



Tier 1 – Establishing a Tribal Response Program

Module 6: TRP Element 4 – Cleanup Plan Approval, Verification, & Certification

Mechanisms for Approval of a brownfield cleanup plan and verification and certification that a cleanup is complete

TribalTAB.org

TRP Element 4: The “Law”

Section 128(a)(2)(D): Mechanisms for approval of a cleanup plan, and a requirement for verification by and certification or similar documentation from the State, a Tribe, or a licensed site professional to the person conducting a response action indicating that the response is complete.



TRP Element 4: Two Parts

- 1) Approval of a Cleanup Plan (Response Action)
- 2) Verification and Certification that the cleanup/response is adequate and complete.



A stylized graphic of a bridge with a series of triangular trusses, rendered in a light blue color, spanning the top of the slide.

Element 4 – Part 1

Approval of a Cleanup Plan

U.S. EPA Goal

EPA's goal in funding activities under Element 4 is to have Tribes include in their response program mechanisms to approve cleanup plans and to verify that response actions are complete. Written approval by a Tribal response program and/or Tribal official of a proposed cleanup plan is an example of an approval mechanism.



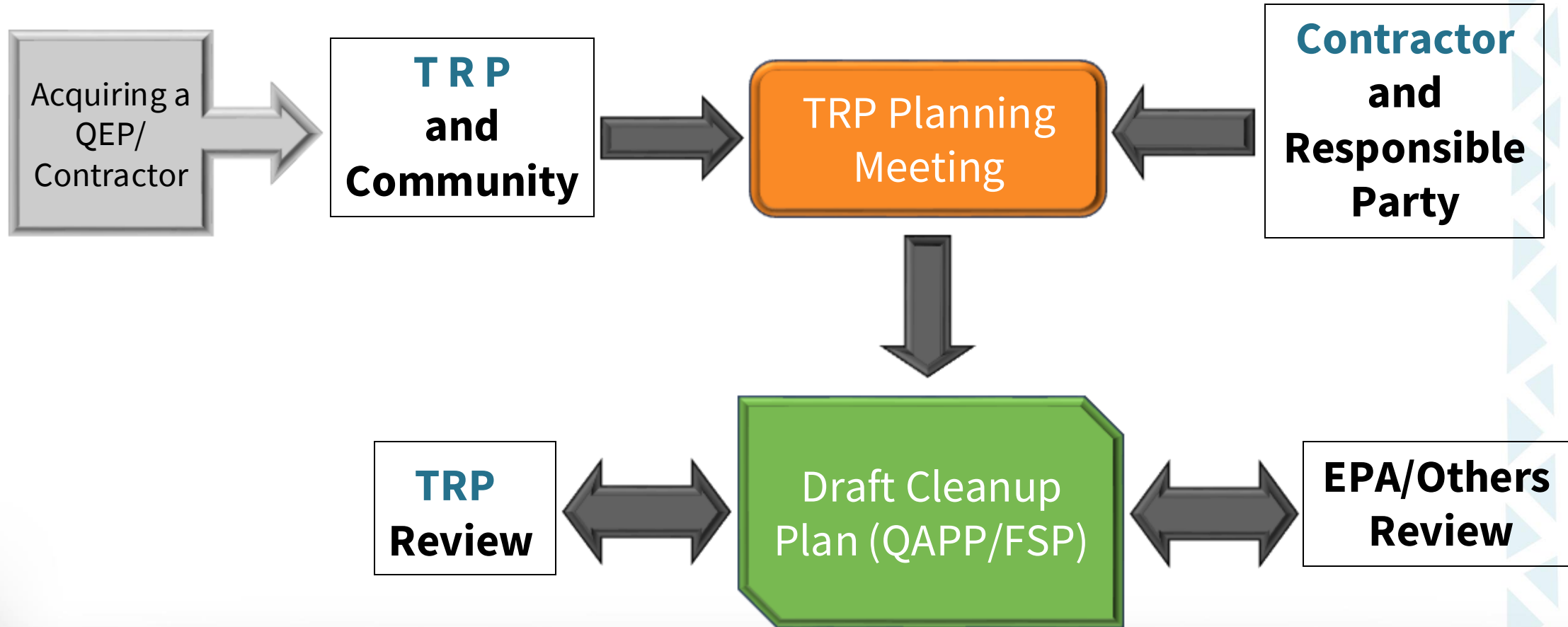
How is this part of Element 4 Different from Element 2?

