Natural Resource Damage Claims:

Potential Liabilities and Mitigation Opportunities

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Overview

- Basis for NRD Claims
- NRDA and Restoration Process
- Damage Measures
- Restoration Approaches
- Potential DoD Impacts
- Mitigation Opportunities

NRDA Claims

- Primary Federal Statutes
  - CERCLA - DOI Rules
  - OPA - NOAA Rules
- State Claims
  - Federal Statutes
  - State Fish/Game Laws, Civil Codes
- International Claims
  - Federal Statutes - OPA
  - UN Compensation Commission

NRDA - Restoration Process

- Damage Assessment
  - Preassessment Phase
  - Assessment Planning Phase
  - Assessment Phase
  - Post Assessment Phase
- Restoration Implementation

Natural Resource Damage Measures

- Cost of restoration (primary damages)
- Compensable value of resource services lost from date of injury until restoration is complete

NRDA Restoration Includes:

- **Restoration -** involves direct attempts to return the resource to its baseline condition
- **Replacement -** provides a substitute for injured resources
- **Acquisition of the Equivalent -** provides for the purchase, trade, and other acquisition or protection of resources that are similar or related to injured resources

Restoration Planning Considerations

- Nature and extent of injuries/damages
- Baseline conditions
- Natural recovery rates
- Impacts of proposed cleanup efforts
- Potential restoration methods
- Guidance provided in the NRDA rules
- Stakeholder concerns

Potential DoD Impacts

- Training restrictions
- BRAC
- FUDS
- Problematic IRP sites
- Disposal activities
- International agreements

Mitigation Opportunities

- Take advantage of existing defenses
- Anticipate and prevent or minimize potential claims
- Take a proactive approach if claims are made

Existing Def

- Claimed damages were identified in an EIS or similar analysis as irreversible and irretrievable commitment of resources
- The decision to grant a permit or license authorized a commitment of resources
- The permitted facility operated within the terms of its permit or license

Anticipatory Management

- Assess vulnerabilities
  - Identify potential sites
  - Rank sites based on possible damages
  - Take preventive measures
- Establish and/or preserve baseline data
- Identify potential replacement or acquisition opportunities

Proactive Measures

- Act while DoD has trustee standing
- Seek cooperative or negotiated settlements
- Use habitat equivalency analysis methods to address damage compensation
- Improve restoration planning and implementation

Enhancing Restoration

- Improve the decision making process
- Expedite restoration implementation
  - Integrate restoration with remediation
  - Consider early stakeholder participation
- Consider innovative alternatives that are cost-effective

Decision Analysis Methods to Support Restoration Planning

- A structured modeling approach that is used to provide insight for complex decisions
- Helps integrate different factors and/or explicitly consider uncertainty
- Enables planners to explore future scenarios and identify key information needs
- Expedites restoration decisions and documents the project selection process

