



Tribal TAB Program

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



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



Purpose & Scope of the TRP

Tier I: Module 1

What is the TRP for?

- Identifying and assessing “Brownfields”
(What is a Brownfield? See Element 1!)
- Tribes protecting public health and the environment
- You and your community!

What is the TRP for?

Responding to releases of:

- hazardous substances, pollutants or contaminants;
- Petroleum;
- Controlled Substances (e.g. Meth); and
- Releases from “Mine scarred Lands”
(past, present and future)



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

Know the Govt. Agencies alphabet soup



Learn the Language of TRP Acronyms

- EPA
- QAPP
- FSP
- HSP
- RQ
- IC
- PPM
- CERCLA
- RCRA
- TSCA
- CWA
- UST/LUST
- TBA
- SNAFU
- ND
- etc.

*Note: never trust an
acronym*



Lana Johnson – TRP Coordinator
Oglala Sioux Tribe, SD

Traditional Purpose of a TRP

TRP is intended to address:



“Brownfields”, big & small, and other sites:
past, present and future

TRP is intended to address:



- Releases of “hazardous substances, pollutants or contaminants” ...
(as defined under several laws)

TRP is intended to address:



- Including Asbestos & Lead Paint

TRP is intended to address:



Releases of petroleum;

TRP is intended to address:



**Meth
Lab**

Releases of controlled substances

TRP is intended to address:



& Mine Scarred Lands



← **Change This**

To This →
&
Eventual Reuse





← **Replace This**

With This →
(Southern Utes Tribal
Multi-purpose Bldg.)



The “Law”

- Small Business Liability Relief and Brownfields Revitalization (SBLRBRA, hereafter referred to as the “Brownfield Law”) passed by Congress in 2002.
- Amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA aka Superfund)
- “BUILD Act” amendments to CERCLA passed in FY2018 Omnibus Appropriations legislation in March 2018

The “Law”

- Added to Section 101 (Definitions):

(39) (A) IN GENERAL.—The term “brownfield site” means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

Translation?

Buildings and/or land/waters that may be contaminated with one or more hazardous substances and the possible contamination is preventing or discouraging use or restoration of those buildings or land, as well as posing a risk to public health and safety and/or the environment.

The “Law”

Added: Section 128(a) ASSISTANCE TO STATES (1) IN GENERAL.—

(A) STATES.—The Administrator may award a grant to a State **or Indian tribe** that: (i) has a response program that includes each of the elements, or is taking reasonable steps to include each of the elements.



Tribal Response Program



Section 128(a) created the:

“Tribal Response Program” (TRP)

*This is significant in that it treats Tribes
the same as states!*

The “Law”

Section 128(a)(1)(A)(i) lists the four elements of a State or Indian Tribe response program:

(1) Timely survey and inventory of brownfield sites.

(2) Oversight and enforcement authorities or other mechanisms, and resources, that are adequate to ensure that a response action will protect human health and the environment.

The “Law”

(3) Mechanisms and resources to provide meaningful opportunities for public participation.

(4) Mechanisms for approval of a cleanup plan, and a requirement for verification by and certification or similar documentation from the State, an Indian tribe, or a licensed site professional to the person conducting a response action indicating that the response is complete.

The “Law”

ALSO:

- Section 128(b)(1)(C) requires a “PUBLIC RECORD” –
the Public Record
{information on cleanup activities}
and
- The Public Record shall contain information
on the use of “Institutional Controls” in the remedy of
a site.

Notes:

- *Congress and the Law refers to both “response actions” and “cleanups” and the terms are used interchangeably.*
- *Although Section 128 was originally titled “State Response Programs” it was later amended to “State and Tribal Response Programs”**

**Federal Register 10/25/2016 effective 11/01/16*

128(a) Grant awarded:

- to establish and/or enhance a response program
- to take reasonable steps to include each of the 4 Elements
- to establish & maintain a Public Record
- and to increase the capacity of a Tribe to assess and cleanup contaminated sites and other releases

The “Law”

Notes:

- For the purpose of this program the term **"Indian tribe"** means any federally recognized Indian tribe, band, nation, or other organized group or community, including any Alaska Federally Recognized Tribe (but **not** including any Alaska Native regional or village corporation), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
- Tribal consortiums are also eligible for funding under this program.

