

November 2013

Private Party CERCLA Cost Recovery

Private parties, such as land owners, Cities or water utilities, are often faced with having to address contamination they did not release. Such a party can implement the clean-up and seek cost recovery. Alternatively, they can 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). Under either approach, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 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 and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) when initiating such cost recovery actions.

This paper provides some rudimentary information to assist private parties in implementing CERCLA clean-ups and/or cost recovery actions. The paper provides a layman's perspective on private cost recovery action under CERCLA, 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

The NCP defines the organizational structure and procedures for responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants in the United States (US). The NCP was developed by the US Environmental Protection Agency (US EPA) in response to the enactment of CERCLA on December 11, 1980 (42 U.S.C. §§ 9601-9675), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), and by Section 311(d) of the Clean Water Act (CWA).

CERCLA created a tax on the chemical and petroleum industries (the Superfund) and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. CERCLA: (1) established requirements concerning closed and abandoned hazardous waste sites; (2) provided for liability of persons responsible for releases of hazardous waste at these sites; and (3) established a trust fund to provide for clean-up when no RP could be identified. The law authorizes the following two kinds of response actions:

- Short-term removals, where prompt actions are needed to address releases or threatened releases; and
- Long-term remedial actions, that permanently and significantly reduce the dangers from releases of hazardous substances that are serious, but not immediately life threatening.

The NCP established more stringent requirements for “remedial” versus “removal” actions.

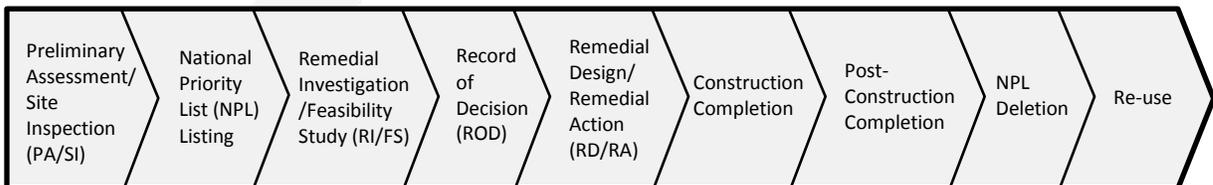
The California Hazardous Substances Account Act (HSAA)

The Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) (Health & Safety (H&S) Code, §§ 25300-25395.40)[3] is often referred to as California’s Superfund statute and the State’s counterpart to CERCLA. As such, only costs incurred for response actions taken under, and consistent with, CERCLA or HSAA qualify for reimbursement under HSAA. In short, the HSAA provides a comprehensive and detailed program to ensure the timely and cost-effective clean up of hazardous substance release sites. It established authority, procedures, and standards to:

- Carry out the investigation, removal and remediation of contaminated sites;
- Issue and enforce a removal or remedial action order to any RP;
- Impose administrative or civil penalties for noncompliance of an order;
- Recover costs and expenses incurred by the California Department of Toxic Substances Control (DTSC) in carrying out the HSAA;
- Determine by binding arbitration the apportionment of liability of a RP;
- Seek contribution from other RPs; and
- Apply for compensation of loss caused by the release of a hazardous substance.

