



Tier 1 Module 3

CERCLA 128(a)

Tribal Response Program

Element 2: Oversight & Enforcement



Element 2: the “Law”

CERCLA 128(a) states: Indian tribes must include, or be taking reasonable steps to include, in their response programs:

- 1) 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 and be conducted in accordance with applicable federal and tribal law.



Element 2: the “Law”

and

2) Oversight and enforcement authorities or other mechanisms, and resources that are adequate to ensure that the necessary response activities are completed if the person conducting the response activities, including operation and maintenance or long-term monitoring activities, fails to complete the activity (such as enforcement, funding, or other programmatic resources, including staff).



Tribal Response Role

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.



Element 2: Part 1

Development of:

- **Oversight and enforcement authorities; or**
- **Other mechanisms and resources.**



Element 2: Part 1

Oversight & Enforcement Jurisdictions in Alaska affected by: (case-by-case)

- **The AK Native Claims Settlement Act (ANCSA)**
- **Land/Building Transfers**
- **Land Acquisitions**
- **Surface vs sub-surface**
- **Water issues**
- **Etc.**



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.



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”

- US EPA Superfund & RCRA Programs
- Alaska DEC 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



AK Village Role

- To conduct oversight some Tribes/Villages may need to develop civil compliance and enforcement authorities, and/or rules, policies and procedures for their environmental programs.
- The necessary oversight may need to be implemented via “other mechanisms”.
- Other authorities, such as federal or state may be needed to fully implement this Element.



AK Village Role

“Other Mechanisms” could include:

- Coordination with EPA, ADEC, Etc.
- MOU/MOA with another agency
- Contract with another agency
- Referral to a federal or state agency



Tribal Requirements

- Tribal laws, codes and ordinances and/or procedures, policies and protocols can vary substantially from tribe-to-tribe
- There is no one-fits-all model policy, law, code or procedure
- Federal and State laws/regs. or other tribes can be a model for development of Tribal policies and rules.



Tribal Requirements

Tribal Response Program requirements or policies could include:

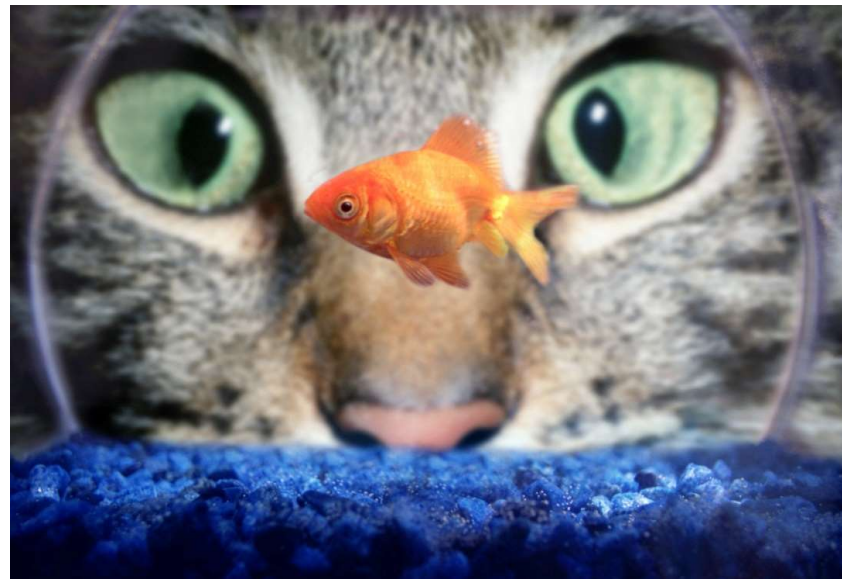
- ✓ **Responses to releases**
- ✓ **Oversight of responses**
- ✓ **Conducting responses**
- ✓ **Cleanup Standards**
- ✓ **Verification & Certification**
- ✓ **Institutional Controls**
- ✓ **Public Participation**



Tribal Oversight

Tribal ID or credentials for TRP compliance and/or oversight?

How would you identify yourself as an oversight official?