Goals of EPA TRP Funding

Generally to increase tribal cleanup capacity and:

- 1) to ensure that tribal response programs include, or are taking reasonable steps to include, certain elements; and
- 2) to provide funding for other activities* that increase the number of response actions conducted or overseen, by a tribal response program. (**including Site Specific Activities*)

128(a) Grants

- These are not competitive grants
- These are not the same as Section 104(k) Brownfield Assessment or Cleanup Grants
- These are “Cooperative Agreements”

EPA 128(a) Guidance

U.S. EPA Office of Brownfields Land Revitalization issues an annual 128(a) funding guidance each Fall:

“Funding Guidance for State and Tribal Response Programs, Fiscal Year 20XX”

NOTE: This guidance is supplemented by the EPA Regions.

Impacts of 128(a)

- Empowered Tribes to identify, inventory, assess and cleanup contaminated sites in Indian country **not other wise being addressed.**
- The TRP has documented hazardous releases at some sites that have compelled a response action by federal agencies or other entities.
- Enabled the Tribes to **apply for grant funds** to address some sites or take action themselves on other sites.
- A big step forward in exercising **tribal sovereignty and self implementation of tribal laws and codes** to address such problems and prevent their reoccurrence.

Impacts of 128(a)

NOTE: All of these impacts may vary in their implementation from Tribe-to-Tribe depending on the provisions of treaties and other federal laws or acts of congress and any agreements or MOA/MOUs the tribe may have with federal agencies or states.

- *Consult appropriate legal expertise for any specific issues that may arise.*

Impacts on Tribal Programs

- Addressing solid waste issues including illegal and **open dumping** & screening open dump sites for hazards;
- Development of **tribal waste management laws/codes**;
- Development of **civil compliance and enforcement** procedures;
- Assisting with addressing **Lead and Asbestos exposures** and abatements;
- Assisting with development of **tribal emergency response** capacity;
- Assisting with addressing **leaking underground storage tanks** (LUST) problems;

Impacts on Tribal Programs

- Preventing or addressing **releases** from poor waste management practices;
- Assisting tribal economic development or property offices with “**Due Diligence**” or “**All Appropriate Inquiry**”;
- Assisting with development of Integrated Solid Waste Management Plans (**ISWMPs**); and
- Creating public outreach materials and conducting public meetings and forums, sometimes in **traditional languages**.

Tribal Issues

- Defining **tribal jurisdiction** for imposing or enforcing tribal civil laws and codes on members vs non-members and various land status (trust, fee, etc.);
- Researching the history and **locating documents** for tribal and other property;
- How to impose “**institutional controls**” on land with differing status and coordinate such controls with federal agencies (BIA, BLM, etc.);
- Protection of **sacred and culturally sensitive sites** and related information;
- **Coordination** with multiple tribal and federal authorities and agencies;

Tribal Lessons Learned

- There are many **more brownfields** or other sources of releases in “Indian country” than originally anticipated;
- **Open dumping** and poor waste management create releases of hazardous substances;
- Most **old structures have asbestos and lead paint** problems;
- **New tribal laws, codes**, procedures and policies are required to fully implement the program; and
- There is **a lot to learn**, A lot of training is required.

Further Implementation

- New discoveries of past releases or **new releases** of hazardous substances, pollutants or contaminants;
- **Continuing need** to monitor and address activities that tend to create new releases from accidents and spills; industrial activities; mining and oil/gas exploration and production; construction and demolition; fires, aging existing buildings; and
- Continuing need to monitor and address releases from waste management facilities and **illegal dumping**.
- There is also the potential to provide **technical support** to other tribal programs and offices.



EPA Tribal Partnership

“Section 128(a) strengthens EPA’s partnerships with states and tribes, and recognizes the response programs’ critical role in oversight of cleanups. In addition, in contrast to some other environmental laws, the tribes are treated as an equal partner and do not need to petition the EPA for “treatment as a state” to implement the response program.”



Dan Heffernan, US EPA Region 8



**Boyd Lopez - Spiritual Leader
Ute Mountain Ute Tribe, CO**

References:

- The “Brownfield Law” of 2002 (SBLR&BRA)
- The “Build Act” of 2018.
(amendments to CERCLA)
- Congressional Record
- US EPA HQ Annual 128(a) Guidance
- Many Tribes



TAB Assistance to Tribes: Contacts

- the KSU TAB web site: www.ksutab.org
- Email to KSU Tribal TAB Team Leaders:
 - ❖ Mickey Hartnett, Co-Director, mickeyh@ksu.edu
 - ❖ Scott Nightingale, Co-Director, scottnight@ksu.edu
 - ❖ Blase Leven, KSU TAB Programs Coordinator, baleven@ksu.edu
- Call us at: (785)280-0931 or (605) 721-8088
- Access to BIT Database: Sheree Walsh (785) 532-6519

No application process, just contact us!

