

Pre-Assessment Screen Phase

OPA & CERCLA NRDA Process

Rick Dawson

DOI-ORDA

Function of a PAS

- Scopes/Screens prior to Assessment:
 - Jurisdictional conditions
 - Practical conditions
- Series of Questions determine if Trustees conduct an **Assessment**
- “Due Diligence” step?

CERCLA

Coordinatio

Pre-Assessment
Phase

Assessment Plan
Phase

Assessment Phase
- Injury Determination
- Injury Quantification
- Damages
Determination

Post
Assessment
Phase

NRDAR Activity

Pre-NRDA
Preparation

Release/Spill → Injury

Injury Assessment

Damage
Assessment

Settlement /
Litigation

→ Damages
Recovery

Resource
Restoration

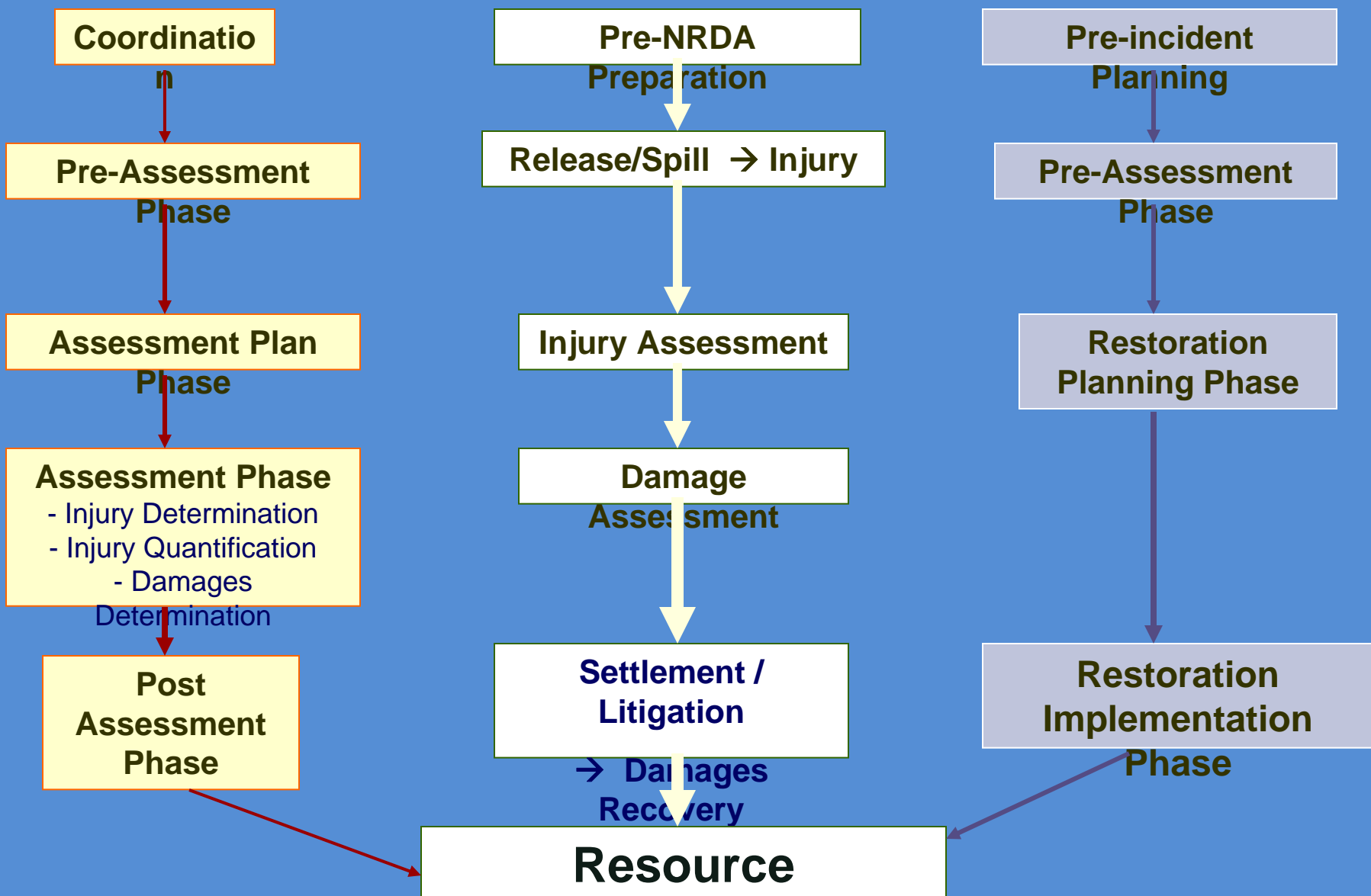
OPA

Pre-incident
Planning

Pre-Assessment
Phase

Restoration
Planning Phase

Restoration
Implementation
Phase



PAS: OPA vs. CERCLA

OPA PAS Questions

- An incident occurred under OPA
- Not an excluded release
 - permitted
 - from public vessel
 - from onshore facility subject to Trans-Alaska Pipeline Authority
- Response actions will not completely address all impacts to trust resources
- Natural resources under trusteeship have been or are likely to be affected

CERCLA PAS Questions

- A discharge of oil or a release of a hazardous substance has occurred.
- Natural resources for which the Federal or State agency or Indian tribe may assert trusteeship under CERCLA have been or are likely to have been adversely affected by the discharge or release?
- The quantity and concentration of the discharged oil or released hazardous substance is sufficient to potentially cause injury to natural resources under the trusteeship of the involved trustees?
