



*CERCLA 128(a):
Tribal Response Program
(TRP)*

*Element 2: Oversight
& Enforcement*

Tier 1: Module 4



Tribal TAB Program

*Providing “Technical Assistance
to Brownfields” to all U.S.
Federally Recognized Tribes!*

TRP Element 2

Indian tribes must include, or be taking reasonable steps to include, in their response programs oversight and enforcement authorities or other mechanisms, and resources that are adequate to ensure that:

1) a response action will protect human health and the environment and be conducted in accordance with applicable federal and tribal law;

and

Element 2

2) *The State or Tribe will complete the necessary response activities if the person conducting the response fails to complete them. (this includes operation and maintenance and/or long-term monitoring activities.)*

Tribal Response Program Role

Therefore: This Element has two parts:

- 1) Development of oversight and enforcement authorities or other mechanisms and resources; and
- 2) Ensuring that response actions or cleanups conducted under this program are adequate and completed.*

*Note: Similar to Element 4



Ina Nez Perce - Director Tribal Env. Dept.
Fort Belknap Indian Community, MT



Development of Oversight and Enforcement Authorities

Element 2: Part 1

Tribal Response Enforcement

U.S. EPA: Eligible grant activities include, but are not limited to, development of legislation, regulations, procedures, ordinances, guidance, etc. that would establish or enhance the administrative and legal structure of their response programs.



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Tribal Civil Enforcement

- To conduct oversight and ensure compliance Tribes may need to develop **civil** compliance and enforcement authorities, policies and procedures for their environmental programs.
- The necessary **authorities** can be created by updating and/or adoption of appropriate Tribal laws, codes and ordinances.

Civil vs Criminal Law

- *Civil case law, up to and including U.S. Supreme Court decisions and opinions, differ somewhat from those for criminal law.*
- *Constantly evolving area of law and tribal sovereignty.*

(Your tribal legal counsel should be consulted for questions in this area.)

Jurisdiction vs Authority

Understand the difference between:

- *Jurisdiction: Established by Treaty and federal laws and legal precedents*
- and*
- *Authority: Established by Tribal laws and Codes*

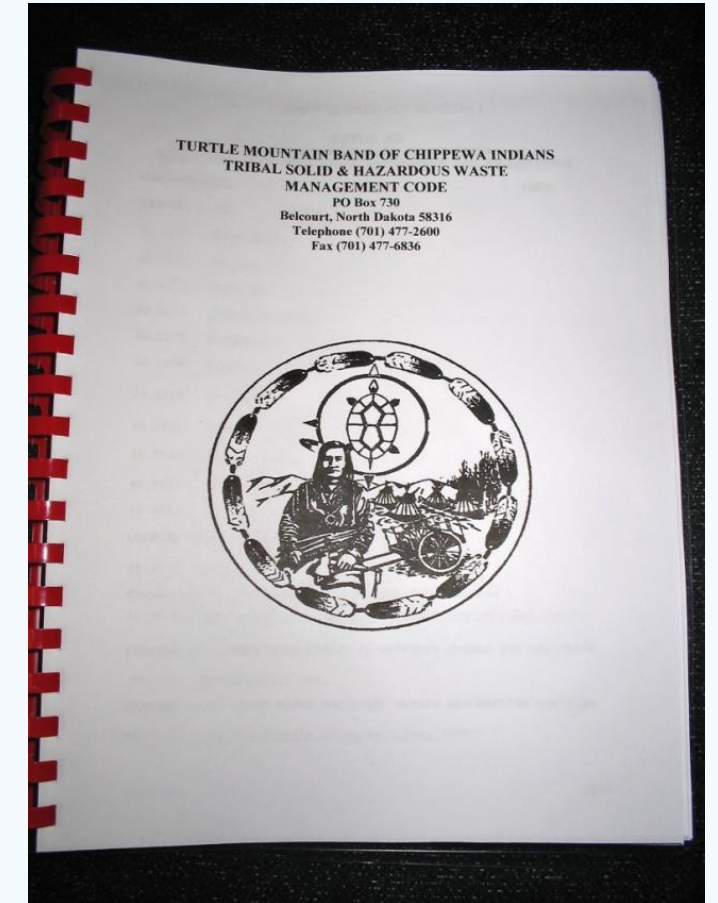
Tribal Laws & Codes

- *Tribal laws, codes and ordinances along with procedures, policies and protocols can vary substantially from tribe-to-tribe*
- *there is no one-fits-all model law or code*
- *Federal and State laws/regs. can be a model for development of Tribal laws and codes/regulations but usually require some adaptation to Tribal applications.*