Element 4 is about the *Tribal process* for the review and approval of a cleanup plan, the verification of a cleanup and the certification of a cleanup.

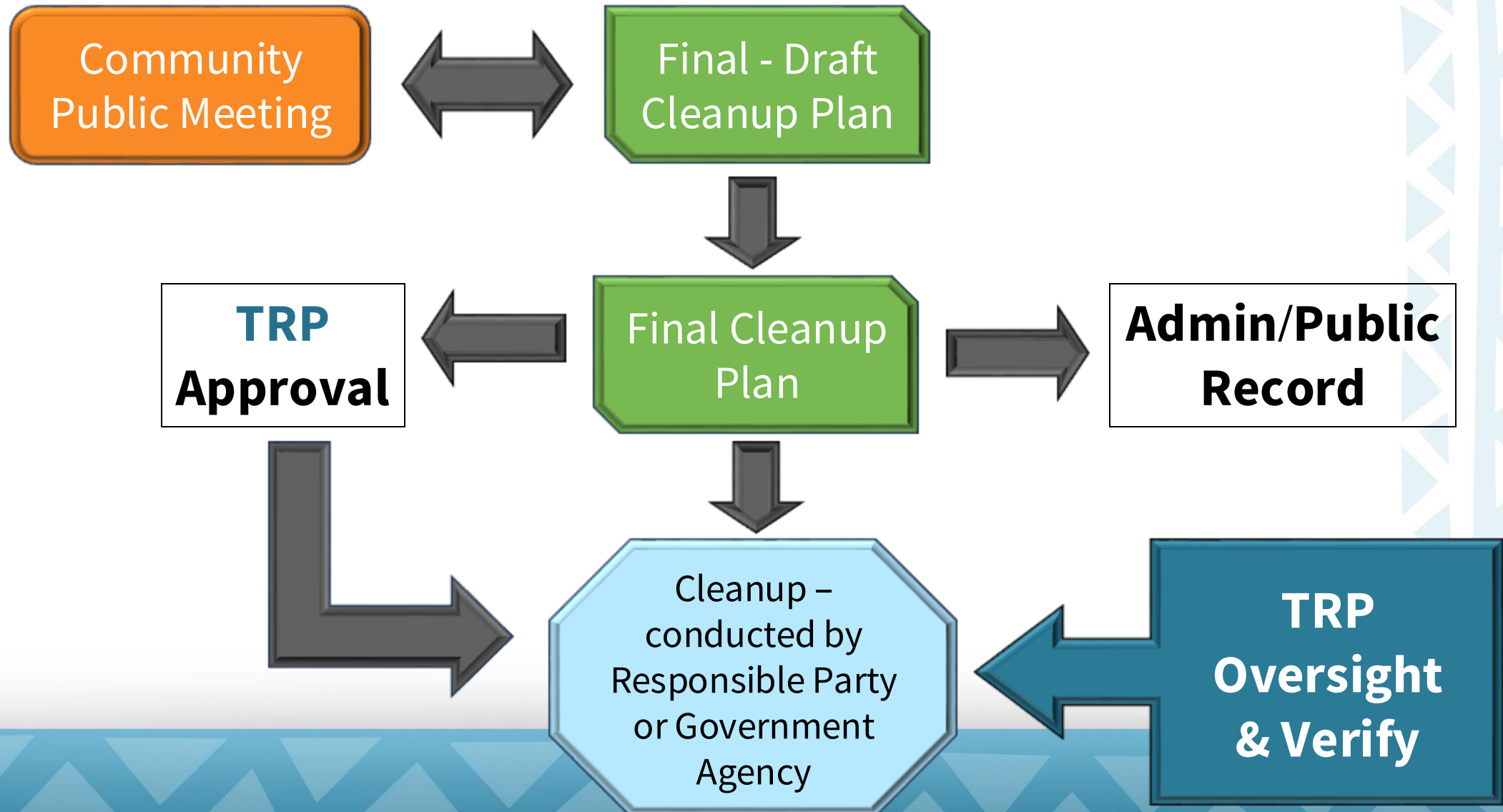
Element 2 is about the *oversight and enforcement authorities or other mechanisms, and resources* to require that cleanup response action is conducted as well as ensure that a cleanup or response action is adequate and complete.