END Purpose & Scope



Additional Background to the “Law”

The following is provided for those that want to know more about the history and genesis of the “Brownfields Law” and why it was created.

Background to the “Law”

1965/1976: SWDA & RCRA

The Solid Waste Disposal Act (SWDA) became law on October 20, 1965. It was a broad attempt to address the solid waste problems confronting the nation. The decade following its passage revealed that the SWDA was not sufficiently structured to resolve the growing mountain of waste disposal issues facing the country.

As a result, significant amendments were made to the act with the passage of the Resource Conservation and Recovery Act of 1976 (RCRA).

Background

RCRA:

EPA was charged with:

- ✓ Developing the Subtitle C “cradle-to-grave” regulations of hazardous waste to include the storage, treatment, transport and disposal of hazardous wastes.
- ✓ compliance and enforcement of hazardous waste regulations per Subtitle C;

Regulation of solid waste was largely delegated to the states per Subtitle D.

Background

RCRA

- States were eligible to seek authorization to implement Subtitle C in lieu of the EPA.
- Tribes were defined as a “municipality” under RCRA and are not eligible to seek such authorization.

Background

1980: CERCLA (Superfund)

The U.S. Congress responded to the Love Canal in Buffalo, NY and other abandoned hazardous waste sites by enacting CERCLA, commonly known as "Superfund".



Background

1980: CERCLA (Superfund)

- CERCLA was intended to clean up the nation's worst sites and identify responsible parties to bear the cost of cleanups.
- A tax on chemicals was established to create the funding to conduct the assessments and cleanups which is the source of the term "Superfund".
- To implement this program the EPA developed the National Contingency Plan (NCP), promulgated as 40 CFR Part 300.

Background

1980: CERCLA (Superfund)

The NCP included a process to assess and rank sites that should be listed on the National Priority List (NPL) of the “worst hazardous waste sites” and a process to remediate those sites and recover the costs to replenish the “Superfund”.

Background

1980: RCRA Regulations

The first U.S. EPA regulations of hazardous wastes were published on May 19, 1980. This started the “cradle-to-grave” regulation of hazardous waste to include the storage, treatment, transport and disposal of hazardous wastes.

EPA was charged with compliance and enforcement of hazardous waste regulations per Subtitle C;

Regulation of solid waste was largely delegated to the states per Subtitle D.

Background

1995: Beginning of “Brownfields”

An adverse impact of the Superfund Program and its cost recovery program to pursue “responsible parties” for the costs of assessing and cleaning up the NPL sites was the avoidance of potentially contaminated sites by developers, real estate agents, lenders and insurance companies. This problem led to some properties becoming known as a “brownfield”, which is the opposite of a “greenfield”. (A greenfield is a general real estate term for undisturbed property with no potential contamination issues).

Background

1995: Beginning of “Brownfields”

In response to this problem the U.S. EPA administratively created the “brownfield pilot grant” program in 1995 to provide additional incentives for brownfields redevelopment. The purpose of these grants was to investigate property for potential contamination to facilitate its cleanup and reuse.

Background

1997: Brownfield Cleanups and TBAs

EPA began providing grants to state and local governments to establish revolving loan funds to fund site cleanup.

EPA also began providing pre-remedial site assessment funding for state and tribal conducted Targeted Brownfields Assessments (TBA).

Both activities were financed with Superfund appropriations and funded under CERCLA Section 104(d) cooperative agreement authority (grants).

Background

2002: The “Brownfield Law”

- In conducting the congressional hearings that led up to the passage of the 2002 “Brownfield Law” it was stated in the legislative history: “The vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program. Instead, most sites will be cleaned up under State authority. For example, while there are an estimated 450,000 brownfield sites, there are fewer than 1,300 NPL sites.” (about 1600 sites in 2010)

Background

2002: The “Brownfield Law”

Congress: “Because the NCP (National Contingency Plan) is intended to address the nation’s worst hazardous waste sites, many of its requirements are not appropriate in the context of funding for brownfields assessment and remediation.”

In recognition of these facts, and the need to create and improve State and Tribal cleanup capacity, CERCLA was amended to add section 128(a) to provide financial assistance to States and Indian Tribes to establish or enhance response programs.

The End

TRP

Tier 1-1

