

# Potential Process for Recovering Environmental Response Costs From the U.S. Government

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# Introduction



## Introduction

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- The goal of a “War Claim Project” is to pursue environmental cost recovery from the U.S. Government for its contribution to contamination.
- In past cases the U.S. Government has expressed a willingness to pay its fair share of environmental response costs through negotiated settlement...but sometimes litigation is necessary.
- There are a variety of avenues to recovery including but not limited to: CERCLA, RCRA, contractual theories, etc.
- The State Taxpayer vs. the Federal Tax Payer – Federal Government attorneys (U.S. Department of Justice, Federal Agency Counsel, etc.) defending federal claims have the federal taxpayer’s interest in mind; but what about State taxpayers?
- Negotiate or litigate: that is the question.

# Types of Information Needed to Develop a Federal Claim



# Sample Federal Claims Case Approach



# Sample Government Involvement Case Approach

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## ■ Conduct a Phase 1 Assessment

- Conduct research and gather facts and documents that provide the historical bases for claim
- Evaluate potential Federal liability under multiple theories [e.g., CERCLA – owner, operator, arranger; contracts, etc.]
- Conduct a preliminary Federal nexus evaluation
- Determine past cost expenditures and future cost estimates for target sites with a nexus to the Federal Government
- Develop preliminary allocation of costs (share of responsibility) to Federal Government
- Conduct a preliminary assessment of critical case elements
- Perform a preliminary cost benefit analysis



# Sample Government Involvement Case Approach

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## ■ Examples of Questions Relating to Critical Case Elements

### ■ U.S. Government liability

- Is U.S. Government liable?
- For what?
- For how long?
- Under what legal theories?

### ■ Historical fact bases and strength of evidence

- Do the facts uncovered support a finding of Federal liability?
- How strong is the evidence?
- What additional evidentiary support is needed?

### ■ U.S. Government's nexus to the contamination being addressed

- Is the U.S. Government really connected to the contamination?
- Did their involvement contribute to contamination for which response costs have been or will be incurred?





# Sample Government Involvement Case Approach

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## ■ Critical Case Elements Assessment (cont'd)

### ■ Reasonableness and supportability of costs

- Have response costs for investigation and cleanup areas/units with a nexus to the U.S. Government been incurred?
- Can costs be pulled from accounting systems to document damages?
- Does sufficient documentation exist to support past costs damages?
- Have non-recoverable costs been excluded from the total damages?

### ■ National Contingency Plan (NCP) consistency

- Were response actions taken to address the release or threatened release of hazardous substances?
- Is there a presumption of compliance with the NCP for the cleanup?
- Was the public involved in the investigations and cleanup process?
- Can substantial compliance with the NCP be documented?



# Sample Government Involvement Case Approach

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## ■ Critical Case Elements Assessment (cont'd)

### ■ Legal issues analysis

- Are there statute of limitations consideration?
- Are there any contractual indemnity issues to be considered?
- Will established or evolving case law be an impediment to reaching a settlement?

### ■ Other considerations

- Does management support the effort?
- Can the organization support the effort?
- What are the organization's settlement and litigation positions and risks?
- What is the likelihood of success and how is it defined?
- Is the return on investment, budget and timeline acceptable?