Tribal Cleanup Standards

- Under the TRP -The Tribes may establish the cleanup standards or goals for the cleanups conducted under their programs via laws, codes or resolutions.
- A typical cleanup or response is conducted to meet site specific “risk based” goals or regulatory based cleanup standard(s).
- Alaska Villages may need to request technical assistance from EPA or ADEC on a specific cleanup standard and how it is derived.



Cleanup Standards

Clean up standards can be established in two ways:

- Establishing a risk-based decision making process and designating who the decision maker is (in EPA Region 10 it is the Reg. Administrator); and/or
- Adopting specific cleanup standards for @ chemical or substance.



Jurisdiction vs Authority

- Jurisdiction: Established by Treaty and federal laws (e.g. ANCSA) and legal precedents (court decisions)
- Authority: Established by Tribal policies, resolutions, laws and codes



Tribal Govt. Jurisdiction

- Constantly evolving area of law and tribal sovereignty.
- Impacted by the ANCSA in Alaska.
- Impacted by court cases and decisions.

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



Tribal-State-Federal Overlap

- In some cases both State and Federal (i.e. ADEC, U.S. EPA or DoD) and tribal procedures and requirements may be applicable to a response action and 2 or more oversight authorities may be applicable.

These cases need to be worked out by the parties involved.



EPA Laws & Regulations

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

- CERCLA (aka Superfund); {*note: CERCLA Section 120(h) for federal facilities*}
- RCRA Corrective Action & LUST regulations;
- Asbestos under the Clean Air Act;
- TSCA for PCB remediation and disposal;
- Lead Abatement under TSCA § 402(c)(3);
- etc.



NALEMP

The Native American Lands Environmental Mitigation Program (NALEMP) was developed in 1996 by the Department of Defense (DoD) to address environmental issues from past DoD activities on Indian lands, including Alaska Native Claims Settlement Act (ANCSA)-conveyed lands and Native allotments. The program provides a unique opportunity for Native communities to not only address impacts from past DoD activities on their lands, but also to develop their own environmental programs and expertise.



Element 2 Part 2

Ensuring that response actions or cleanups conducted under this program are adequate and completed.



2 Parts of Completion

This part has 2 sub-parts:

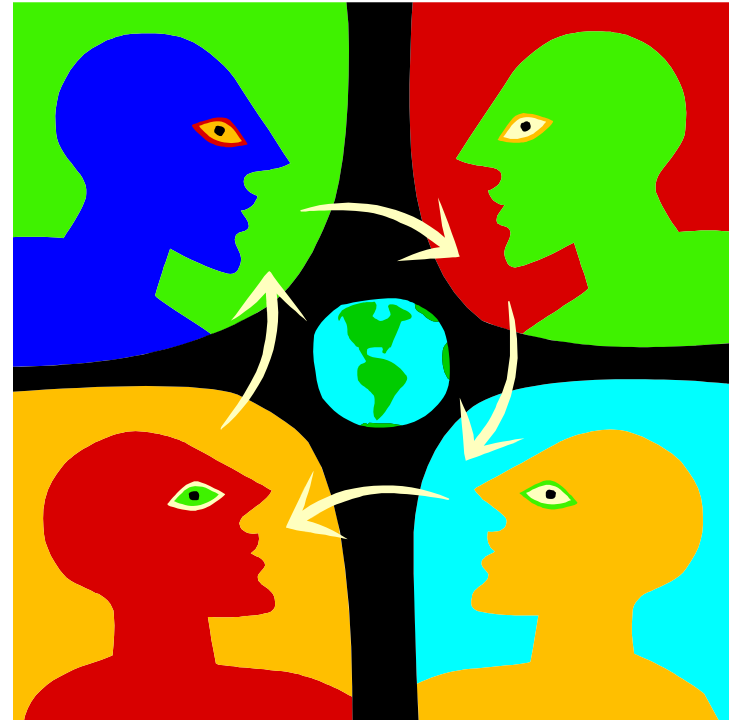
- Ensuring necessary response actions are adequate to protect public health and the environment;
and/or
- Ensuring that a response action is completed to include operation & maintenance or long-term monitoring activities