Typical Cleanup Planning Process



Typical Cleanup Planning & Implementation Process



Hire an Expert?

Hiring a consultant or other expert (e.g., a “Qualified Environmental Professional” or QEP)* to assist with the review of cleanup plans and other relevant factors can be a grant fundable cost under 128(a) subject to the approval of the EPA Regional grant manager.*

Who qualifies as a QEP in your state?

**Note: See Tier II Module 7 – “Contracting”*



What is a “QEP”? Should My Contractor be a “QEP”?

The U.S. EPA established a standard for a Qualified Environmental Professional in 40 CFR Part 312.10 to ensure the quality of “All Appropriate Inquiries”. The standard includes specific educational and experience requirements for an environmental professional. The definition applies to persons conducting All Appropriate Inquiries for the purposes outlined in 40 CFR Part 320. You can require that the contractor project manager meet the requirements of a “QEP” as defined by the U.S. EPA and/or the state.



Who Qualifies as an Environmental Professional?

The EPA standard defines an environmental professional as someone who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to a property, sufficient to meet the objectives and performance factors of 40 CFR Part 320.

In addition, an environmental professional must have:

- ❖ A state or Tribal issued certification or license and three years of relevant full-time work experience; or
- ❖ A Baccalaureate degree or higher in science or engineering and five years of relevant full-time work experience; or
- ❖ Ten years of relevant full-time work experience.



Analysis of Brownfield Cleanup Alternatives (ABCA)

When demolition/deconstruction is being considered as a means of removing a source(s) of contamination from a brownfield site it may be appropriate to conduct an “ABCA”.

The evaluation of alternatives must include effectiveness, implementability, and the cost of the response proposed.

- ❖ The evaluation will include an analysis of reasonable alternatives including no action.
- ❖ For cleanup of brownfields petroleum-contaminated sites identified in the EPA-approved scope of work, an analysis of cleanup alternatives must include considering a range of proven cleanup methods including identification of contaminant sources, exposure pathways, and an evaluation of corrective measures.

The clean up method chosen must be based on this analysis.

Note: This may also be applicable in Element 4: Approval of a Cleanup Plan



Analysis of Brownfield Cleanup Alternatives (ABCA)

The ABCA should include:

- ❖ Information about the site and contamination issues (i.e., exposure pathways, identification of contaminant sources, etc.)
- ❖ Future use of the site
- ❖ Cleanup standards used
- ❖ Applicable laws
- ❖ Information and analysis of cleanup alternatives considered for the site, including a range of proven cleanup methods (effectiveness, implementability, and the cost of the cleanup alternatives), and “no-action” as an alternative
- ❖ A description of the selected environmental cleanup
- ❖ Assess whether land use (institutional/engineering) controls will be necessary (during or after cleanup) and if so, how they will be implemented and maintained
- ❖ A discussion of how the selected cleanup will conform to all applicable Federal, Tribal and State laws.





Element 4 – Part 2

Verification and Certification of a Cleanup

Element 4:

Verification & Certification

Tribes must include, or be taking reasonable steps to include, in their response programs a requirement for verification by and certification or similar documentation from a Tribe, or a licensed site professional (Qualified Environmental Professional [QEP]) to the person conducting a response action indicating that the response action is complete.



U.S. EPA Goal

EPA's goal in funding activities under this Element is to have Tribes include in their response program mechanisms to verify that response actions are complete.

Mechanisms can include:

- ❖ Tribal laws/codes
- ❖ Tribal approval of protocols or standard operating procedures (SOPs)
- ❖ Tribal Council resolution



Verification

- ❖ When a response action is completed there needs to be verification by review and/or audit of the action and its' results to ensure that all remediation requirements for a site have been successfully implemented or satisfied.
- ❖ The verification should be conducted by someone that has the expertise and experience to perform the audit of the results and/or conduct verification sampling and testing.



Verification

The verification can include:

- ❖ A review and audit of all field reports and data to include all relevant environmental media sampling and analysis results; and/or
- ❖ Independent sampling and analysis of relevant environmental media to verify results of the remediation.



Eligible Use of Grant Funds

Eligible uses of 128(a) grant funds for this Element include, but are not limited to:

- ❖ Auditing site cleanups to verify the completion of the cleanup;
- ❖ Hiring a “*Qualified Environmental Professional*” to provide expertise; and/or
- ❖ Verification at non-brownfields sites* (if such activities are included in the Tribe's work plan.)