Exxon Valdez Oil Spill: Avoiding Additional Injury

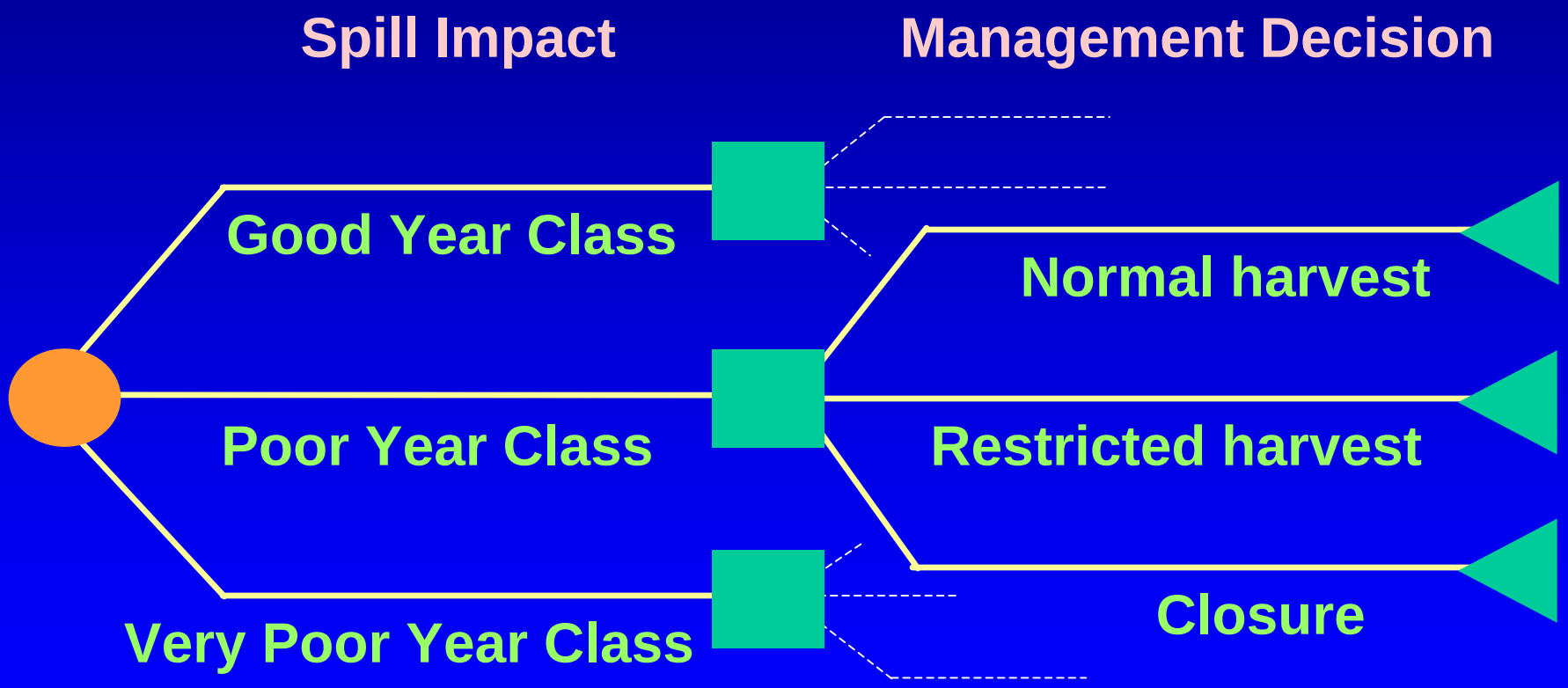
Decision - How to **a**djust fishing pressure to minimize further injury to returning salmon?

Issue - Protective closure approach was risky since this was a culture-based fishery

Method - Decision Tree used to assess the expected value of additional information about returns

Results - Justified real-time monitoring of returns that enabled adaptive management of harvest to reduce the potential for additional injury

