSAIC RIVER, NEW JERSEY



U.S. Sen. Cory Booker on the Passaic River

“NEW JERSEY’S BIGGEST CRIME SCENE”







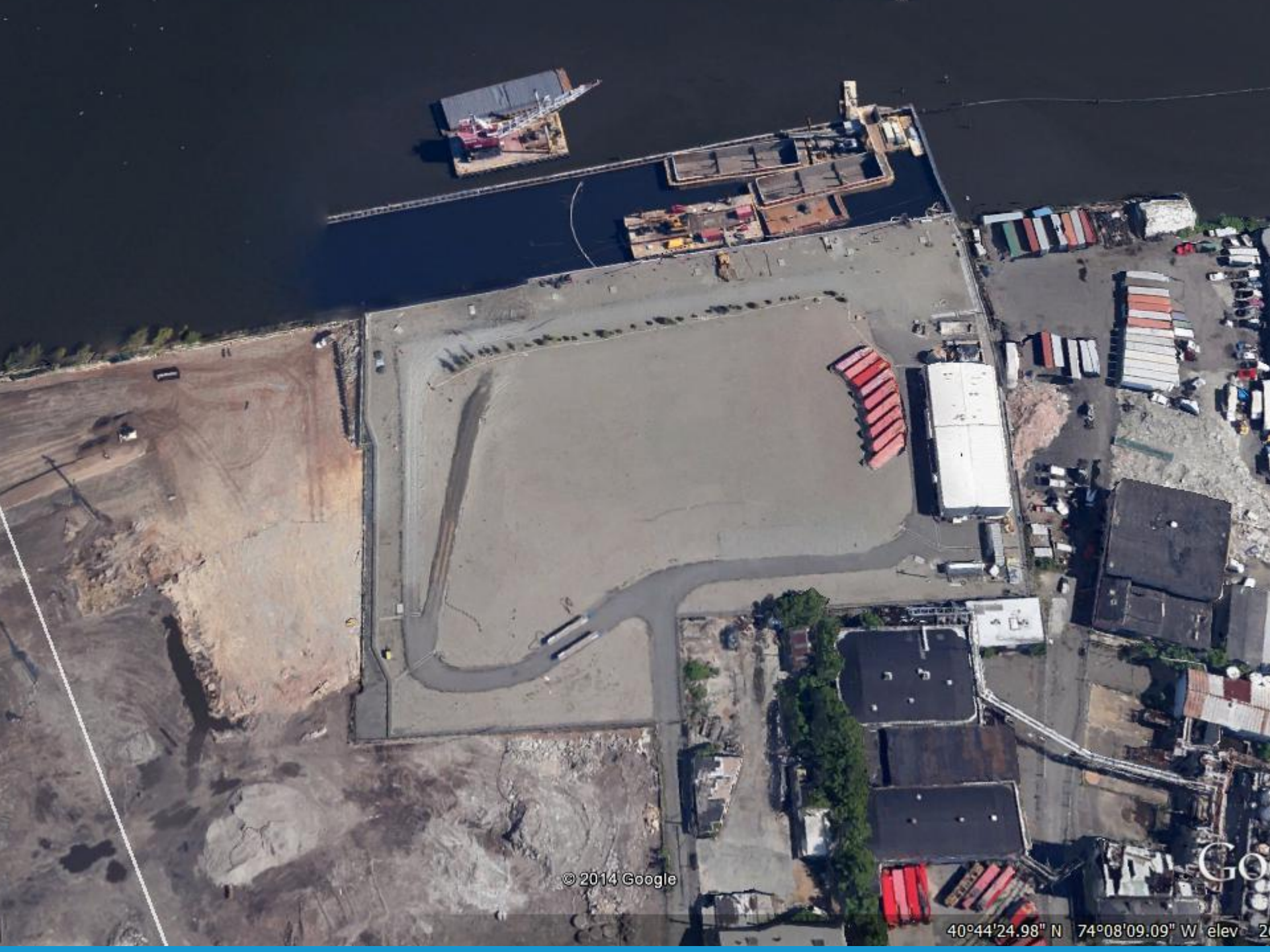
EXCLUSION ZONE

10-29-76

5-50

GS-VDUW





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40°44'24.98" N 74°08'09.09" W elev 2

DANGER!



**DO NOT CATCH!
DO NOT EAT!**

BLUE CLAW CRABS
IN THESE WATERS MAY CAUSE
CANCER

AND MAY HARM BRAIN DEVELOPMENT
IN UNBORN AND YOUNG CHILDREN

PFLIGRO!



**NO LOS PESQUE!
NO LOS COMA!**

LOS CARACANOS DE TERAZAS AZULES
EN ESTAS AGUAS PUEDEN CAUSAR
CANCER

Y PUEDEN AFECTAR EL DESARROLLO
CEREBRAL EN PEQUEÑOS NIÑOS PEQUEÑOS

DANGER!