- Data sufficient to pursue an assessment are readily available or likely to be obtained at reasonable cost?
- Response/remedial actions, if any, carried out or planned do not or will not sufficiently remedy the injury to natural resources without further action?

NOAA NRDA PROCESS (15 CFR 990)

PREASSESSMENT PHASE

Notice of Intent (NOI)

RESTORATION PLANNING PHASE

Develop Alternatives
Evaluate Alternatives
Develop Restoration Plan

RESTORATION IMPLEMENTATION PHASE

Administrative Record, Demand
NEPA Compliance, Establish Account
Implement Restoration Plan

Preassessment Phase

- Notification
- Trustee Coordination
- Determine jurisdiction
- Determination to conduct restoration planning
- Notice of intent to conduct restoration planning
- Ephemeral Data Collection
- Emergency restoration



Where to Get the Info

- POLREPs (Pollution Reports)
- via Incident Command System
- Agency FRC (Field Response Coordinator)
- Co-Trustees on scene
- Area contingency plans
- Field trip (SCAT data)

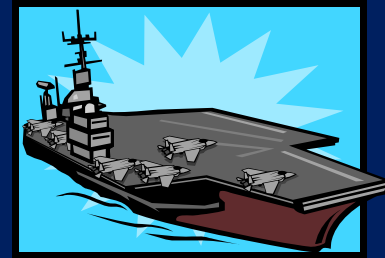
Jurisdiction?

- An incident occurred under OPA

incident = discharge or substantial threat of discharge of oil into navigable waters or onto adjoining shorelines

- Excluded Discharges:

- permitted
- from public vessel
- from onshore facility subject to Trans-Alaska Pipeline Authority



- Natural resources under trusteeship have been or are likely to be affected

Ephemeral Data Collection

- Applies to the physical or biological components of the environment that are either short lived or transitory
- Examples: dead & injured wildlife; water and sediment samples; micro and macro invertebrates, either mobile or sessile.