Tribal Laws & Codes

Tribal Solid & Hazard Waste Laws/Codes may include Tribal Response Program Requirements such as:

- ✓ Prohibition of dumping or illegal releases
- ✓ Responses to releases
- ✓ Oversight of responses
- ✓ Conducting responses
- ✓ Cleanup Approval & Standards
- ✓ Verification & Certification
- ✓ Institutional Controls
- ✓ Public Participation
- ✓ Tribal Permits & Fees

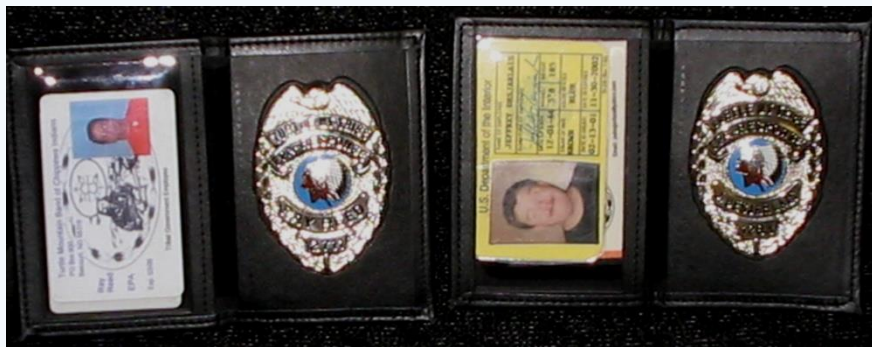


Tribal Compliance & Enf.

Tribal ID and Official Vehicle(s) for Tribal Environmental Civil Compliance and Enforcement



Turtle Mtn. Band of Chippewa Indians
North Dakota





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*Ray Reed, TRP Coordinator
Turtle Mtn. Band of Chippewas, ND*

Tribal-Federal Overlap

- In some cases both Federal (i.e. U.S. EPA, US-ACE or BLM) and tribal laws and requirements may be applicable to a response action and both oversight authorities may be applicable.

EPA Laws & Regulations

Federal Laws and U.S. EPA regulations that govern response actions include:

- *CERCLA (aka Superfund);*
- *RCRA Corrective Action & LUST regulations;*
- *Asbestos Abatement under the Clean Air Act;*
- *TSCA for Lead Based Paint & PCB remediation and disposal;*
- *etc.*

“Other Mechanisms”

“other mechanisms, and resources” may be other authorities or resources that could be brought to bear on a situation to ensure that a party meets their obligations. This could include the authority or resources of another tribal program or a state or federal agency.

“Other Mechanisms”

- *Other Tribal Programs (Housing, Energy, Police, etc.)*
- *US EPA Superfund & RCRA Programs*
- *State Laws & Programs*
- *Dept. of Defense Installation Restoration Program (IRP)*
- *Dept. of Defense Formerly Utilized Defense Sites (FUDS)*
- *Native American Lands Environmental Mitigation Program (NALEMP)*
- *US Army Corp of Engineers Programs (US-ACE)*

Tribal Accomplishments

- *Updating, drafting and adopting new or revised tribal laws and codes*
- *Conducted site specific cleanups utilizing tribal authority to implement and conduct a response action*
- *Developing internal procedures and policies (SOPs) on how to implement the requirements*
- *Referrals to the BIA, U.S. EPA or a State for appropriate compliance and enforcement action.*