Fishery Management Strategy: Simplif



Maitland/Elpis Grounding: Expedite Restoration

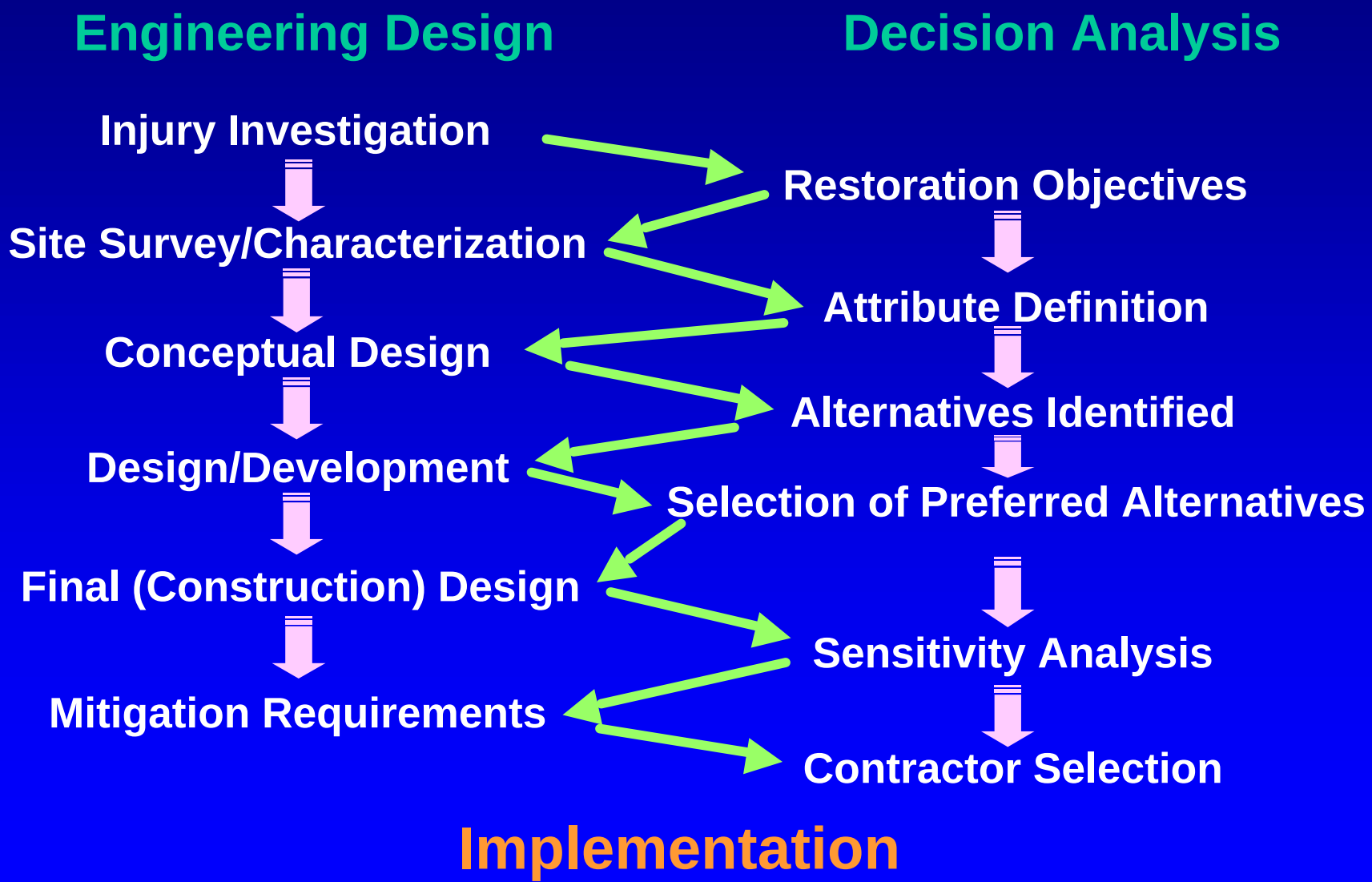
Decision - How to select the best engineering methods to structurally repair coral reefs?