The CERCLA (or Superfund) Process

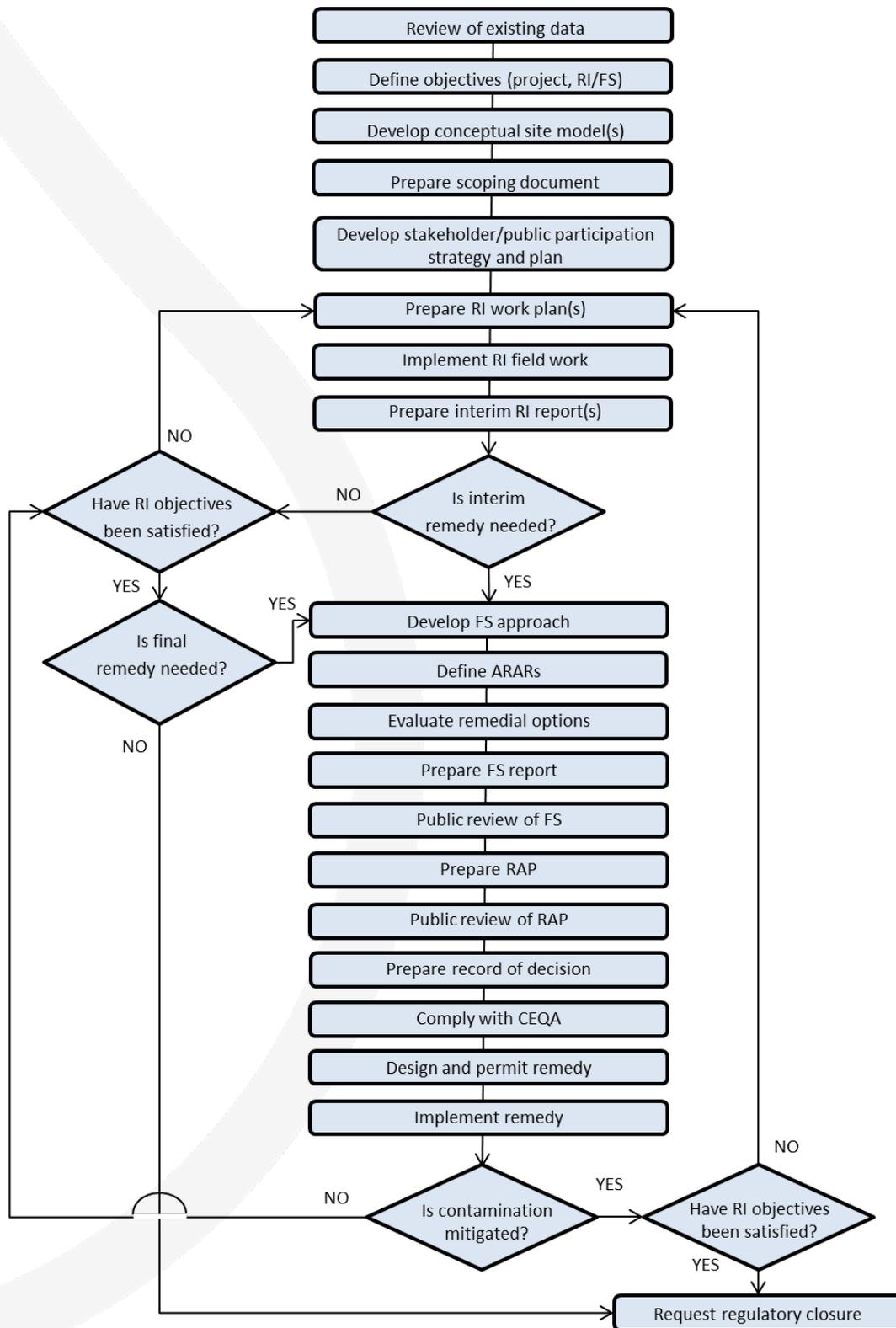
There are several steps involved in cleaning up a release site under CERCLA. The Superfund clean-up process begins with site discovery or notification to US EPA of possible releases of hazardous substances. Sites are discovered by various parties, including citizens, State agencies, and US EPA Regional offices. US EPA, a designated State agency, or private party then implements the process below. Stakeholder involvement, regulatory enforcement actions, and emergency response can occur at various times during the process.



1. PA/SI: Investigations of site conditions. If the release of hazardous substances requires immediate or short-term response actions, these are addressed under the Emergency Response Program of Superfund.
2. NPL Listing: A list of the most serious sites identified for long-term clean-up. A site need not be listed on the NPL for a CERCLA clean-up (and cost recovery) process to be implemented.
3. RI/FS: Determines the nature and extent of contamination. Assesses the treatability of site contamination, and evaluates the potential performance and cost of treatment technologies. Can include scoping, site characterization, development and screening of alternatives, treatability investigations, and detailed analysis of alternatives.
4. ROD: Explains which clean-up alternatives will be used at NPL sites. When federally-funded remedies exceed \$25 million, they are reviewed by the National Remedy Review Board.
5. RD/RA: Preparation and implementation of plans and specifications for applying site remedies. The bulk of the clean-up usually occurs during this phase. All new fund-financed remedies are reviewed by the National Priorities Panel.
6. Construction completion: Identifies completion of physical clean-up construction, although this does not necessarily indicate whether final clean-up levels have been achieved.
7. Post-construction completion: Ensures that Superfund response actions provide for the long-term protection of human health and the environment. Included here are Long-Term Response Actions (LTRA), Operation and Maintenance (O&M), Institutional Controls, Five-Year Reviews, Remedy optimization.
8. NPL Deletion: Removes a site from the NPL once all response actions are complete and all clean-up goals have been achieved.
9. Re-use: Information on how the Superfund program is working with communities and other partners to return hazardous waste sites to safe and productive use without adversely affecting the remedy.

One additional step that is often implemented as part of a CERCLA clean-up is “interim remedial action”. At many CERCLA clean-ups, especially those with multiple source sites, numerous responsible parties, 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 general, they are implemented to address ongoing sources of groundwater contamination (i.e. source removal), control the continued migration of contamination (i.e. plume control), and/or initiate resource restoration. As part of the iRAP process, interim RI/FS documents may be prepared to support the selection of an interim remedy. In many cases, the interim remedy (or an expansion to the interim remedy) is eventually selected as the final remedy in the ROD. A flowchart that details one approach to the RI/FS process that incorporates interim remedies is provided as Figure 1.

Figure 1: RI/FS/iRAP Process





Stakeholder Participation

Stakeholder participation (often referred to as community involvement) is the process of engaging in dialogue and collaboration with project stakeholders and community members. The goal of stakeholder participation is to advocate and strengthen meaningful participation during CERCLA clean-ups. As such, stakeholder participation strives to encourage and enable project stakeholder and community members to get involved, and keeps the community informed of ongoing and planned activities.