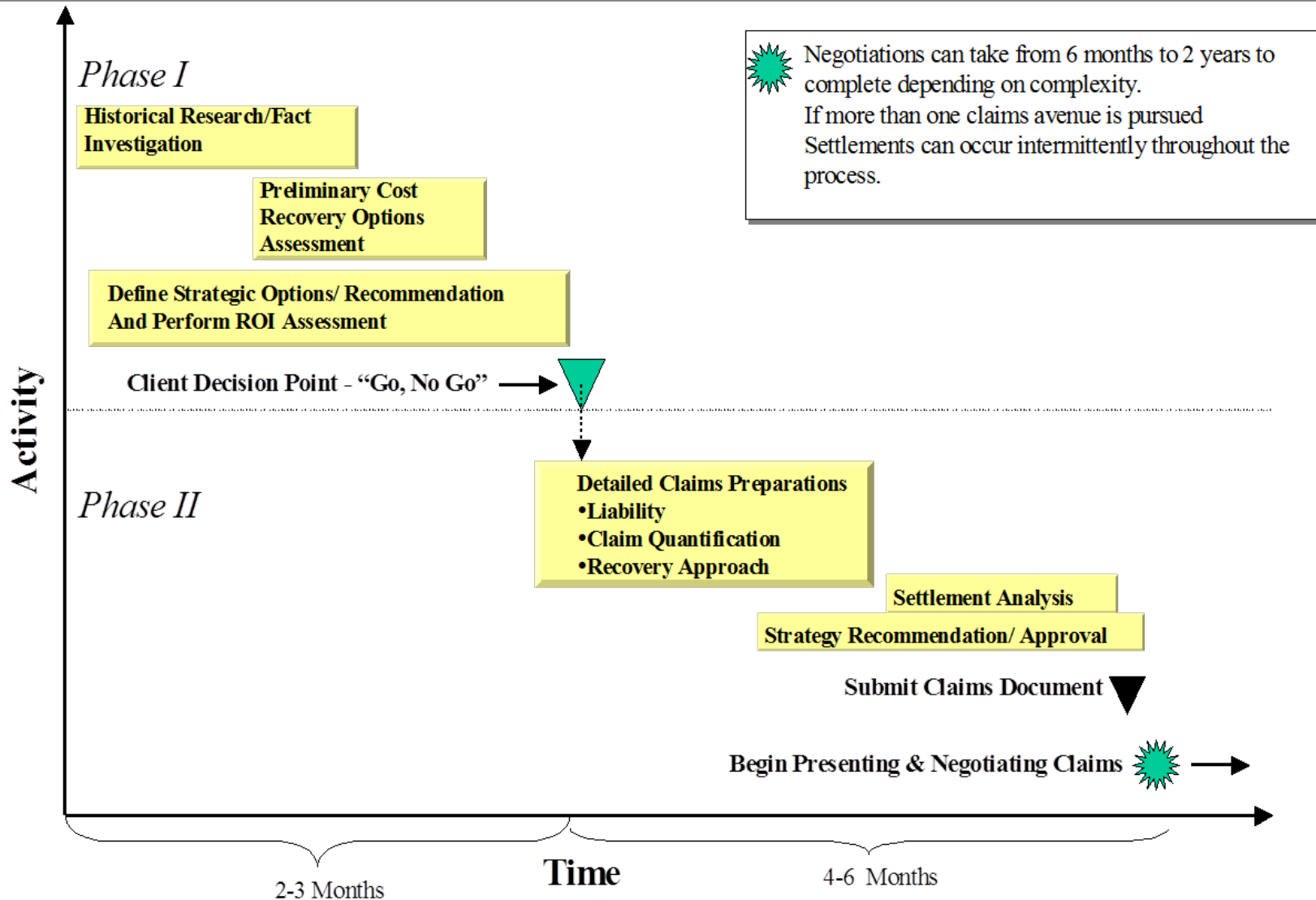
## Sample Government Involvement Case Approach

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- Case development activities following a positive case evaluation:
  - Conduct more in-depth internal and external records research to support liability
  - Develop a detailed cost claims package documenting past and future costs damages
  - Evaluate NCP consistency in the context of response actions being claimed
  - Develop a defensible allocation model supporting a realistic U.S. Government share of responsibility
  - Draft claim documents that include support for:
    - Liability
    - Nexus
    - Costs
    - Demand
    - Other important site specific elements
  - Develop a negotiation/litigation plan and timeline