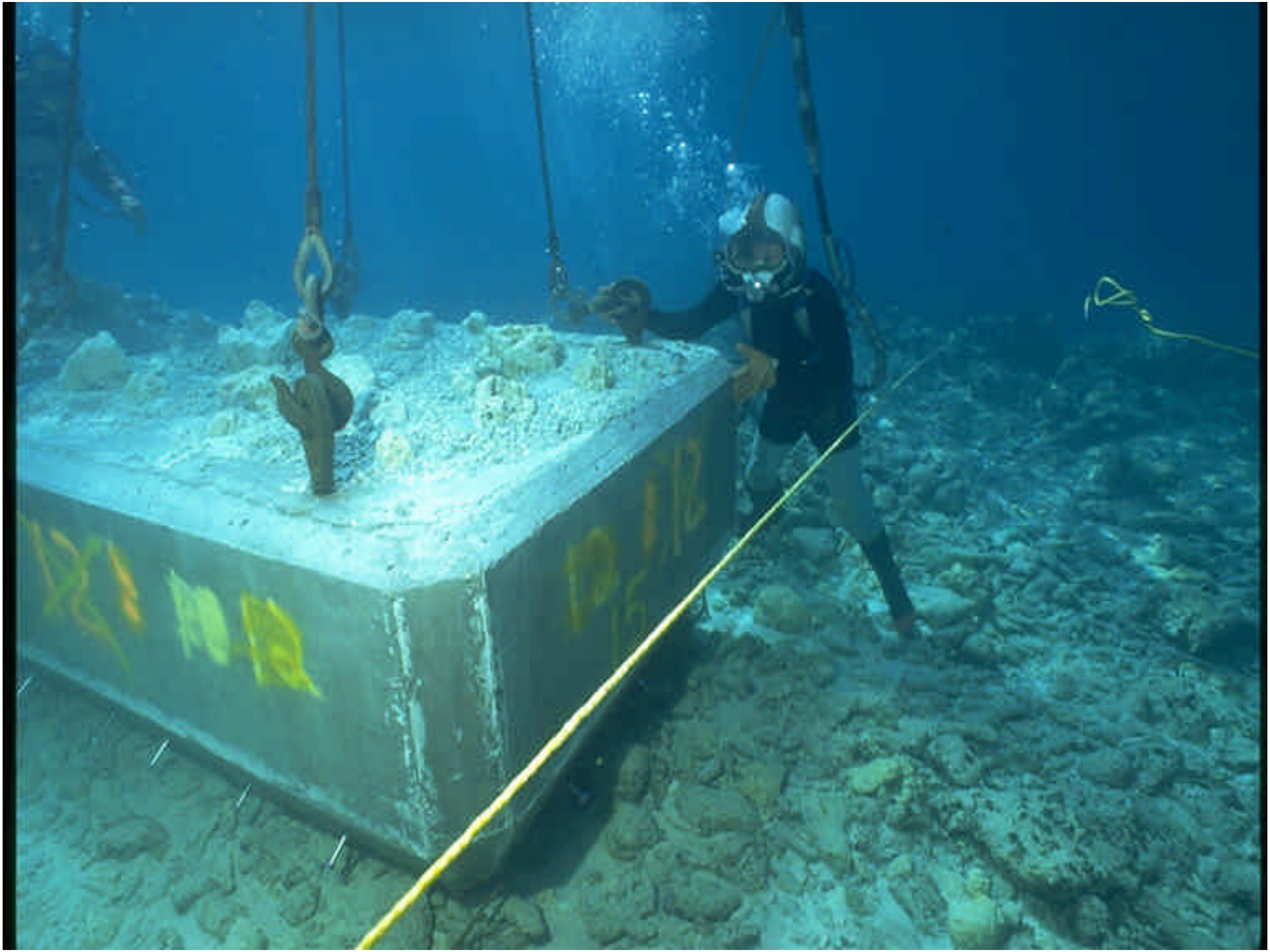
Issue - Urgent need to implement restoration; controversy over NOAA sanctuary policy

Method - Group multicriteria methods used to link trustee planning to design process

Results - New methods quickly selected, tiered NEPA documents to DA, and use of "Best Value" contracting for implementation

Linking Planning and Design





Cantara Loop Toxic Spill: Restoration Project Selection

Decision - How to select an annual portfolio of restoration projects over a 5 year period?

Issue - Consistent and defensible approach needed due to active intervention by stakeholders

Method - Group multicriteria decision analysis based on criteria in charter documents; turnkey software used by expert peer review panel

Results - Provided defensible framework for soliciting & evaluating proposals

Relationship Between Panel Evaluation and Council Decisions

Tier Assigned by Panel	% Funded by Trustees	% Consistency
I	94	88
II	33	83
III	3	98