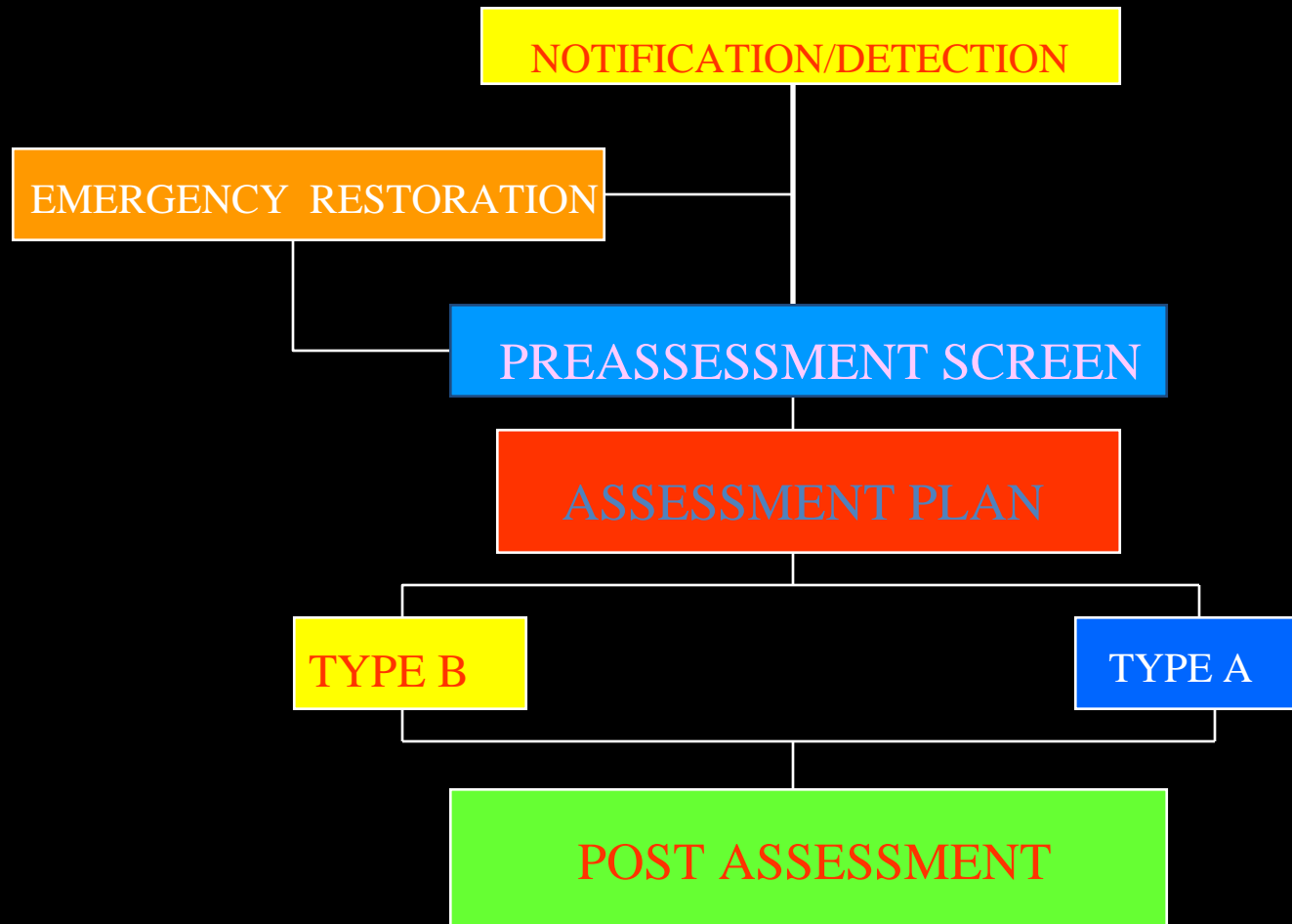
Emergency Restoration

- AFTER Coordination with FOSC
- Actions can be implemented to minimize on-going irreversible losses to natural resources that are affected and/or are threatened to be affected by the discharged oil.

