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

Public Record & Institutional Controls

Tier I: Module 7

Tribal TAB Program

Providing "Technical Assistance to Brownfields" to all U.S. Federally Recognized Tribes!

TAB
TECHNICAL ASSISTANCE TO BROWNFIELDS

KANSAS STATE
U N I V E R S I T Y

In Partnership with: the Division of Community Health Services| Alaska Native Tribal Health Consortium (ANTHC)

ALASKA NATIVE TRIBAL HEALTH CONSORTIUM

Tribal TAB in Alaska

Traditional Tribal Areas | Overlaid on Regional Corporations

Inupiaq
ANWR
Oil development site & caribou calving ground
Kutchin (Gwich'in)
Siberian Yup'ik
Koyukon
Tanana
Han
Tanacross
Holikachuk
Ingalik
Upper Kuskokwim
Ahtna
Upper Tanana
Central Yup'ik
Tanaina
Eyak
Tlingit
Alautiiq
Unangan
Haida
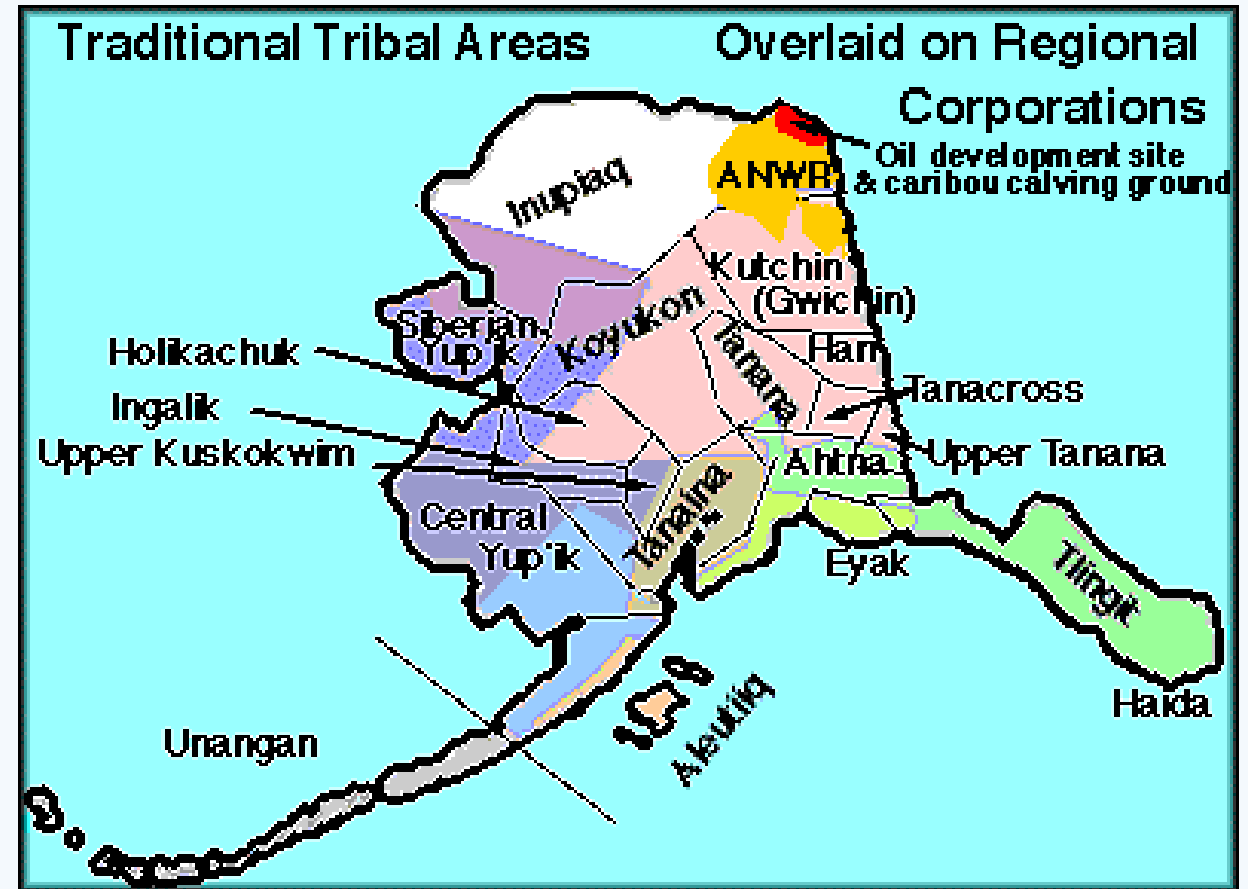
ANTHC TRP Role:

- **Leading development of online Tribal Brownfields Forum**
  - Forum using similar framework to LEO Network

- **Act as ongoing technical assistance hub for Alaska tribes**

The "Law"

128(b)(1)(C) PUBLIC RECORD..... "maintain, update not less than annually, and make available to the public <u>a record of sites</u>, by name and location, at which <u>response actions have been completed in the previous year</u> and are <u>planned to be addressed</u> under the Tribe and State program that specifically governs response actions for the protection of public health and the environment <u>in the upcoming year</u>."

The "Law" (cont.)

"The public record shall identify whether or not the site, on completion of the response action, will be suitable for unrestricted use and, if not, shall identify the _institutional controls_ relied on in the remedy and include relevant information."

2 Parts of this Requirement

1) A publically available record of sites that have been remediated and those that are planned to be remediated

2) Publication of "Institutional Controls" implemented

Part 1: the "Public Record"

The Public Record

Each tribe receiving <u>financial assistance</u> under 128(a) shall maintain and update, at least annually or more often as appropriate, and make available to the public a record of sites, by name and location, at which:

- response actions have been completed in the previous year; and

- response actions are planned to be addressed the next year.

Inventory vs Public Record?

The "Brownfield Inventory" is a list of <u>ALL</u> actual or potential brownfield sites.

The "Public Record" is <u>only</u> a list of sites that have been cleaned up last year or will be cleaned up next year + Institutional Controls in place.

Show Me the Record:

- Tribes that receive funding under section 128(a) must establish a public record system during the first grant funding period unless a public record system that meets the requirements is already established.

- Prior to funding a tribe's annual work plan for subsequent years, EPA regional offices will verify and document that a public record, as required, exists and is being maintained.

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US EPA Guidance

The Public Record must include any response action (completed or planned) under the oversight or jurisdiction of the Tribal Response Program in the previous or coming year.

NOTE:

This would include any third party response action (completed or planned) under the oversight or jurisdiction of the Tribal Response Program.

US EPA Guidance

The Public Record is _not_ required to include a response action conducted under Federal jurisdiction (i.e. Superfund or DOD) or AK-DEC, however, EPA would strongly encourage listing of these actions as well.

Bottom Line:

- <u>Minimum EPA requirement</u> = Include all response actions taken/planned under the Tribal Response Program.

- <u>Encouraged by EPA</u> = Include all response actions taken/planned (including assessments), regardless of jurisdiction, in Tribal lands.

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Public Record vs Element 3

The Public Record is a separate requirement from Element 3 for public participation. However, it can be a component of that Element.

More than 1 year?

- EPA encourages tribes to maintain public record information, including data on institutional controls, on a long term basis (more than one year) for sites at which a response action has been completed.

- Subject to EPA regional office approval, tribes may include development and operation of systems that ensure long term maintenance of the public record in their work plans.

Contents of PR

The Public Record should only include the required information and facts, not full response/cleanup plans or reports. However, those documents can be referenced and made available for review separately.

Some related documents (work plans and reports) have been made available via web sites.

NOTE: can store such documents & reports in the KSU "BIT"

Tribal Options

A Tribe may elect to use the Public Record to:

➢ inform the public of _all_ response actions in the vicinity of the village or community;

and/or

➢ _nearby_ response actions that potentially impact the tribal community health, environment and/or welfare (including the economy).

