

## Recommendations

Should a private party be faced with addressing contamination released by another party, and is considering a cost recovery action under CERCLA or HSAA, the following suggestions are made:

1. Retain legal counsel familiar with CERCLA/HSAA cost recovery actions;
2. Retain a consultant (and testifying expert) familiar with the contaminants of concern (COCs) and CERCLA/HSAA process;
3. Document all actions thoroughly, especially through scoping plans, work plans and associated materials;
4. Develop quality assurance/quality control (QA/QC) and standard operating procedures (SOPs), and audit actions to ensure compliance;
5. Implement appropriate health and safety (H&S) measures;
6. Develop a stakeholder participation process (SPP) with defined milestones when stakeholder and public involvement are solicited;
7. Engage with various stakeholders, especially regulators, at various times, but particularly during the preparation of the FS;
8. Ensure that the CERCLA process and litigation strategy are aligned;
9. Identify RPs and, even though joint and several liability applies under CERCLA, evaluate where and when releases occurred, if possible;
10. Develop other legal causes of action that support cost recovery and damages (e.g. common causes of action, Polanco);
11. Be prepared to collect your own data to support your position, even if you are only pursuing injunctive or declaratory relief; and
12. Build relationships with other stakeholders (e.g. regulators, elected officials, media) to help you drive the project to your desired outcome (i.e. do not rely on a legal strategy alone).



# Private Party CERCLA/HSAA Cost Recovery

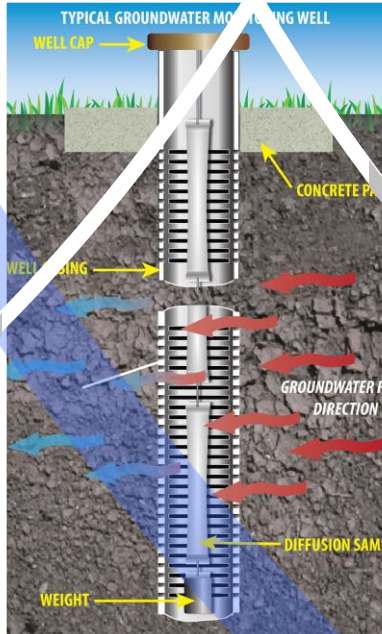
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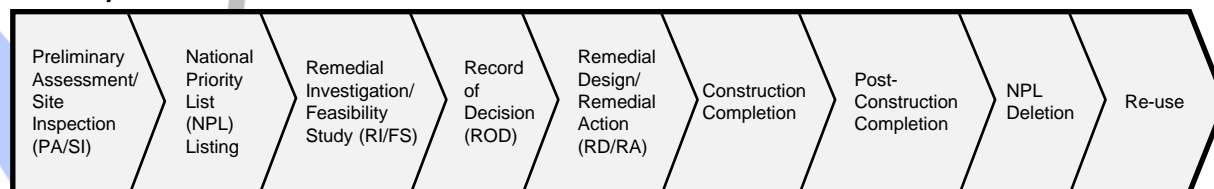
# Private Party CERCLA/HSAA Cost Recovery

Private parties, such as land owners, Cities or water utilities, often have to address contamination they did not release. Such a party can implement the clean-up and seek cost recovery, seek relief from the court requiring that the responsible parties (RPs) implement clean-up (injunctive relief), or seek damages from the RPs for the private party to subsequently implement the clean-up themselves (declaratory relief).

Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or State Hazardous Substances Account Act (HSAA) cost recovery actions are often used because of the strict, retroactive, and joint and several liability provisions within the statute. However, private parties must be aware of what is required to ensure compliance with CERCLA/HSAA and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) when initiating such cost recovery actions.

This brochure provides some rudimentary information to assist private parties in implementing CERCLA/HSAA clean-ups and/or cost recovery actions, and is not intended to offer legal advice or conclusions. Parties should seek legal counsel when considering whether to implement such cost recovery actions.

## CERCLA/HSAA Process



The figure above presents the basic steps involved in CERCLA/HSAA clean-ups. One additional step that is often implemented as part of a CERCLA/HSAA clean-up is "interim remedial action". At many clean-ups, especially those with multiple source sites, numerous RPs, and/or extensive groundwater contamination, the RI/FS process can take many years (in fact decades) to complete. Interim remedial action plans (iRAPs) are implemented during the overall RI/FS process to more expeditiously address known areas of contamination. In many cases, the interim remedy is eventually selected as the final remedy in the ROD. The flowchart at right provides a more detailed outline of the RI/FS/iRAP process.

## Private Party Actions

A party wishing to recover under CERCLA must establish that: (1) the property is a "facility" as defined in CERCLA; (2) a "release" or "threatened release" of a "hazardous substance" occurred; (3) the "release" or "threatened release" was the cause of response costs that were "necessary" and "consistent" with the NCP; and (4) the party is seeking to recover from one of the four named classes of potentially liable parties.

Under CERCLA, a private party is eligible for cost recovery only if it is able to prove the remedial actions were consistent with the NCP. A private party remedial action is consistent with the NCP if the action, when evaluated as a whole, is in substantial compliance with, and results in, a CERCLA-quality cleanup. Among other requirements, the NCP requires that the party seeking cost recovery provide an opportunity for public comment and participation, evaluate the health and environmental threat, conduct a RI, prepare a FS (that considers different treatment technologies, identifies all applicable or relevant and appropriate requirements [ARARs], and includes a cost analysis), and document all actions taken and that form the basis for the cost recovery. Substantial compliance with the NCP is generally considered to be an element of a *prima facie* case under CERCLA. The vast majority of courts which have addressed the issue have held that seeking public involvement in the clean-up process is essential to establishing NCP compliance.

\*\*Continued overleaf\*\*