DO NOT CATCH! DO NOT EAT!

**BLUE CLAW CRABS
IN NEWARK BAY COMPLEX MAY CAUSE
CANCER**

**AND MAY HARM BRAIN DEVELOPMENT
IN UNBORN AND YOUNG CHILDREN**

Fines up to \$3,000 could be imposed (N.J.A.C. 7:25-14,18A)

For further information, call toll-free 1-800-DEER-KNOW







What Costs & Damages?

- Private Parties
- Public Entities/State as Actor
 - Response & Remediation Costs
 - Owner of Submerged Lands
 - Owner of adjacent/dependent properties
 - Public Tax Base, Fees & Revenues
 - Navigational Services (local sponsor, dredging & disposal)
 - Public/Social services (schools, medical, emergency response)
- Public Entities/State as Trustee for Public



Consider Intersection of Economy & Environment

- Waters of the State are vital public resources
- Intersection of the Environment & Economy
 - Navigation & Commerce
 - Industry & Jobs
 - Tax base & Growth
 - Development & Redevelopment
- Contamination that damages the State's economy, ecology, and environment is compensable



Focus on Making the Public Whole

BUNDLE THE PLAINTIFF'S AVAILABLE CLAIMS AND DAMAGES



Statutory Recovery of Remediation Costs

- Strict Liability for Remediation
- Environmental Claims most frequently arise under federal/state statutes:
 - CERCLA, RCRA, OPA
 - Clean Water Act and State law equivalents
 - State Superfund and equivalents
- Strict Liability Applies
- Joint & Several Liability Often Applies
 - Impacts of BNSF
 - Divisibility vs. Allocation
- Polluter Pays (loosely speaking)



Available Theories of Recovery

- CERCLA/OPA/State Remediation Statutes
- Negligence & Gross Negligence
- Trespass
- Per Se Violations
- Public Nuisance & RCRA
- Strict Liability for Intentional Discharges
- Purpresture & Common Law Obstruction of Navigation
- Breach of Contract
- Fraud and Negligent Misrepresentations
- Public Trust Doctrine
- Equitable Claims and Restitutionary Remedies



Loss of Use of Navigable Waters are an Interference with a Vital Economic Resource

“The original purpose of the [public trust] doctrine was to preserve for the use of all the public natural water resources for navigation and commerce, waterways being the principal transportation arteries of early days, and for fishing, an important source of food.”

N.J. v. Jersey Cent. Power & Light Co., 125 N.J. Super. at 101-102 (quoting Arnold v. Mundy, 6 N.J.L 1, 71 (1821))



Foundations of Public Trust Doctrine

“It is the settled law of this country that the ownership of and dominion and sovereignty **over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found**, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.” Neptune city v. Avon-by-the-Sea, 61 N.J. 296, 304 (1972) (citing Central R.R. Co. v. Illinois, 146 U.S. 387 (1892)).



As Trustee, the State is Charged with the Protection of the Resource

“The conclusion seems inescapable to this Court, that if the State is deemed to be the trustee of the waters, then, as trustee, the state must be empowered to bring suit to protect the corpus of the trust – *i.e.*, the waters – for the beneficiaries of the trust – *i.e.*, the public.” N.J. v. Jersey Cent. Power & Light Co., 125 N.J. Super. at 103 (quoting Maryland v. Amerada Hess, 350 F.Supp. 1060, 1067 (D. Md. 1972)).



Expanded Costs & Damages Available Under OPA

- Response Costs
- Property Damages
- Lost Governmental Revenues
- Costs of Additional Public Services
- Lost Profits and Earning Capacity
- Subsistence Use Damages

AND

- Natural Resources Damages



The Impact of Deepwater Horizon

- Hard to Overstate the Potential Impacts
- Economic Damages to Private Parties
- Public Entities' Lost Revenues and Increased Costs of Public Services
- Natural Resource Damages
 - Damages to the Marshes
 - Injuries to fish, birds and food chain
 - Losses of Human Uses and Cultural Impacts
- Removal of Damage Caps
- Long term impacts on drilling in the Gulf
- Legal Ramifications



“Remote” Damages Available

- OPA broadened the availability of damages by allowing for the recovery of economic damages by those **without a proprietary interest in damaged property** (i.e., “Profits and Earning Capacity” damages).
- This is a significant departure from federal maritime law, which required that persons who do not have a proprietary interest in physically damaged property have no cause of action for their economic losses.
(Robins Dry Dock)



Causation and the Scope of Damages

- Traditional Property Damages
- Lost Profits Restaurants & Hospitality – where?
- Lack of Physical Proximity: Seafood Industry
- Governmental Losses of Revenues & Taxes
 - Across Every Sector – Tourism, Seafood, O&G
 - Offset by Response Inflows?
- Increased Costs of Social Services? Others?
- Moratorium and Economic Response Injuries?
- Line Drawing is very hard but the breadth of damages was staggering



