



Tier 1 – Establishing a Tribal Response Program

Module 4: TRP Element 2 – Oversight & Enforcement

The development of oversight and enforcement authorities and/or other mechanisms and resources to ensure that cleanups are adequate and completed

TribalTAB.org

TRP Element 2

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
- 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 Rule

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*





[Click to play video, which will open in YouTube.](#)

Video 4.1: Codes & Ordinances Benefit TRP

Ina Nez Perce

***Director Environmental Department, Fort Belknap
Indian Community, MT***

Element 2, Part 1:

Development of Tribal Oversight & Enforcement Authorities



Tribal Response Program 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.*

** Consult US EPA Guidance and the Region for specific activities*





Click to play video, which will open in YouTube.

Video 4.2: TRP Enforcement
Stephanie Wallace
U.S. EPA Region 8, Montana Office (retired)

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.



NOTE: “Jurisdiction” is a separate issue that may be different for each Tribe.



Civil versus Criminal Law

- ❖ Civil case law, up to and including U.S. Supreme Court decisions and opinions, differ somewhat from those for criminal law.
- ❖ This is a constantly evolving area of law and Tribal sovereignty.

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



Jurisdiction versus Authority

Understand the difference between:

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



Tribal Laws & Codes

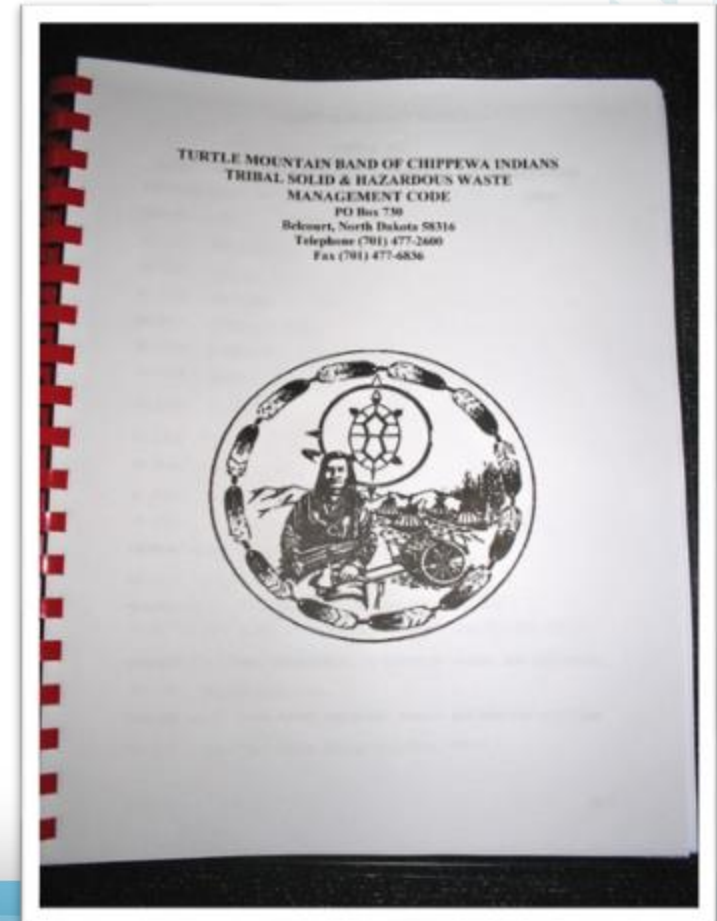
- ❖ Tribal laws, codes, and ordinances along with procedures, policies, and protocols can vary substantially from Tribe-to-Tribe
- ❖ There is **no one-fits-all model** law or code
- ❖ Federal and State laws/regulations can be a model for development of Tribal laws and codes/regulations but usually require 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 & Enforcement

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



Turtle Mountain Band of Chippewa Indians,
North Dakota





Click to play video, which will open in YouTube.

Video 4.3: Enforcement

Ray Reed

TRP Coordinator, Turtle Mountain Band of Chippewas, ND

Tribal – Federal Overlap

- ❖ In some cases, both Federal (i.e., U.S. EPA, COE, or BLM) and Tribal laws and requirements may be applicable to a response action and both oversight authorities may be applicable.
- ❖ Also, state jurisdiction/authority can apply in some locations or situations.



EPA Laws & Regulations

Federal Laws and U.S. EPA regulations that may govern a response action 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
- ❖ U.S. Coast Guard, 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.

(In other words: What ever gets the job done!)



“Other Mechanisms” Could Include

- ❖ 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
- ❖ Private Party



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 (*often using US EPA Brownfield funds*)
- ❖ Developing internal standard operating procedures (SOPs) and policies on how to implement the requirements
- ❖ Referrals to the BIA, U.S. EPA or a State for appropriate compliance and enforcement action.





Click to play video, which will open in YouTube.