# Sample Government Involvement Case Approach

## Typical Project Schedule



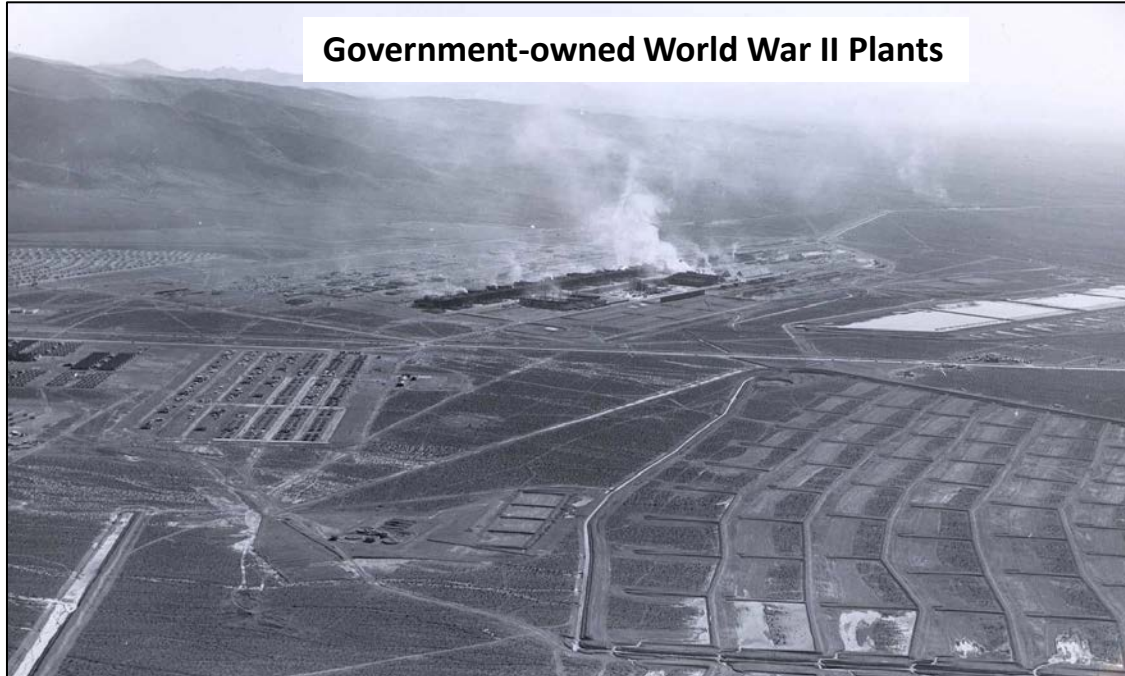
# U.S. Government Claims Hypothetical Scenario

# Federal Involvement With Many Types of Facilities

Shipyards and Ship Breaking Activities



Government-owned World War II Plants



Refineries and Synthetic Rubber Plants



## U.S. Government Claims Hypothetical Scenario

- A former smelter, now a State Superfund Site, has been the subject of public concern due to levels of metals in a residential neighborhood and adjacent waterway
- The former operator is defunct and it appears that state funds are going to be used to clean up lead, zinc, copper and arsenic in the residential yards and the nearby waterway





## Hypothetical Scenario: Historical/Liability – Research Findings

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- Prior to the U.S. entry into WWII, a site was selected on which to build a federally-owned smelter
  - Considerations included port facilities, undeveloped surrounding area, and easy access to supplies of hydrochloric acid needed for operations
- The U.S. Government arranged for a foreign corporation (now defunct) to operate the facility
- Due to WWII demand for the metal the smelter produced, the U.S. Government acquired ores from various countries and shipped them to the site
- The U.S. Government would not allow the operator to construct additional waste treatment facilities due to critical materials shortages
- The U.S. Government also funded construction of a housing development for plant workers – later becomes a residential neighborhood within the municipality





# Hypothetical Scenario: Legal Analysis of CERCLA Liability

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## ■ Owner

- U.S. Government ownership of the plant and equipment
- U.S. Government ownership of the ore processed
- U.S. Government ownership of the wastes generated