*A “non-brownfield site” would be an active business, institution, office, or facility



Who can Conduct Verification?

Verification can be conducted by:

- ❖ Qualified Tribal staff
- ❖ A “Qualified Environmental Professional” (*as specified under 40 CFR §312.10*)
- ❖ Qualified Tribal contractor (primary or third party)
- ❖ US EPA and/or state environmental staff
- ❖ Other qualified government staff (BIA, IHS, BLM, etc.)
- ❖ Qualified local government staff



Certification of Completion

A “[Certification of Completion](#)” is generally a letter or document, issued by an authorized Tribal official, stating that all remediation requirements for a site have been successfully implemented or satisfied.

Notes:

- ❖ *Consult the US EPA or state programs for examples of such letters*
- ❖ *Your legal counsel will usually need to be involved*



Certification of Completion

The certificate is normally requested by and issued to the “person responsible for conducting the response action”. The “person” is typically the party that owns the property and/or the party that is responsible for the release(s).

That would not normally be the contractor actually performing the cleanup, but the party that the contractor is performing the work for and/or the property owner.



Other Certificates

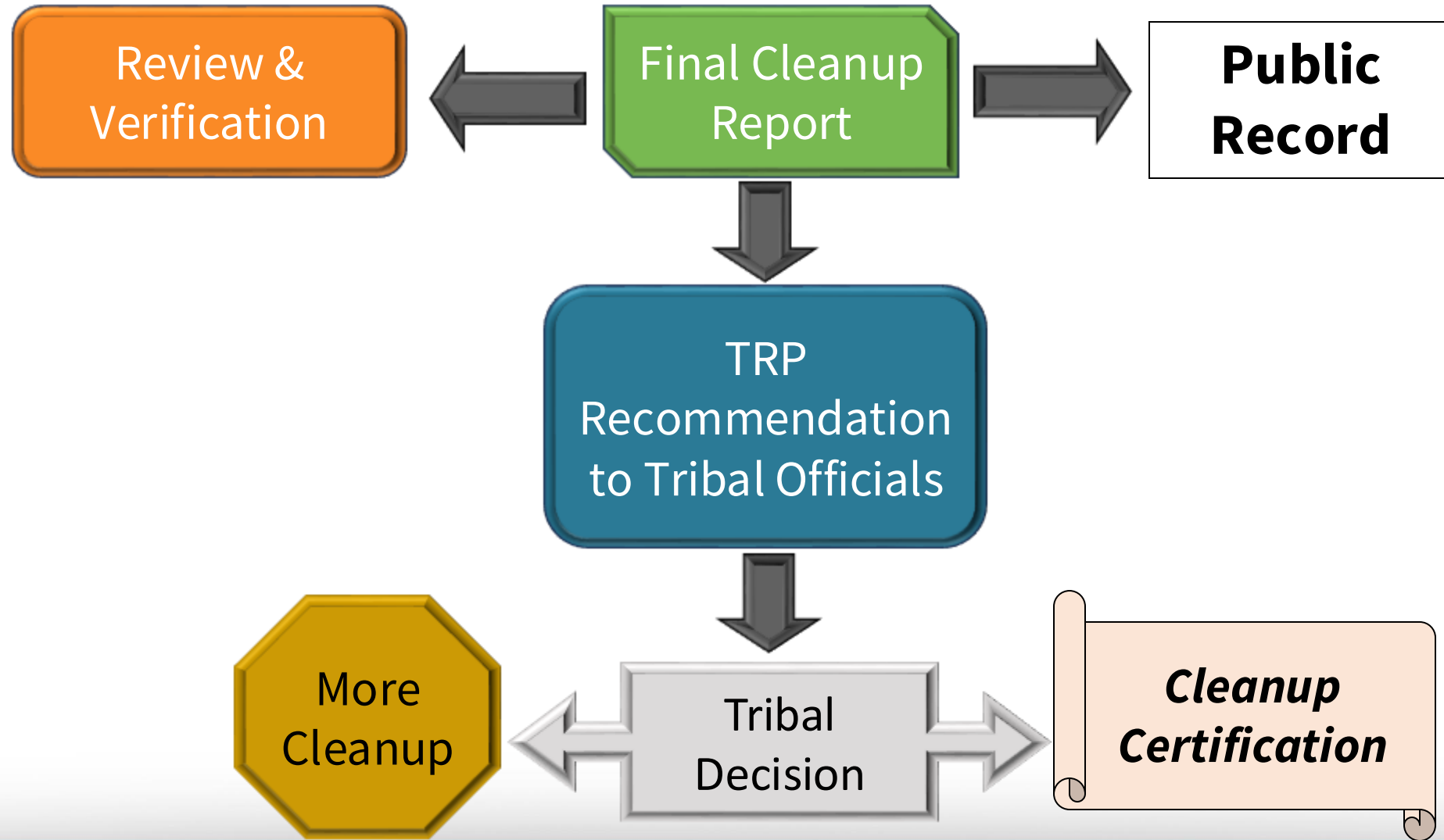
There are circumstances under which a Tribe might issue a qualified certification to include a:

- ❖ Conditional Certificate of Completion;
- ❖ Partial Certificate of Completion;
- ❖ No Further Action” (NFA) determination; or
- ❖ “Comfort Letter”.

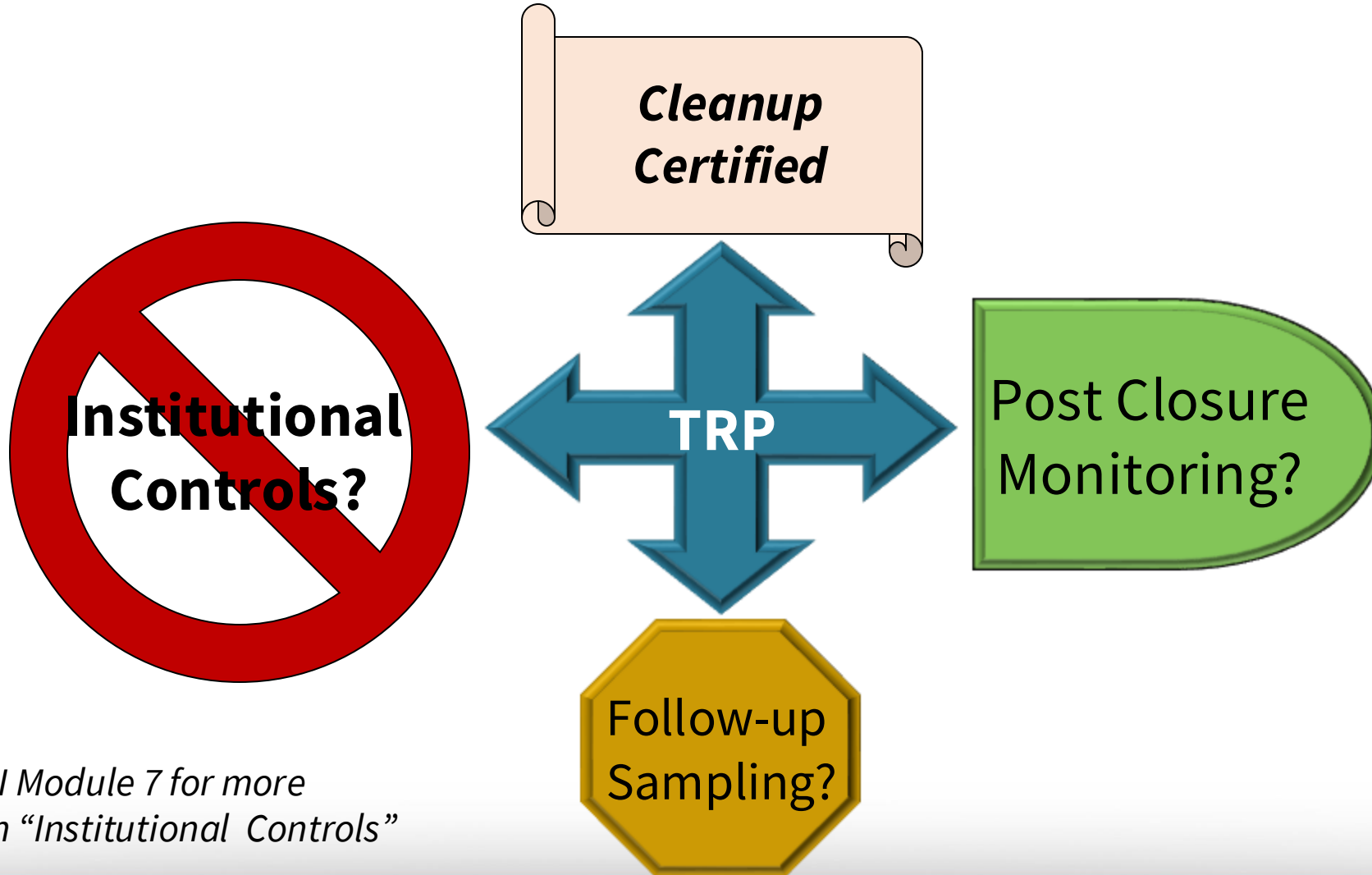
(Tribal legal counsel should be consulted for the appropriate terminology to be used for a specific situation by the Tribe in accordance with Tribal laws and codes.)