*LaDonna TaMaka
Waste Win
Allard -*

*Standing Rock
Sioux Tribe,
ND/SD*





*Ensuring that a Response Action
is Adequate & Completed*

Element 2: Part 2

2 Parts of “Completion”

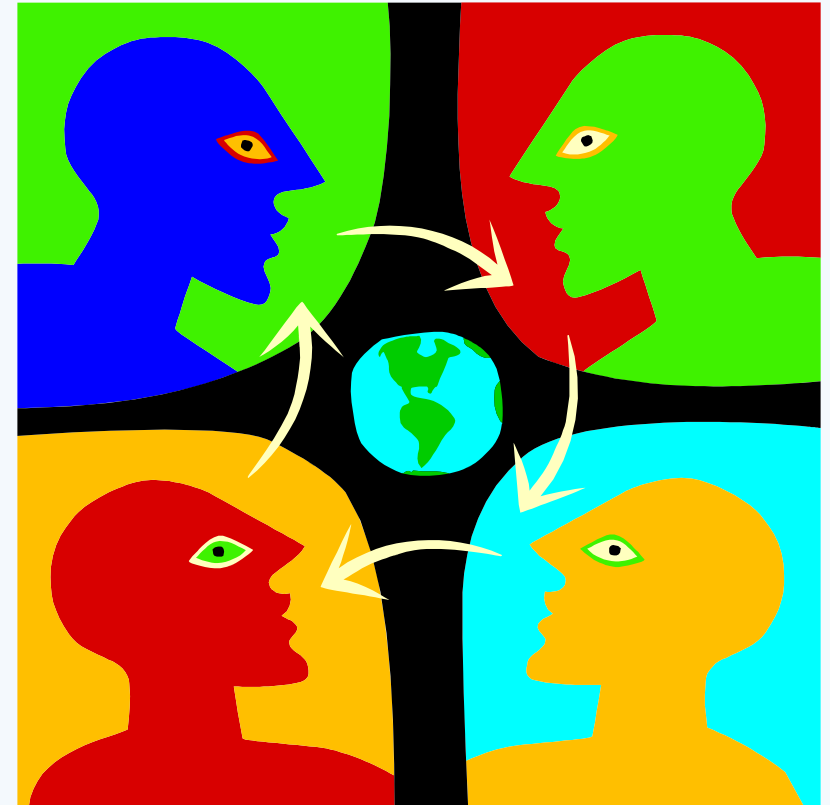
This part of Element 2 has 2 sub-parts:

- Ensuring necessary response actions are adequate to protect public health and the environment;
- and/or
- Ensuring that a response action is completed to include operation & maintenance or long-term monitoring activities