## ■ Operator

- Hands on supervision of the process, presence at the facility, and technical assistance
- Involvement with waste disposal decisions and controlled operations related to waste treatment

## ■ Arranger

- Designed the system by which wastes were transported to the nearby waterway
- Denied the construction of waste system modifications

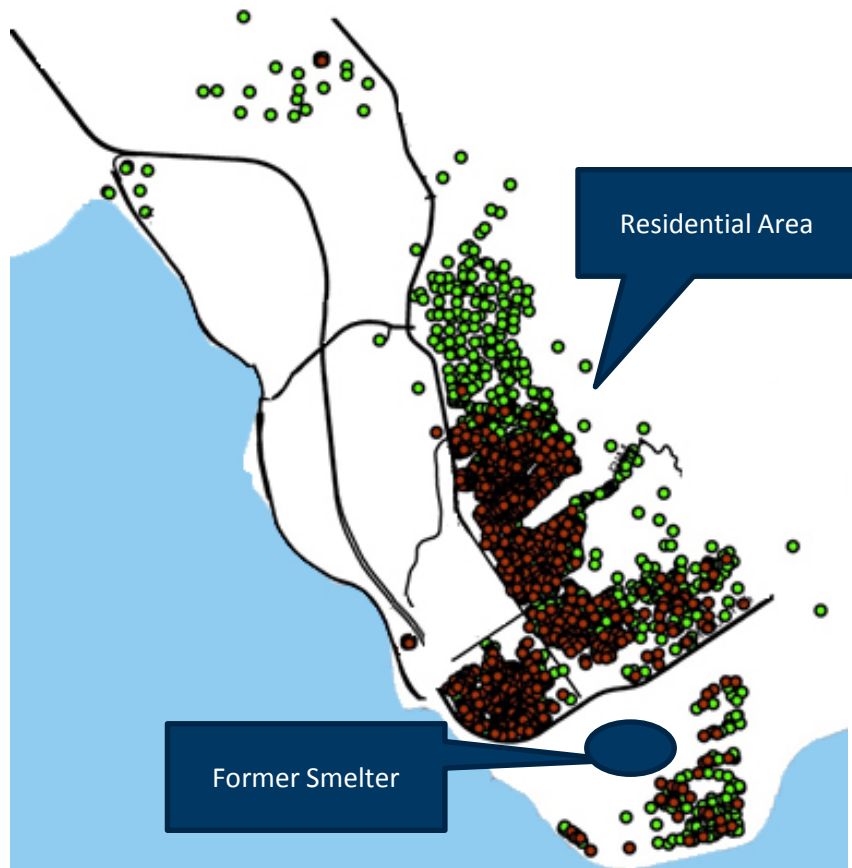
## ■ Other

- No statute of limitations issues
- No other legal impediments



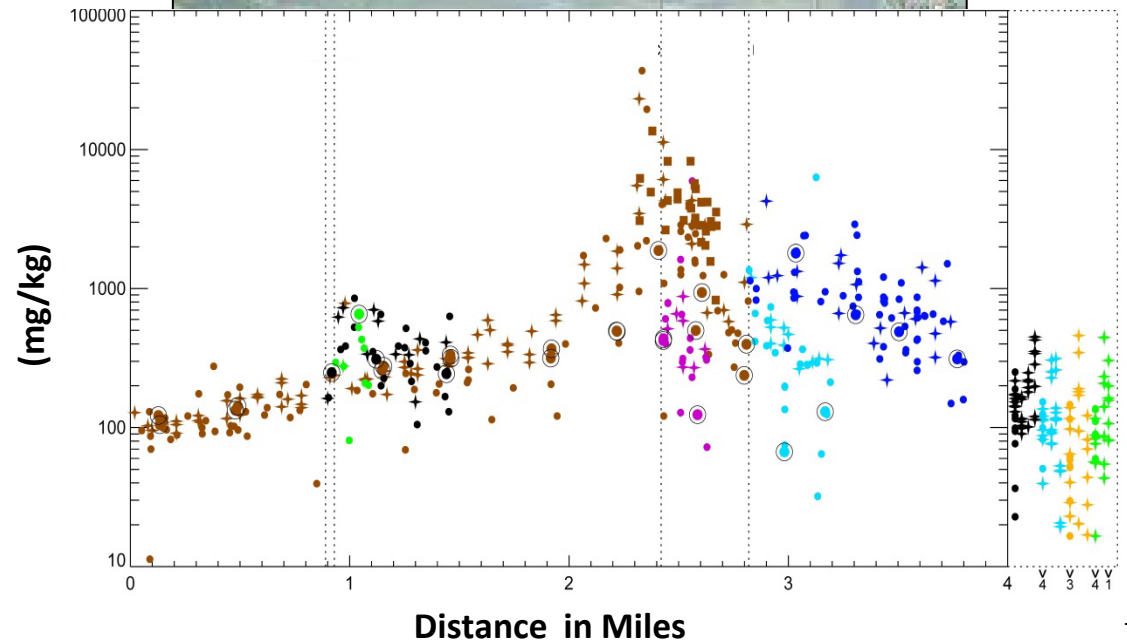
# Hypothetical Scenario: Technical Data and U.S. Nexus

■ Technical data supports a U.S. Government nexus to contamination