Evaluating Options f Participation in Restoration Planning

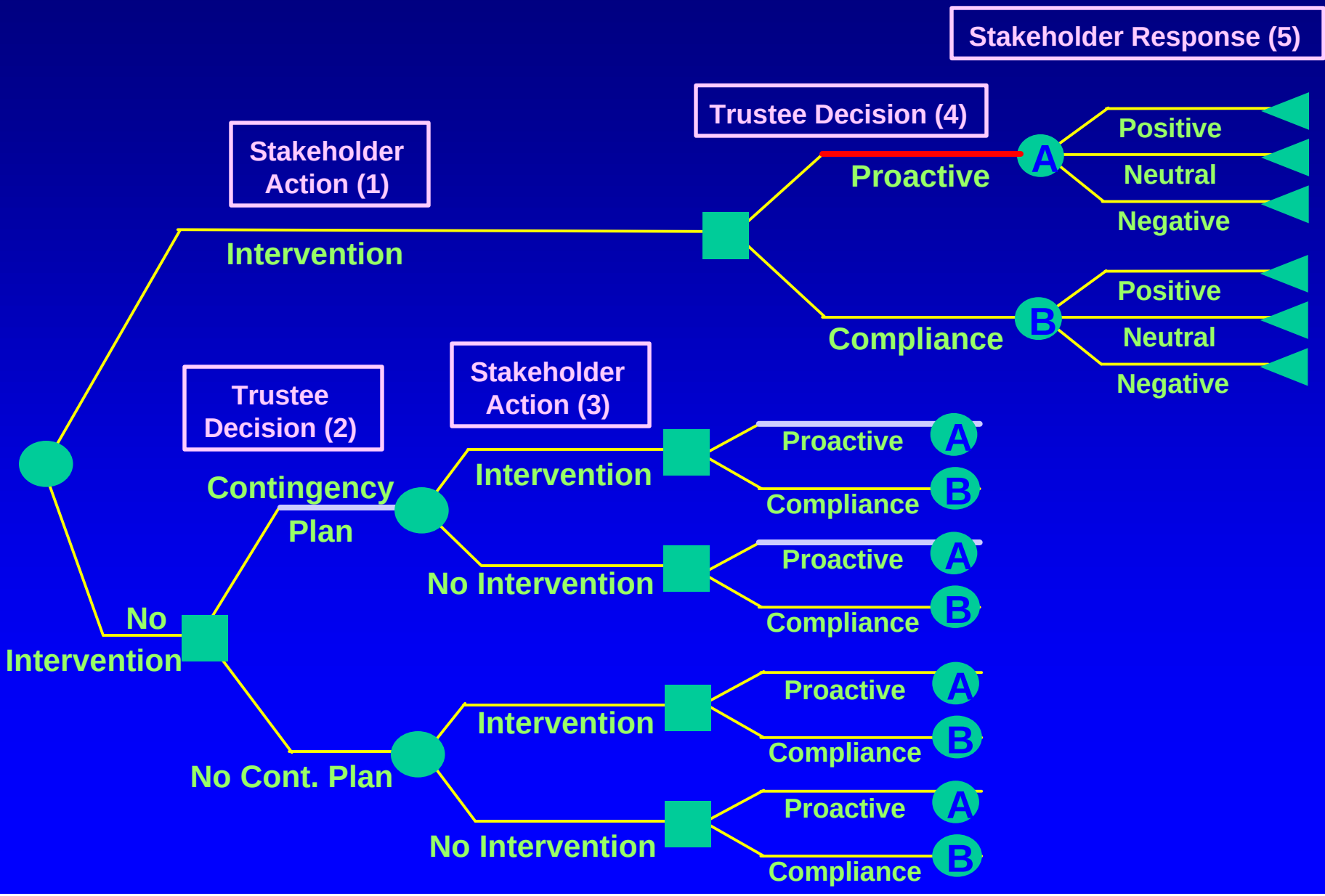
Decision - How and when to involve stakeholders in the restoration planning process?

Issue - Diverse stakeholders, potential for adverse impacts due to stakeholder intervention

Method - Retrospective analysis used to create decision tree to explore site-specific costs of alternative participation scenarios

Results - Suggested the expected value of a more proactive stakeholder participation

Stakeholder Participation Decision



Current Trends
NRDA Practice

- State claims
- Cooperative agreements
- Restoration cost as the prime measure of damage (Habitat Equivalency Analysis)
- Closer linkage between injury and proposed restoration,
- More proactive stakeholder participation

Conclusions

- DoD is vulnerable to NRD Claims
- Impacts on training and operations
- Anticipatory management can help avoid claims or reduce their scope
- Proactive approaches can reduce costs and promote a positive image