Video 4.4: Element 2 Codes

LaDonna Tamakawastewin Allard
Standing Rock Sioux Tribe, ND/SD

Element 2, Part 2:

Ensuring that a Response Action is Adequate & Completed



Two Parts of “Completion”

This part of Element 2 has two sub-parts:

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



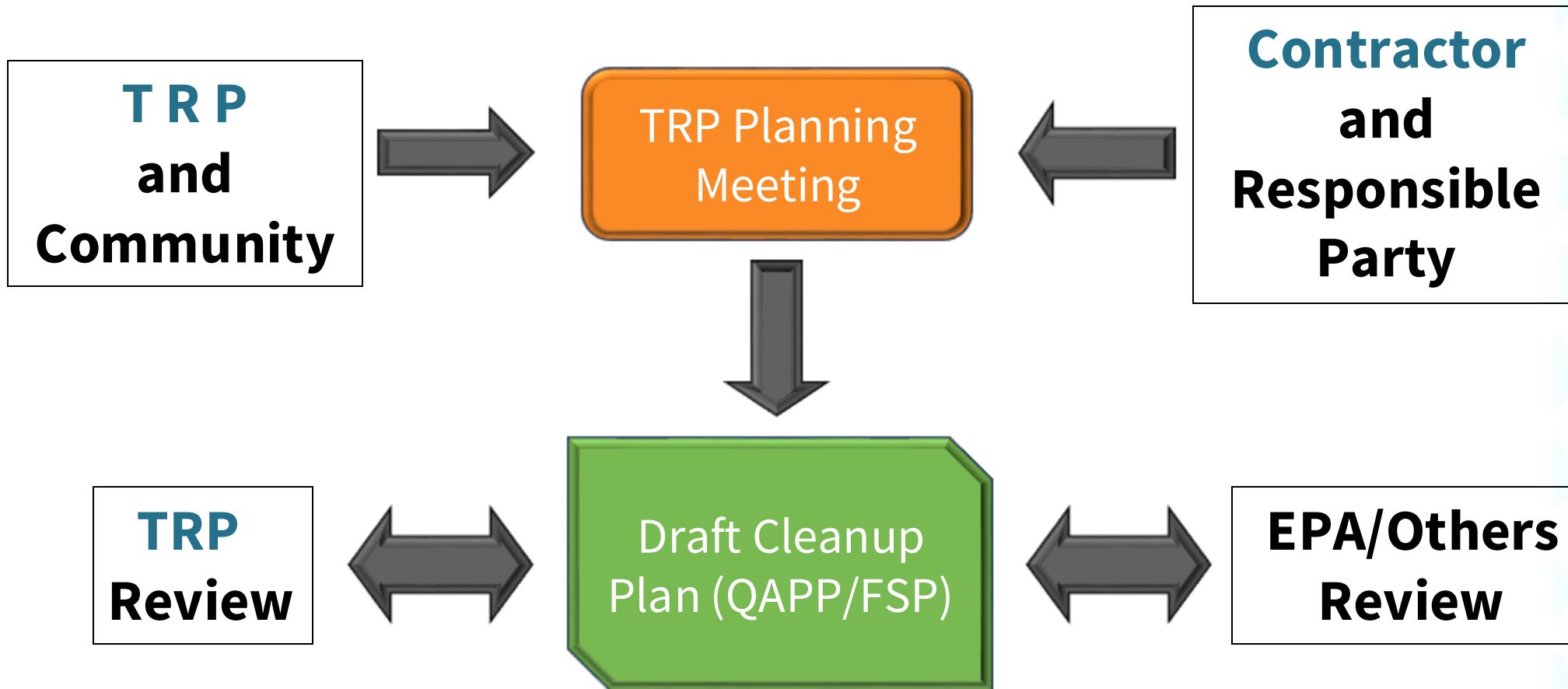
Steps: Cleanup Oversight

Cleanup Adequacy:

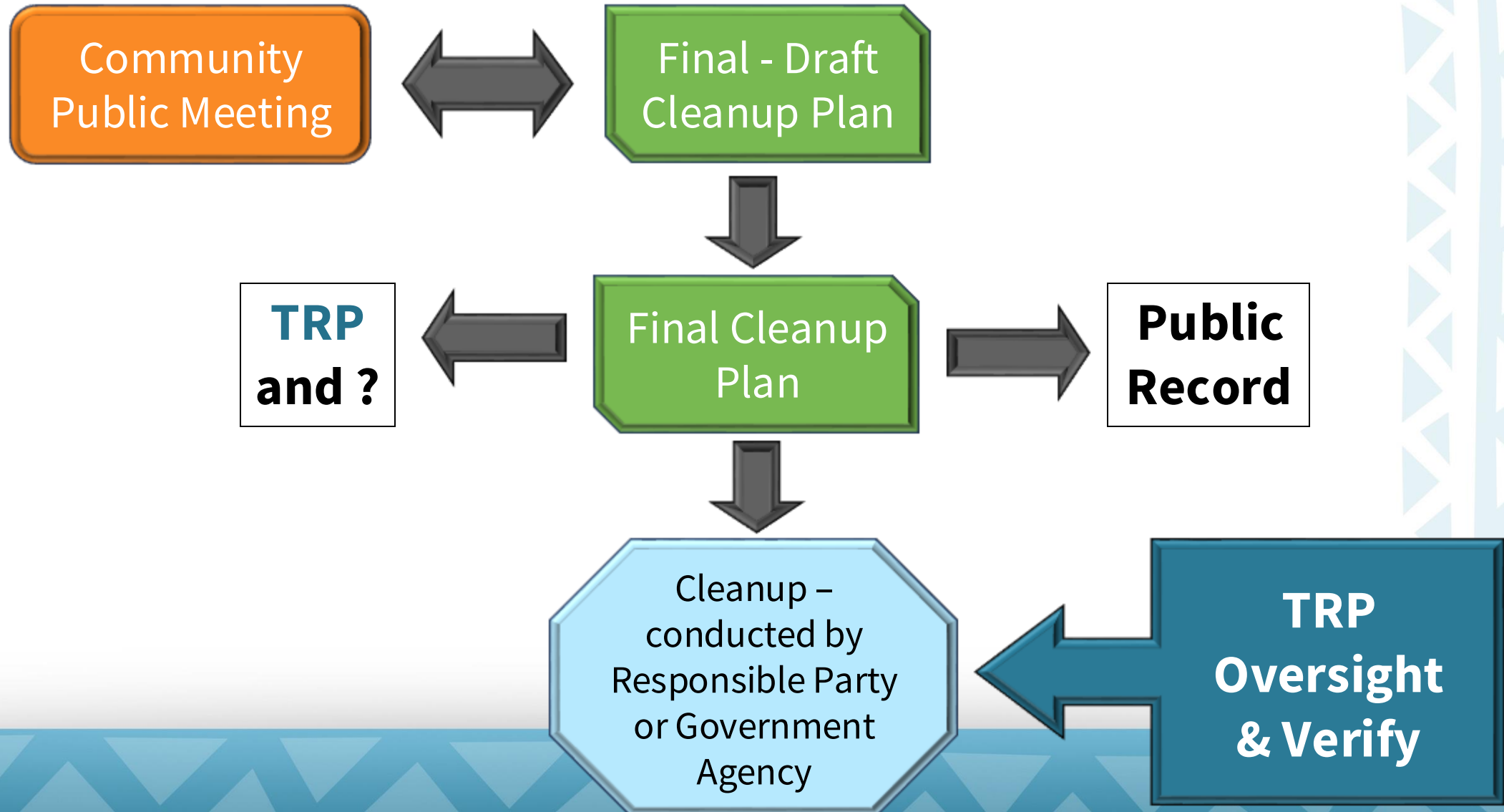
- ❖ What are site end use and cleanup goal(s)?
- ❖ Have all local/Tribal exposures been addressed?
- ❖ Have all community concerns been addressed?



Typical Cleanup Planning Process



Typical 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. (*using federal/state standards as a minimum*)
- ❖ 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 a 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. 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:

- ❖ 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
- ❖ any Tribal specific criteria



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.



Cleanup Conditions

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!”....many things can impact a planned schedule*



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.

**A Quality Assurance Project Plan (QAPP) is typically required when using federal grant funds*



Element 4 Overlap

NOTE: Element 2 overlaps Element 4 - verification and certification of cleanups.

The same administrative and legal authorities may need to be in place to conduct those actions in Element 4.



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
- ❖ Such costs must be **authorized** under the Tribe's grant work plan and budget 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 also available under [Section 104\(k\)](#) for Assessment and Cleanup of specific brownfield sites.



Tribal Funding

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

For example, a 1% of total construction contract fee and/or a 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 “Responsible Parties”
- ❖ Observing & assisting EPA or other federal or state actions
- ❖ Reviews of contractor reports documenting results of a cleanup
- ❖ Oversight & assistance to LUST
- ❖ Coordination with U.S. Army COE on DoD/FUD sites



Tribal Accomplishments

- ❖ Tasking contractors or utilizing Tribal staff and capacity to conduct some cleanups
- ❖ Referrals to the U.S. EPA or state for appropriate compliance and enforcement action
- ❖ Drafting and developing Tribal laws and codes to implement compliance authority and requirements
- ❖ Developing SOPs for response action investigations and oversites



Examples of Oversight & Enforcement



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



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



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



Oversight by Yakutat Tlingit Tribe

The U.S. Army Corps of Engineers (USACE) 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.



Oversight of LUST/UST Tank pulls and remediation



The Leech Lake Tribe in
Minnesota conducted
oversight of an oil
pipeline leak cleanup in
coordination with
U.S. EPA



The Leech Lake Tribe in Minnesota conducted oversight of the cleanup of a building owned by a church group and imposed Tribal cleanup standards for Lead and Asbestos.



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
- ❖ Coordination with other Tribal programs



Tribal 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 officials **not aware** of Tribal laws 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 Element 2 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



We Would Like to Hear From You

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brownfields assistance?

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



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