Steps: Cleanup Oversight

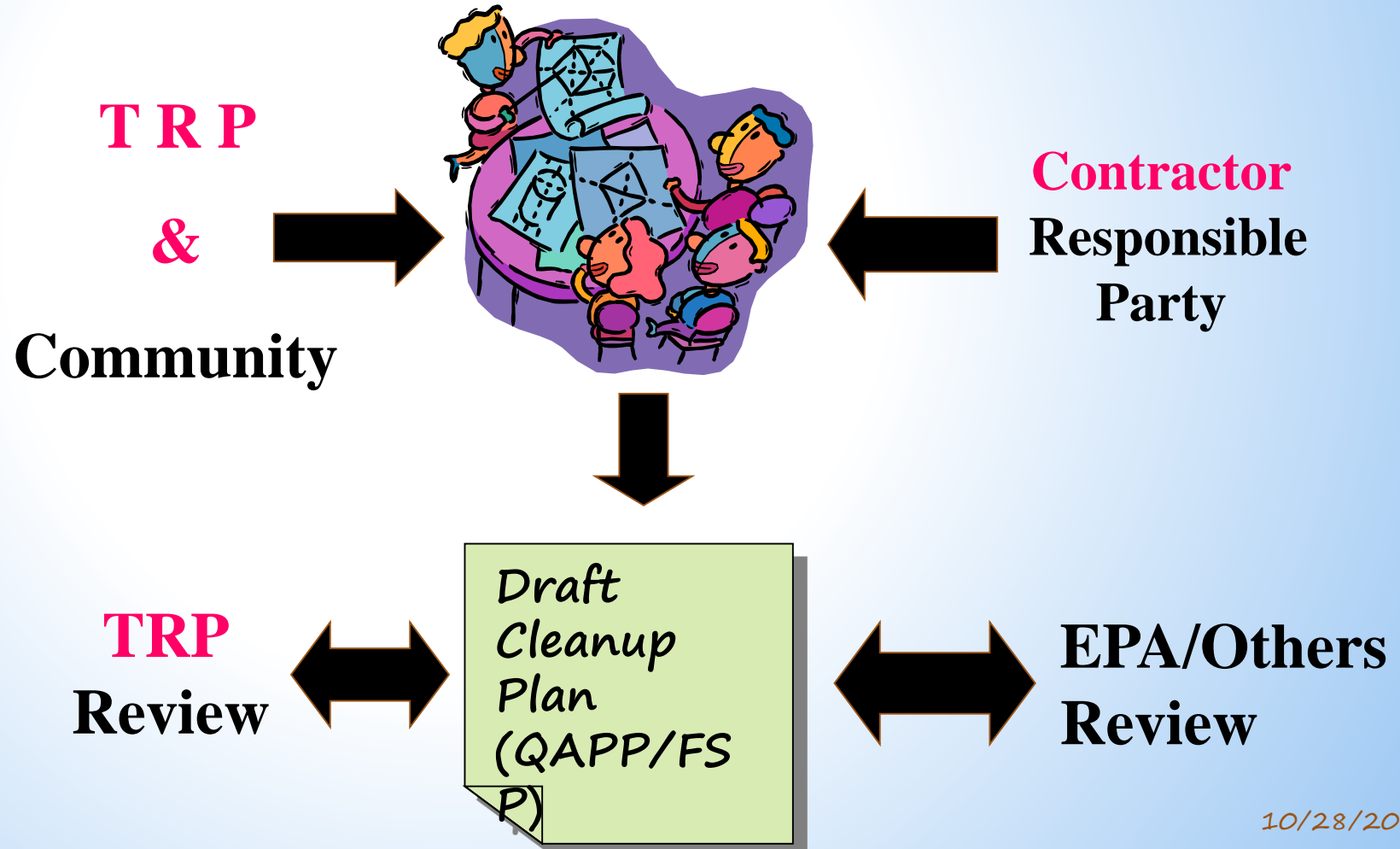
Cleanup Adequacy:

- What are site end use and cleanup goal(s)?
- Have all local/tribal exposures been addressed?