OPA RULE Reasonable Assessment Costs

- *Reasonable assessment costs* means, assessment costs that are incurred by trustees in accordance with NOAA NRDA rules, the trustees may recover their assessment costs provided that they have determined that assessment actions undertaken were premised on the likelihood of injury and need for restoration;
- Reasonable assessment costs include:
 - administrative, legal, and enforcement costs necessary to conduct Emergency Restoration, produce a PAS/NOI & DARP;
 - monitoring and oversight costs;
 - costs associated with public participation.

DOI NRDA PROCESS (43 CFR Pt. 11)



Pre-Assessment Screen (PAS)

- Provides a rapid review of readily available information that focuses on resources for which the Federal or State agency or Indian tribe may assert trusteeship
- Ensures that there is a reasonable probability of making a successful claim before money and effort are expended in carrying out an assessment (see 43CFR11.23)

PAS Information Sources?

- RI Studies
- Internal Bureau Reports & Studies
- Scientific Literature

NCP: Coordination of OSC with Trustees for Data

- 40 CFR 300.145 (c)(3) at the request of the OSC, the SSC may facilitate the OSC's work with the lead administrative trustee for natural resources to ensure coordination between damage assessment data collection efforts and data collected in support of response operations.

Additional CERCLA PAS Criteria

- There likely are feasible assessment procedures, as described in this rule
- The releases could have affected natural resources under your trusteeship
- The potential effects on your resources are not clearly covered by any exemptions or defenses
- The Trustees can identify at least one party who is potentially responsible for the release, and who is not clearly covered by an exemption or defense.

CERCLA Exemptions/Defenses

- Natural resource injuries that were identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement supporting a permit or license. This defense does not apply to a tribal trustee when the decision to grant the permit or license was inconsistent with the fiduciary duty of the United States with respect to that tribe.
- Natural resource damages where the release and the damages occurred wholly before December 11, 1980. Under this provision, there is no liability under the Superfund law if resources have returned to baseline and interim losses ended before December 11, 1980.
- A release of a hazardous substance caused by an Act of God.

What the PAS Phase Includes

- Coordination with the Response Agencies
- Emergency Restoration (Ephemeral Data collection)
- Acquisition and analysis of information to complete PASD/PAS Findings
- Trustee Coordination
- Begin Administrative Record
- Draft NOI

Emergency Restoration

- Emergency Actions: NR Trustee determines reasonably necessary to exercise existing authority on-site response actions.
- Ephemeral data collection
- Data collection to preserve data to be used in the PAS

Preassessment Sampling Limitations

- Sample collections necessary to preserve perishable materials considered likely to have been affected by, and contain evidence of, the oil or hazardous substance (e.g. biological samples)
- Samples of other ephemeral conditions or material, such as surface water or soil containing or likely to contain oil or hazardous substance, where those samples may be necessary for identification and for measurement of concentrations
- Body counts (or visibly injured organisms)