## Legend

- Residential Properties that Exceed 46 ppm (As) and/or 500 ppm (Pb)
- Residential Properties that are Equal to or Below 46 ppm (As) and/or 500 ppm (Pb)



# Hypothetical Scenario: Cost Claim Package Development

## Samples of past cost package elements:

- Response actions were requested and approved
- Summary level information documenting response costs expenditures
- Accounting records
- Invoices and proof of payment
- Technical materials supporting costs

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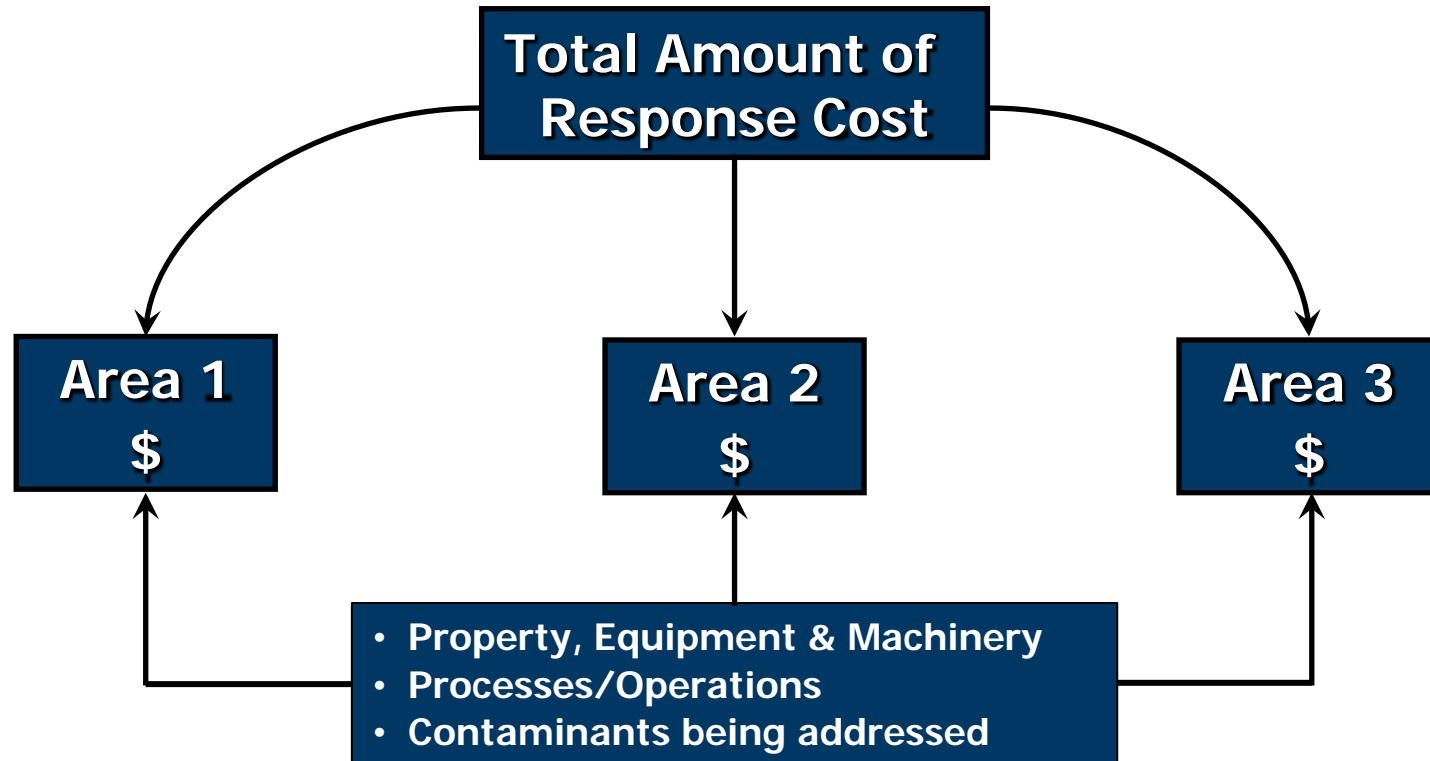
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*							0.00	USD		
**	Account 50103683						0.00	USD		