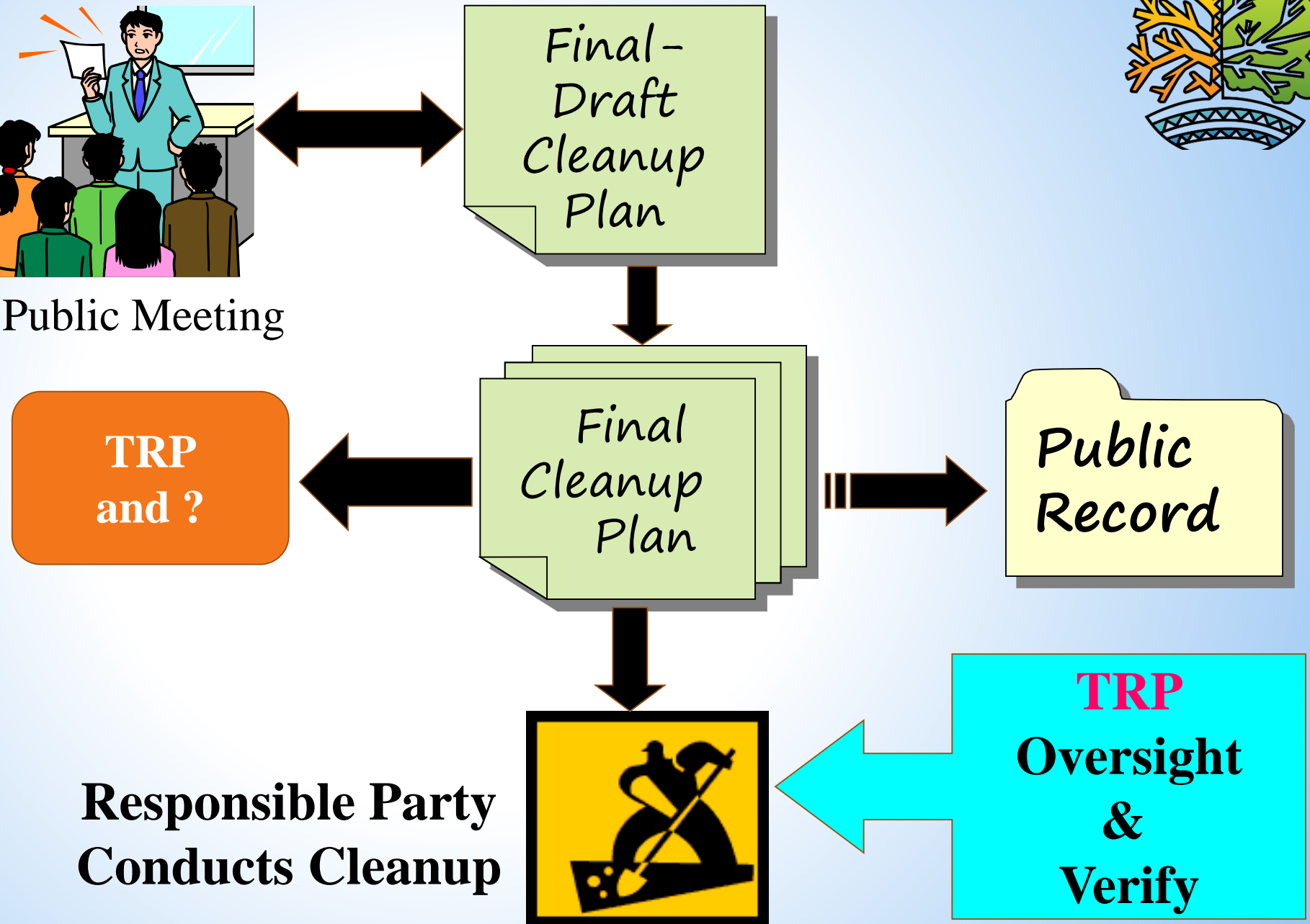
Typical Clean up Planning Process





Public Meeting

Cleanup Planning Process



Tribal Cleanup Standards

- Under the TRP –The Tribes may establish the cleanup standards or goals for the cleanups conducted under their programs via tribal laws, codes or resolutions.
- A typical cleanup or response is conducted to meet site specific “risk based” goals or cleanup standard(s).
- Use the State and EPA guidelines, experts and resources!

Cleanup Standards

Clean up standards can be established in two ways:

- Establishing a decision making process and designating who the decision maker is (i.e. Tribal Council, Tribal Chair, Environmental Director, etc.);

and/or

- Adopting specific cleanup standards for @ chemical or substance.

Cleanup Methods & Goals

Under federal programs (and funding) a **range of alternatives*** is usually considered in the development of a response plan and then a decision is made, with community input, on the appropriate response to take, and the appropriate cleanup levels/goals to be obtained, **considering several factors** which can include:

* AKA “Analysis of Brownfield Cleanup Alternatives” (ABCA)

Factors to be Considered:

- *Protection of human health and the environment*
- *effectiveness*
- *“implementability”*
- *cost*
- *compliance with all applicable laws, regulations and codes*
- *long and short term effectiveness*
- *community acceptance*
- *Other Tribal Criteria?*

Cleanup Completion

The completion of a response action is dependent on the:

- required actions;
- planned time-frames*; and
- cleanup standards & goals;

That are established in the cleanup plan.

**Note: “Stuff Happens!”*

Determining Completion

Determining completion can be evaluated by visual observation in some cases but typically it will involve conducting confirmation or verification sampling and analysis to determine if the required cleanup levels and goals have been achieved.

Element 4: Overlap

NOTE: This Element overlaps Element 4: verification and certification of cleanups.

The same administrative and legal authorities may need to be in place to conduct those actions.

Tribal Oversight Costs

U.S. EPA:

- *Costs incurred for oversight of cleanups at other than brownfield sites may be eligible and allowable costs under the 128(a) grant;*

and

- *These costs must be authorized under the tribe's grant work plan to be allowable.*

EPA Funds for Cleanups

- Eligible 128(a) grant fundable activities include, but are not limited to, conducting limited site-specific activities, such as assessment or cleanup, provided such activities establish and/or enhance the response program and are tied to the four elements; and/or
- Grants are available under Section 104(k) for Assessment and Cleanup of specific brownfield sites.