Make the Public Interest Whole and Restore the Public Trust

NATURAL RESOURCE DAMAGES



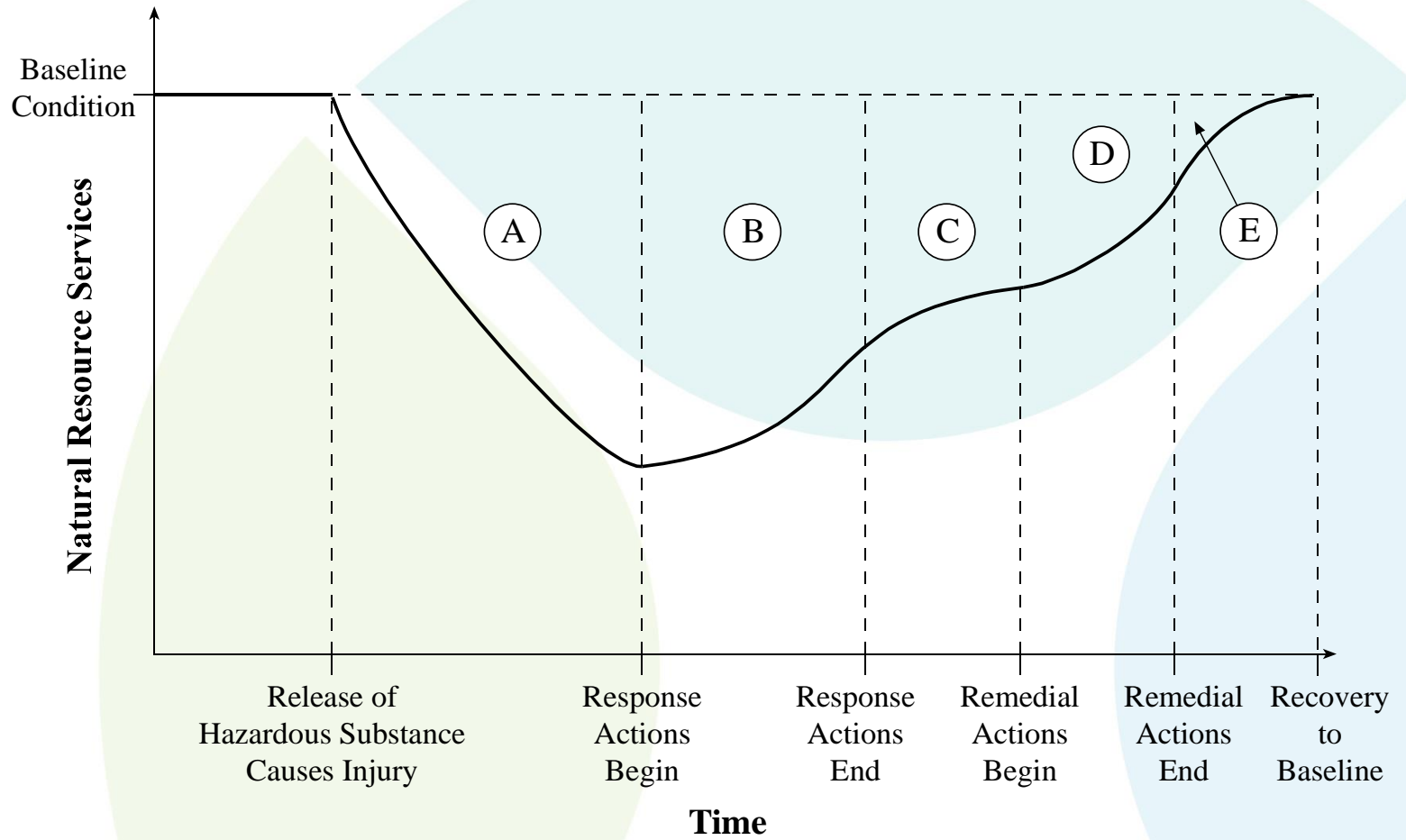
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Natural Resource Damages: Different than Cleanup/Remedial Claims

- Cleanup/response is primary
- Risk based on human health & environment
- Superfund and other State/federal schemes
- Remediation and Clean-up
- Economic Damages
- Property Damages
- MUCH More legal authority/case law
- More Accepted Science & Methodology



Return to Baseline



Natural Resource Damages

- Trustees may seek to recover damages for the injury to the resource caused by the effects of contamination and the effects of the remedial actions taken at the site
- Damages include
 - 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)



Natural Resource Damages

Include the costs of:

- Assessing an area's natural resource damages,
- Restoring the natural resources, and
- Compensating the public for the lost use of the affected resources.

The Battle of How and How much!

Fact of Injury?

Quantification of Injury and Damages?

Evolving Law & Science