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PPM Type 1	1 Monthly Unit @ \$435.61/ea.		= \$435.61
02 - Site Assessment	2,767.00	66.64	1,844.00
08A - Part A Application	7,882.00	97.20	7,661.50
Draft of Part A Application - Attachment B	1 LS Unit @ \$3,086.00/ea.		= \$3,086.00
08B - Part B Application	53,848.00	26.79	14,619.61
Draft of Part B Application - Sections II through VII	1 LS Unit @ \$961.00/ea/		= \$961.00
Draft of Part B Application - Section XI	1 LS Unit @ \$1,042.00/ea.		= \$1,042.00
Draft of Part B Application - Subpart B	1 LS Unit @ \$7,845.00/ea.		= \$7,845.00
			<b>\$9,848.00</b>
08C - Preparing Draft Document	21,516.00	0.00	0.00
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			<b>13,369.61</b>

Invoice

# Hypothetical Scenario: Developing a Federal Share



## Potential Cost Allocation Elements

1. Years of ownership
2. Years of active control/use
3. Weighted years of use
4. Production volume
5. Contaminant used/released
6. Causation
7. Equitable factors
8. Credits/Adjustments



## Hypothetical Scenario: Next Steps and Result

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- Claims document is developed and submitted
- Perhaps a tolling agreement is executed
- A claims presentation is made to federal representatives/client agencies
- Negotiations ensue and the parties engage in several rounds of information exchange and informal negotiations
- Parties reach an impasse
- A mediator is retained to initiate an alternative dispute resolution (ADR) process
- Litigation is initiated concurrent with mediation, but the case is stayed while the mediation is in process
- Parties reach a settlement

# Potential Keys to Success



## Potential Keys to Success

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- Retain qualified counsel
- Conduct fatal flaw analyses early and on an on-going basis
- Get management buy-in to the process
- Have internal and external resources work as a team
- Recognize and plan for the amount of work involved
- Pursue the claim quickly if there are statute of limitations concerns; perhaps enter into a tolling agreement (if appropriate)
- Present the liability basis and historical facts clearly to federal representatives
- Include only costs where there is a nexus between the federal government and areas for which response costs will be incurred
- Compile cost documentation to support claimed costs
- Develop a realistic and defensible allocation share for the federal government



# Questions and Discussion

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## Contact Information

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