

Water Quality Assurance Revolving Fund (WQARF) Liability

What Property Owners, Prospective Buyers
and Lenders Need to Know

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Water Quality Assurance Revolving Fund

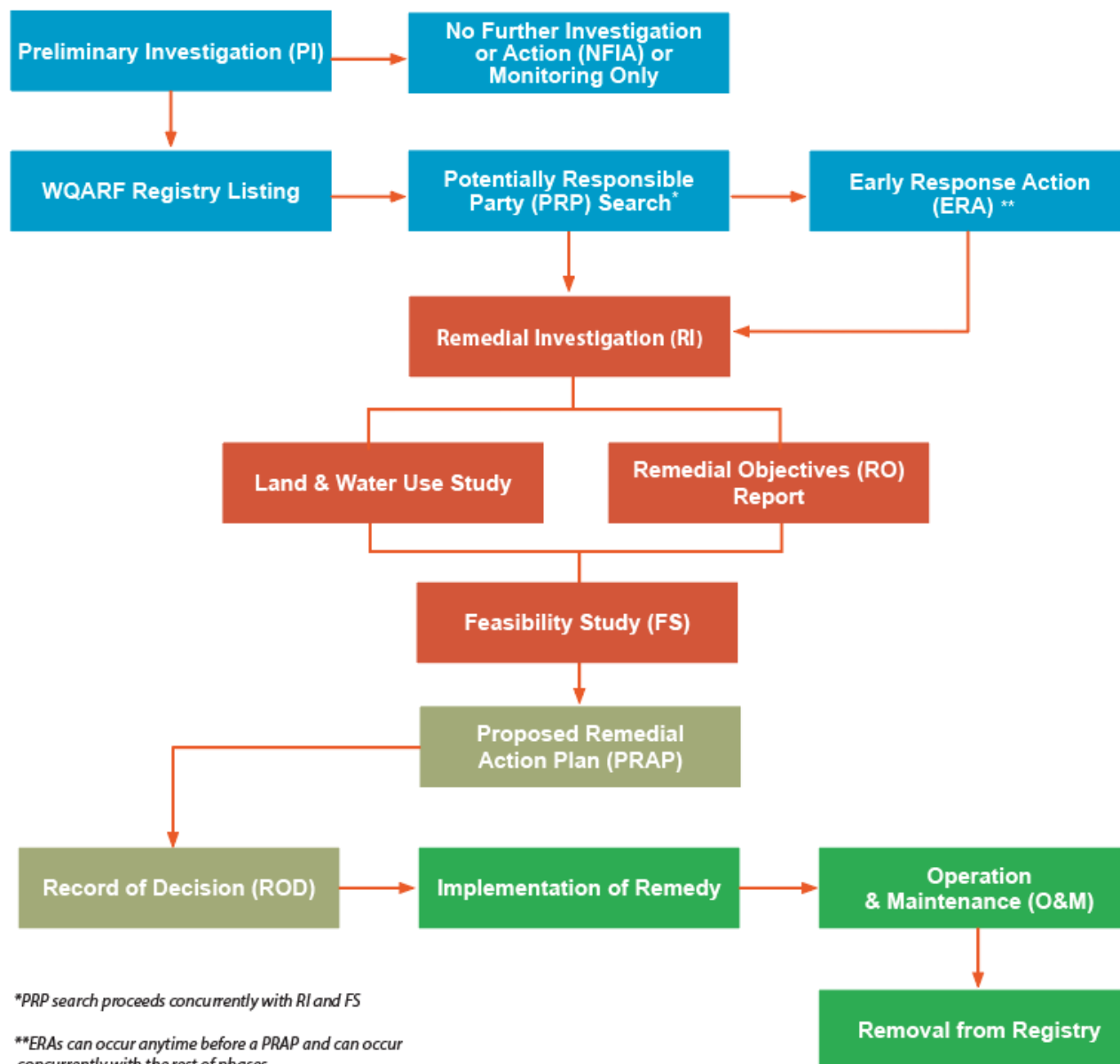
WQARF

What is WQARF & How does it relate to CERCLA?

- A state program established in 1986 and revised in 1997 loosely patterned after the Federal Superfund program.
- Established to safeguard public health, protect Arizona's unique environment and restore natural resources through investigation, management and remediation of soil and groundwater contaminated with hazardous substances.