Cleanup Completion



Cleanup Certification Follow-up Needed?



Note: See Tier I Module 7 for more Information on “Institutional Controls”



Tribal Accomplishments

- ❖ Tribes have adopted new laws and codes to implement these authorities and processes.
- ❖ Tribes have gained some experience with the development and approval of a cleanup plan through:
 - implementing brownfield 104(k) cleanup grants; and/or
 - TRP 128(a) grant funded site-specific cleanups.



Tribal Accomplishments

- ❖ Tribes have assisted U.S. EPA staff in planning and conducting cleanups on their lands under RCRA, CERCLA and LUST.
- ❖ Tribes have reviewed and commented on cleanup plans developed by other federal and state agencies. (e. g. Army COE and DoD)
- ❖ An Alaska Tribe has been contracted by the DoD to oversee a contractor and conduct a cleanup
- ❖ An Alaska Tribe has used 128(a) funds to verify a DoD Cleanup
- ❖ An Alaska Tribe had developed detailed Standard Operating Procedures (“SOP”) for the cleanup review and approval process by the Tribe.



Tribal Accomplishments

- ❖ The Standing Rock Sioux Tribe (SRST) of North Dakota has issued such certifications. The SRST Tribal Response Program contracted for the site cleanups using EPA 128(a) and 104k Brownfield grant funds.
- ❖ The SRST DER/EPA had existing general authority in Tribal law and codes to conduct oversight and approval of a cleanup.



Tribal Issues

- ❖ It may not be clear if the Tribe has any existing authority in place to require and/or approve a cleanup plan. (do the research!)
- ❖ Drafting and adopting new Tribal laws, regulations, or codes can be very time consuming and may conflict with existing Tribal laws/codes.
- ❖ It can be difficult to determine who has the jurisdiction and/or the lead to approve a cleanup plan for a site.



Tribal Issues

- ❖ Availability and costs of proper Tribal legal support
- ❖ Funding for verification sampling and analysis not always available
- ❖ Access to necessary expertise needed to assist a Tribe with establishing site specific, risk based, cleanup standards and reviewing and approving cleanup technologies
- ❖ The impact of historic and cultural issues is becoming more complicated and the consultation and studies required by State or Tribal Historic Preservation Offices (SHPO/THPOs) can affect the remedy selection as well as be time consuming and costly.



Lessons Learned

- ❖ Need to maximize ability and rights to review and comment/approve of cleanup plans developed by state or federal entity where Tribe has jurisdiction and/or significant interest
- ❖ Need to establish clear Tribal processes and, where possible, authority to review and approve cleanup plans
- ❖ Need to identify all Tribal and community entities that need to be involved in and/or informed of approval of a cleanup plan



Lessons Learned

- ❖ Need expertise and/or technical support to set site specific, risk based, cleanup standards and goals and to gather critical information and data
- ❖ Need to educate and inform Tribal leaders of cleanup decision-making process and goals (*ongoing problem due to turn over of elected officials*)
- ❖ The Tribal authority to access a site and conduct sampling and oversight in order to verify and certify a response action needs to be established (*in some cases, site access agreements may be needed*)
- ❖ Model Tribal documents and letters should be drafted and receive Tribal legal review before they are needed



Lessons Learned

- ❖ Tribes need to determine internal and external capabilities and capacity to conduct verification reviews and sampling/analysis in advance.
- ❖ There may be jurisdictional and/or legal issues to be resolved in order to conduct verification and issue a certification of cleanup.



We Would Like to Hear From You

Questions about this Module or need other
brownfields assistance?

Contact the Tribal TAB team at
Tribal-TAB@ksu.edu



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