Other Information

The process or media used for the Public Record may also be a mechanism to inform the community of related information or actions such as:

- Phase I or II Assessments planned or conducted

- Brownfield Inventory

- Related Inventories (open dumps, LUST, etc.)

- Informal "cleanups" such as community cleanups, school lab cleanups, open dump removals, etc.

US EPA Goal & Funding

- EPA's goal is to enable Tribes to make the public record easily accessible.

- Section 128(a) funds may be used to <u>establish</u> and <u>maintain</u> and <u>make available</u> a public record system that meets these requirements.

- This includes making information available to the public on the Internet or other means that ensures that the information is readily accessible to the public. (e.g. Website)
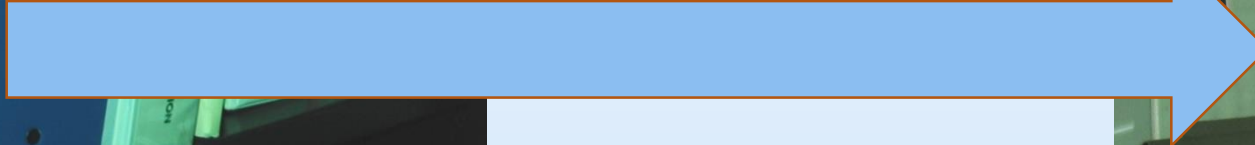
Many Tribes have created a notebook or file designated as the "Public Record" that is available to the public at the tribal environmental office, the tribal government office, or other readily accessible public location such as a school or library. Others are using social media or web sites.

P.R. on the Internet

If a tribe places the public record on the internet, maintains the substantive requirements of the public record, **and provides EPA with the link to that site**, EPA will, for purposes of cooperative agreement funding only, deem the public record reporting requirement is met.

Tribal Issues:

Many tribes have not planned or completed a response action or cleanup yet under the 128(a) Program. This has made it difficult to "establish" the Public Record when the <u>required</u> information does not exist yet.

Tribal Issues

Cleanup Projections: It can be difficult to manage community expectations when projecting cleanups for the coming year when a number of things can cause delays or even stop the project, such as:

- Funding delays

- Contracting delays

- Weather related delays

- Legal and/or federal enforcement issues

- Jurisdictional problems

Lessons Learned

- Do NOT put original copies of files or documents in the public record. (they will disappear!)

- Make sure you know where <u>all</u> copies of the public record are located and if there is more than one update them all at the same time.

- If you put the Public Record on a web site be sure you know how to access and update the information and, if necessary, funding is in place to do that.

Lessons Learned

- Ensure that all appropriate tribal environmental program staff, including the Director, are aware of the Public Record, it's purpose and where it is located.

- A pro-active approach to providing clear understandable information via the Public Record can prevent rumors and misconceptions by community members.

  aka: "alternative facts"

Further Implementation

- Using a multi-media approach that will reach all of the community.

- Improved coordination with other cleanup authorities and the use of the Public Record as a means to inform the community of <u>all</u> response actions that have or will take place in, or in the vicinity of, their community.

Part 2: "Institutional Controls"

(and Engineering Controls)

What can happen without I.C.s?

Tribal housing built above a prior landfill resulting in the abandonment & demolition of the houses.

04/02/2007

Institutional Controls

Tribes that receive 128(a) funding must establish a Public Record and identify in the Public Record whether or not the site, upon completion of the response action, will be suitable for <u>unrestricted use</u>. If <u>not</u>, the Public Record must identify the Institutional Controls relied upon in the remedy.

I.C.s are:

Administrative or legal controls that help minimize the potential for human exposure to contamination on a site; **or** protect the integrity of a response action.

Examples of I.C.s

- Signs
- Notices in Deed, Lease, etc.
- BIA Title Status Reports (TSRs)
- General area land use restrictions
- Site specific land use restrictions
- Land use review and approval

WHY?