- **Major differences between WQARF and CERCLA:**
 - Proportional liability scheme rather than joint and several
 - Provides settlement discount of 25% on allocated share of liability
 - Remedial Objectives are defined in terms of resource use
 - Expanded Community Involvement process
 - Innocent property owner's liability
 - Bears the burden of determining liability

WQARF PHASES



■ **Four Classes of WQARF Liability:**

- Owners
- Operators
- Arrangers
- Transporters



■ **Arizona Revised Statutes (A.R.S.) 49-283(A)(1)**

– Owned or operated the facility:

- When the hazardous substance was located in or on the facility
- When the hazardous substance was located in or on the facility but before the release
- During the time of the release or threatened release

- A.R.S. 49-283(E), a person is not a responsible party if:
 - A hazardous substance from another property migrated onto or beneath your property.
 - You cannot have owned or occupied the property that it migrated from and;
 - You cannot be a responsible party of that property



- **Arizona Revised Statutes (A.R.S.) 49-283(A)(2)**
 - Owned or possessed the hazardous substance and arranged, by contract, agreement or otherwise, for the disposal, treatment or transport for disposal or treatment of the hazardous substance
 - Accepted for transport to the disposal or treatment facility waste that contained a hazardous substance and either selected the facility to which it was transported or disposed of it in a manner contrary to law
- Under Arizona Law, the buyer of a property must have caused or contributed to the release to be liable for the contamination

- Under A.R.S. 49-283(H), a person who maintained indicia of ownership in a property primarily to protect a security interest in a facility and who does not participate in the management of the facility is not liable as an owner or operator of that facility



- A.R.S 49-283(H) does not apply to a person who does any of the following:
 - Through intentional misconduct or gross negligence causes, contributes to or aggravates the release of a hazardous substance
 - Fails to disclose to the facility's purchaser the known presence of a release or a threatened release of a hazardous substance at the time of sale or divestiture of the facility or the security interest in the facility
 - Fails to obtain a phase I environmental assessment of the facility, at the time of, or at a reasonable time before foreclosure
 - Does not apply to residential properties with fewer than five residential units

- A.R.S 49-283(H) does not apply to a person who does any of the following:
 - Fails to do any of the following after acquiring ownership of the facility:
 - Provide the department reasonable access so that the necessary remedial actions may be conducted
 - Undertake reasonable steps to control access to the area of known presence of a release of a hazardous substance to protect the public health and welfare and the environment.
 - Act diligently to sell or otherwise divest the property within two years of the lenders possession or ownership, whichever is earlier.

- Under A.R.S 49-283(I) a fiduciary is not personally liable as an owner or operator
- “Fiduciary” means:
 - A trust company or bank certified or authorized to engage in the trust business pursuant to A.R.S Title 6, Chapter 8, Article 1
 - Any person appointed by a court or testamentary act to act as personal representative, executor, trustee, administrator, guardian, conservator, receiver or trustee in bankruptcy
 - Any person acting as a trustee of a deed of trust pursuant to A.R.S. Title 33, Chapter 6.1, Section 33-803
 - Any person acting as a trustee pursuant to A.R.S. Title 14, Chapter 7

- A.R.S. 49-283 (I) does not apply if either of the following apply:
 - A fiduciary through intentional misconduct or gross negligence causes, aggravates or contributes to the release or threatened release of hazardous substances or permits others to do so
 - The appointment of the fiduciary is for the purpose of avoiding liability under this article

- Pursuant to A.R.S 49-285.01 ADEQ may enter into a Prospective Purchaser Agreement (PPA) that provides a written release and covenant not to sue for potential owner liability to the State for the existing contamination at the property if certain conditions are met

- To be eligible for a PPA, the following conditions must be met:
 - Property is within a WQARF registry site or ADEQ has sufficient information to determine the extent of the contamination
 - The purchaser did not cause or contribute to the contamination and is not affiliated with any person who may be responsible for the contamination
 - The purchaser's use or development of the property will not exacerbate the contamination or interfere with ongoing remedial actions
 - The purchaser completes and submits an application to ADEQ before the sale of the property closes, and
 - The purchaser provides a substantial public benefit, which must be more than the mere continuation of a business on the property

- A substantial public benefit may include:
 - Funding or other resources to perform or facilitate remedial measures at the property
 - Productive reuse of a vacant or abandoned industrial or commercial property
 - Development of property by a governmental entity or nonprofit organization to address an important public purpose
 - Creation of conservation or recreation areas
 - Other substantial public benefits that meets ADEQ overall mission

- ADEQ Website Homepage: <https://azdeq.gov/>
- Liability and Real Estate Issues | WQARF Program
<https://azdeq.gov/node/4633>
- Prospective Purchaser Agreements:
<https://azdeq.gov/node/4174>
- CERCLA Liability
<https://www.epa.gov/enforcement/superfund-liability>

A scenic photograph of a desert landscape. In the foreground, there are green cacti with small red flowers. A river flows through the middle ground, surrounded by rocky banks and more vegetation. The background shows a hilly, arid landscape under a clear sky.

Questions?

A solid yellow vertical bar is positioned to the left of the contact information.

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