



NRDA Statutory Elements And Defenses

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Natural Resources Damage Liability and Litigation
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Filling the Gaps



- Class Hypothetical– the case of the orphaned bayou
- Torts
- Elements of CERCLA claim for removal/remediation/restoration
- Elements of OPA claim
- Shortfalls

Statutory Elements for NRD Claims



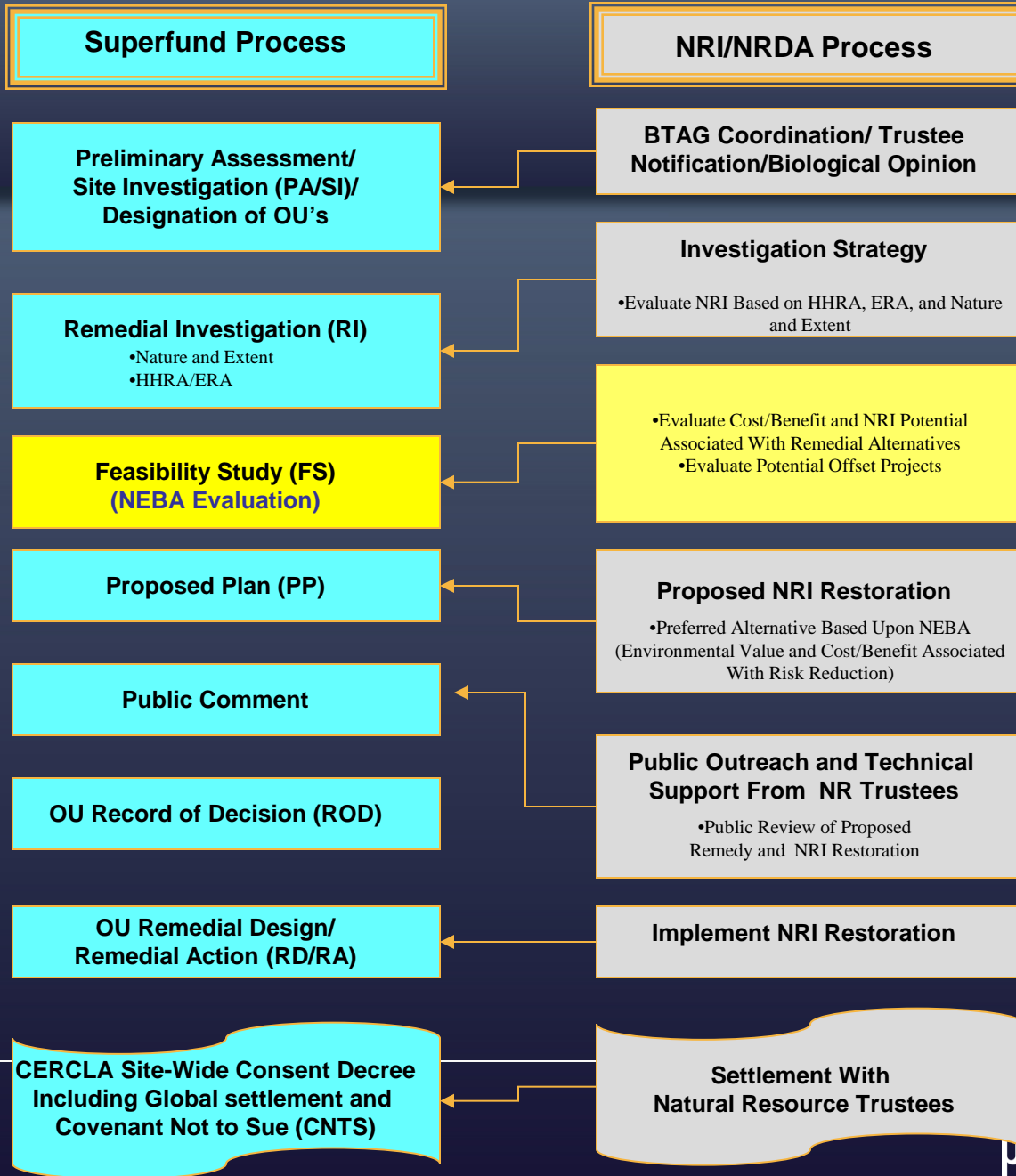
- CERCLA section 107(a)(4)(C):

“Damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release”

- OPA section 2702(b)(2)(A):

Responsible parties are liable for “[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee”

- Also the CWA 33 SC 1321(f)(4)



Using same metrics on both sides



Defenses (beyond issues of fact)

- Statutory Defenses under CERCLA and OPA/CWA : acts of God, acts of War, or acts or omissions by third parties (outside contractual relationship)
- Challenges to status as potentially responsible party
- Standing (only trustees can assert)
- Time bar: pre-1980 releases under CERCLA; also limits under OPA section 2717(e) and 2751(d) (date – August 1990)



Defenses (cont'd)

- Statute of limitations: 3 years after date of discovery of the loss or within three years of completion of remedy (if NPL-listed site); OPA also three years
- Federally permitted releases: under CERCA, but only if in compliance with permit.
- Irretrievable commitment of resources: Under CERCLA, if identified in environmental impact statement (section 107(f)(1)).

General Defenses



- Unlike CERCLA, no bar against traditional equitable defenses (see CERCLA section 107(a)).
- Joint and several liability and apportionment
- Recovery limited to costs of restoring, replacing or acquiring equivalent natural resources, including loss of use and reasonable assessment costs. CERCLA 107(f)(1)
 - Equitable or legal?
 - Right to jury trial
- Rebuttable presumption (vs. administrative record review)



Questions?

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