Governmental, Administrative and/or Legal Controls and/or Conditions need to be placed upon the use of a property when remaining or residual contaminants may pose a hazard if they are disturbed or if the land use changes and that would cause unacceptable exposures or new releases.

Why are contaminants left on a site?

When total cleanup is:
- too expensive or not feasible
- not necessary based upon planned land use
- Cleanup would cause more environmental damage
- would damage historical or cultural sites
- Cleanup was not done (yet)!

Who does them?:

- Federal Agencies (BIA, BLM, NPS, DoD, etc.)
- AK-DEC
- Tribal Council
- Tribal Court
- Tribal Land/Real Estate Office
- Incorporated towns
- Other local non-tribal govt.
- Property owner

Examples of Physical or Engineering Controls

- Fence
- Ground water controls
- Surface water controls
- Caps and covers (paving)
- Solidification
- Chemical treatment
- Vicious Dog!

Fundable Activities

EPA considers activities related to <u>maintaining and monitoring institutional controls</u> to be eligible costs under section 128(a). This may include installing, maintaining and monitoring engineering controls necessary to implement and enforce the institutional controls such as: fencing, gates, earthen berms or other barriers, signage, boarding of buildings and monitoring equipment.

I. C. Tribal Examples:

- <u>Ft. Belknap, MT</u>: Closed Landfills – signs and restrictions
- <u>Wind River Tribes</u>, WY- DOE UMTRA Site: land use restrictions
- <u>Keweenaw Bay Indian Community, Mich.</u>: restricted access to a site by recreational vehicles to minimize damage to a cap over a contaminated area.
- <u>Oglala Sioux Tribe, SD</u>: Environmental Review Process
- AK: Prohibiting berry picking in a contaminated area.

Signs are a form of Institutional Control

Monitoring & Enforcement

Someone must monitor
And enforce the controls

Monitoring of I.C.s

- Inspections
- Pre-approvals of changes in land use
- Pre-approval for construction
  (OST Env. Review includes TRP sign-off)
- Notification of change in ownership
- Notification of change of lease
- Notification in change of land status

Tribal Issues:

- Very little precedent for I.C.s on tribal lands by a Tribe therefore not many legal procedures developed.

- I.C.s must often be coordinated with multiple Tribal government departments and functions as well as the AK-DEC and/or federal agencies.

- Authority, responsibility and jurisdiction for enforcement and monitoring of I.C.s can be a problem.

Tribal Issues (cont.)

Limited jurisdictions can make effective controls difficult, especially when use of adjacent lands or waters can affect the contaminated area or water or visa versa.

Lessons Learned:

- Land use and land use controls are an important developing issue in "Indian country".

- The lack of land use or institutional controls had led to serious problems and impacts on the health of tribal members and communities.

- Tribal Councils and attorneys generally need to be educated on the purpose of institutional controls and procedures to establish such tribal controls adopted.

Further Implementation

- The sharing of tribal legal research and implementation issues between tribes is important.

- Coordination with AK-DEC and federal agencies will be important.

Storing & Managing Documents & Data

The KSU-TAB "Brownfield Inventory Tool" (BIT) is a comprehensive brownfield program management tool that can be used to compile and record data for the Public Record. You may enter detailed site data, upload documents and data, and generate and export a variety of reports, including a Property Profile Form.

(BIT users are asked to contact the KSU-TAB to create a user name and password for privacy protection.)

EPA Guidance

- *"A Citizen's Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tank, and Resource Conservation and Recovery Act Cleanups" OSWER 9255.0-98, EPA-540-R-04-004, February 2005*

- EPA's institutional controls web site at: http://www.epa.gov/superfund/policy/ic/index.htm

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

❖ ANTHC & KSU TAB Assistance to Tribes: No application process, just contact us! www.ksutab.org

❖ Annual EPA 128(a) Program Guidance

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END

Public Record
&
Institutional
Controls