Consistency with NCP

Under CERCLA, cost recovery can only occur if the remedial actions were consistent with the NCP. The NCP specifies the steps a party must undertake in selecting a remedy and cleaning up hazardous waste. A remedy is consistent with the NCP if the action, when evaluated as a whole, is in substantial compliance with, and results in, a CERCLA-quality clean-up.

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 remedial investigation, prepare a feasibility study (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. Some courts have found that “comprehensive input” by State and local regulators fulfilled the public participation requirement of the NCP. However, 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.

Private Party CERCLA Actions

Under CERCLA, private parties may recover clean-up costs from hazardous waste clean-up actions from RPs. A party wishing to recover under this provision in CERCLA must establish that:

1. A released substance is considered hazardous;
2. A release occurred at a facility;
3. The release or threatened release caused the Plaintiffs to incur necessary response costs consistent with the NCP; and
4. Defendants are within one of four classes of persons subject to CERCLA's liability provisions.

Has a release of a hazardous material occurred?

Under CERCLA, a "hazardous waste" is a waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may:

- Cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; and/or
- Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Typically, in groundwater related matters, the concentrations detected of a chemical present in groundwater, soil, or soil vapor are often compared to various State or Federal regulatory concentrations. However, new, emerging, environmental contaminants are being identified at a pace far greater than the establishment of regulatory standards for these chemicals. To pursue a CERCLA or HSAA cost recovery action related to these “emerging” contaminants will require additional efforts to demonstrate that these chemicals are hazardous at the concentrations observed.

Did a release occur at a facility?

In order to establish that a contaminated site is a “facility” within the meaning of CERCLA, parties initiating actions must provide evidence that it is a “site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located”.

In order to establish that a “release” of a contaminant occurred at a “facility”, parties initiating action must provide evidence that a hazardous substance had spilled, leaked, pumped, poured, emitted, emptied, discharged, injected or disposed into the environment, or that it escaped or leached into the environment.

Were response costs incurred due to releases at other sites?

As an element of a *prima facie* case, parties initiating a CERCLA based cost recovery claim must provide sufficient evidence to establish that a release or threatened release from a “facility” caused them to incur response costs.

CERCLA itself does not define the term “response cost”. However, response has been defined to mean “*remove, removal, remedy, and remedial action*” and all “*enforcement activities related thereto*”. The differing response actions (removal and remedial) are further described below:

1. Removal actions are those actions that may be taken to address releases or threatened releases requiring a prompt response, such as when contaminated surface soils or abandoned drums pose a risk to human health or the environment. Removal actions are categorized as emergency, time-critical, or non-time critical, and may be taken with respect to any hazardous substances, pollutants or contaminants. Cost recovery in regards to a removal action must be commenced within three years after completion of the removal action.

2. Remedial actions are those actions that permanently and significantly reduce the risks associated with releases, or threatened releases, of hazardous substances that are serious but not so critical as to require a removal action response. Remedial actions include the long-term prevention of the migration of pollutants and neutralizing toxic substances. Cost recovery in regards to a remedial action must be started within six years after initiation of the physical on-site construction of the remedial action. If the remedial action is initiated within three years after completion of the removal action, the costs incurred in the removal action may also be recovered in the remedial cost recovery action.

Were the response costs the result of a CERCLA party?

Under CERCLA, the following four classes of RPs, or potentially responsible parties (PRPs), may be found liable for contamination at a “facility”:

1. The current owner or operator of a facility;
2. The owner or operator of a facility at the time that disposal of a hazardous substance occurred;
3. A person who arranged for the disposal of a hazardous substance at a facility owned or operated by another person; and/or
4. A person who transported a hazardous substance to a facility which the transporter selected for the disposal of the hazardous substances.

In preparing a CERCLA cost recovery action, it must be demonstrated that the person to whom the claim is being made, is one of the defined parties under CERCLA.

Causation

Once the four criteria for establishing a CERCLA cost recovery action have been met, the underlying causation necessitating the cost recovery action must be defined. As an example, a claim is made that contaminants released at one location — the facility — has migrated to reach a different location, such as drinking water wells. The issue of causation is often a difficult one and in groundwater contamination and typically necessitates the use of “experts” in the fields of hydrogeology and contaminant transport, among others.

Contrary to the rule followed in most areas of the law, the burden of proof as to causation in a CERCLA case lies with the defendant. The plaintiff must prove only that contaminants which were once in the custody of the defendant could have travelled onto the plaintiff's property, and that subsequently, contaminants (chemically similar to the contaminants once existing in defendant's custody) on the plaintiff's land caused the plaintiff to incur clean-up costs. The plaintiff need not produce any evidence that the contaminants did flow onto its land from the defendant's land. Rather, once plaintiff has proven a prima facie case, the burden of proof falls on the defendant to disprove causation.

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 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 strict, retroactive, and 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).

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