PAS Reasonable & Necessary Costs

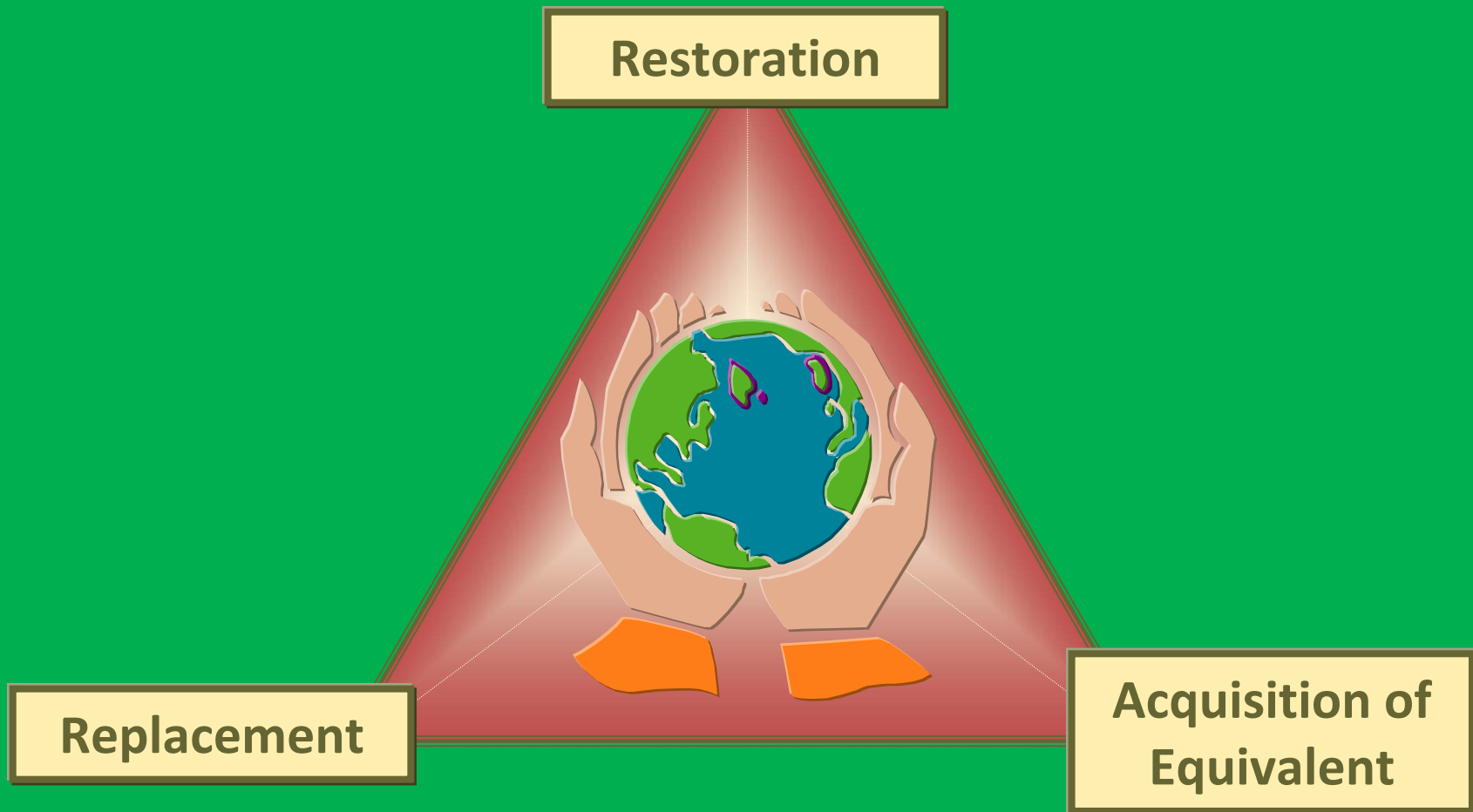
43CFR 11.23(g)

- Release detection and identification
- Trustee identification and notification
- Potentially injured resource identification
- Initial sampling, data collection, and evaluation
- Site characterization and preassessment
- Any other preassessment costs for activities authorized by DOI NRDA Regs (*§§ 11.20 -11.25*)

Contents of Notice of Intent

- Facts of the incident
- Trustee authority
- NR and services injured as a result of the incident
- Potential restoration action relevant to injuries
- Potential procedures to evaluate injuries or the type and scale of restoration
- Opens Administrative Record
- Invitation to RP to participate
- Public review/comment at Trustee discretion

Restoration Options Under CERCLA & OPA



Trustee Recoveries

- Assessment Costs
- Costs of Primary Restoration Actions
- Costs of Compensatory Restoration Actions



If you follow Either NRDA Process You get by Rule

- REBUTTABLE PRESUMPTION
 - Burden of Proof shifts to the RP
 - APA protection in litigation