Tribal Funding

Some Tribes are establishing emergency or environmental response funds for such situations and establishing some fees to provide the funds.

{e.g. a 1% of total construction or demolition contract for solid waste management permit fee}

Tribal Accomplishments

- *Conducted site specific cleanups utilizing 128(a) or 104(k) grant funds to gain experience*
- *Conducted oversight of Cleanups by other “Responsible Parties”*
- *Observing & assisting EPA or other federal actions*
- *Reviews of contractor reports documenting results of a cleanup*
- *Oversight & assistance to federal/state LUST program*

Tribal Accomplishments

- *Tasking contractors and/or utilizing tribal staff and capacity to conduct some cleanups*
- *Referrals to the U.S. EPA or state for appropriate compliance and enforcement action.*
- *Working with DoD or US-ACE on Cleanups*
- *Drafting and developing tribal laws and codes to implement compliance authority and requirements*



Examples

A 128(a) cleanup conducted by the Standing Rock Sioux Tribe of ND was in response to a botched “demolition and cleanup” started by a private party on tribal land.





Example

The Turtle Mountain Band of Chippewa Indians of ND utilized tribal funds from 1% construction solid waste permit fees, to conduct some responses after a tornado struck and caused some potential releases of hazardous substances.





Turtle Mtn. conducted “informal” oversight of a cleanup of fee property purchased under an IRS Tax Lien to construct a new Super Market.

Example



Example: Tribal Oversight

The Yakutat Tlingit Tribe: The U.S. Army Corps of Engineers (US-ACE) has conducted cleanups at former military sites in Yakutat and is presently doing remedial investigations at others under the Formerly Used Defense Sites (FUDS) and the Native American Lands Environmental Mitigation Program (NALEMP). The Tribe is utilizing TRP funding to conduct its own investigations into dioxin contamination and to review the remediation work being done by the USACE in Yakutat.

Example: Tribal Oversight

*Oversight of
LUST/UST
Tank pulls
and
remediation*



Example: Tribal Oversight

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Conducting oversight of responsible party cleanups (e.g. an oil pipeline leak cleanup) in coordination with U.S. EPA



Tribal Lessons Learned

- *It is important to determine and document site ownership, responsibility and jurisdiction;*
- *Site Access Agreements may be needed;*
- *Adopting and implementing tribal laws and codes to establish the tribal authority to conduct these actions is necessary;*
- *Need to have appropriate internal policies & procedures & SOPs in place;*

Lessons Learned

- *There is a significant need for more training, experience and real-time on-scene technical assistance in this area.*

and

- *Implementation of these actions can be costly and may not be an eligible use of TRP grant funds.*

Tribal Issues

- Lack of **existing** Tribal civil compliance and enforcement authorities, policies and procedures in place for environmental programs.
- Federal/State officials **not aware** of tribal laws, codes and requirements.
- The **tribal sovereignty** and civil case law is constantly evolving.

Tribal Implementation

- Identify existing response sites where Tribal oversight is necessary and appropriate.
- Determine what tribal or other authorities exist or need to be improved or created to fully implement this Element and the TRP.
- Where Tribe does not have jurisdiction, determine tribal role(s) and means for input or oversight.

Tribal Implementation

- *Collaboration and sharing among tribes of case studies and situations;*
- *More opportunities for tribal staff to learn in the field and shadow or observe experienced EPA/State response staff and contractors.*
- *Tribes hiring Tribes to perform tasks*

Resources:

- ❖ Use the “*Brownfield Forum*” to seek answers to questions and advice of other tribes and/or KSU staff. The Tribal Brownfields Forum is an online platform for connecting brownfields and contaminated-sites staff and professionals from Tribal areas: www.tribalbrownfields.org
- ❖ KSU TAB Assistance to Tribes: No application process, just contact us!
<https://www.ksutab.org/services/ksu%20tribal%20tab%20program>
- ❖ Annual EPA 128(a) Program Guidance

Was this helpful to you in understanding the TRP?

Please let us know and also let us know if there are other topics you would like to have addressed!

*Please provide feedback to:
KSU-Tribal TAB at chsr@ksu.edu*



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END

*Oversight &
Enforcement
Tier I
Module 1-4*