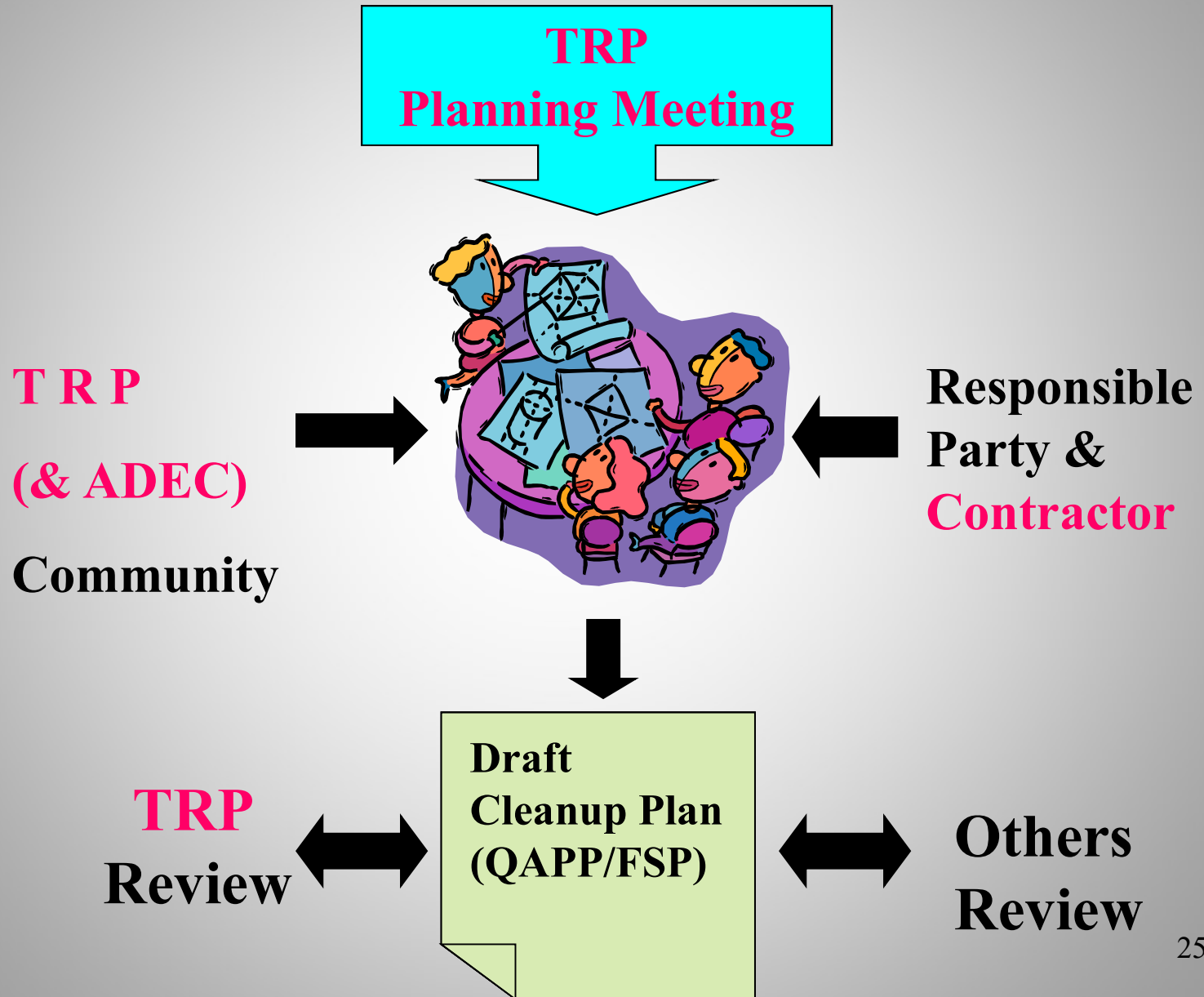
Steps: Cleanup Oversight

Cleanup Adequacy:

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



Typical Clean up Planning Process



Cleanup Process



Public Meeting

Final-Draft
Cleanup
Plan

**TRP &
Other Agencies**

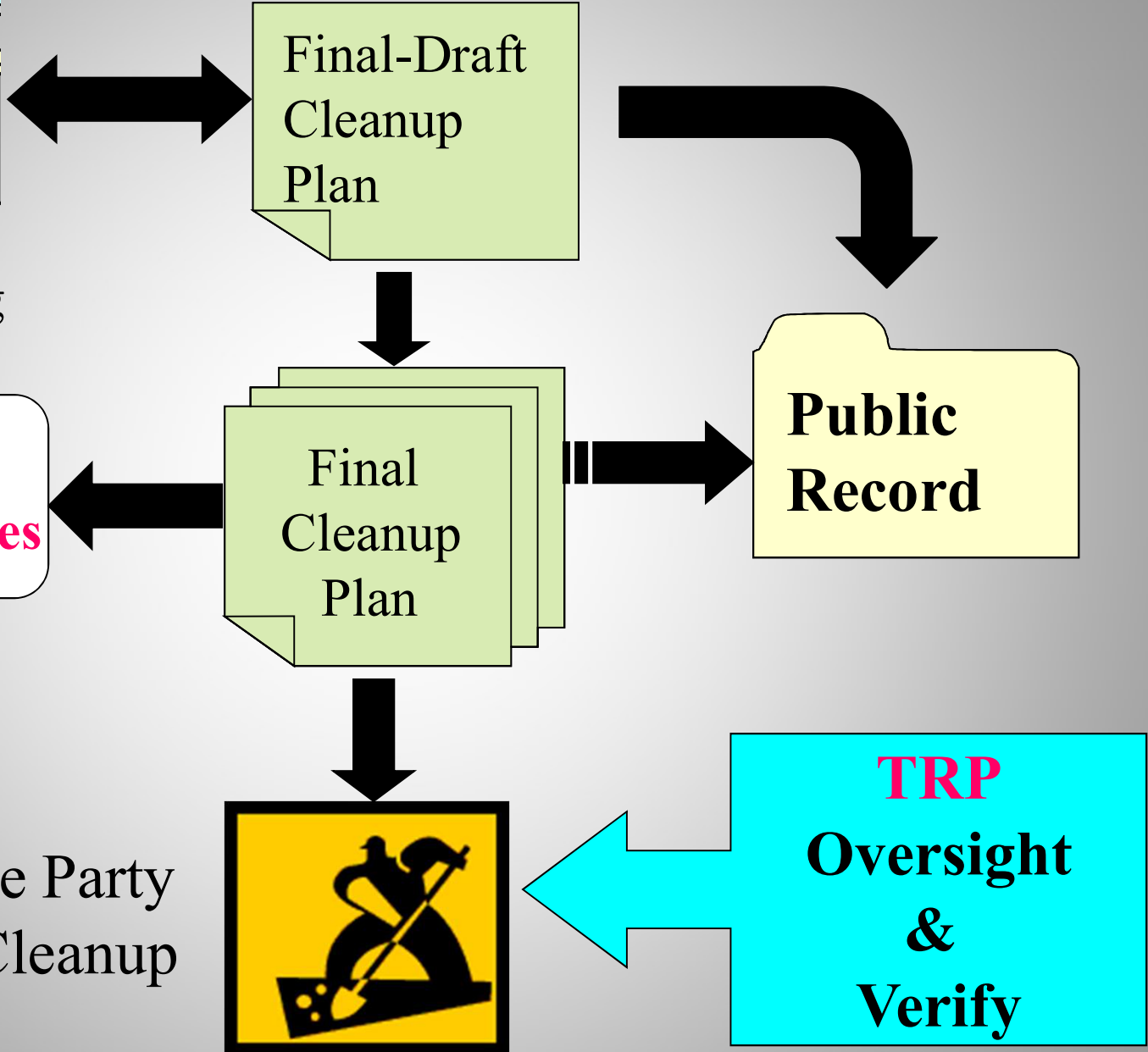
Final
Cleanup
Plan

**Public
Record**

Responsible Party
Conducts Cleanup



**TRP
Oversight
&
Verify**





Cleanup Goals

Under federal programs 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 to be obtained, considering several factors which can include:



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

This part of Element 2 overlaps Element 4: verification and certification of cleanups. Note: administrative and/or legal authorities or agreements may need to be in place to conduct these 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 Cleanup of specific brownfield sites.

(Alaska Tribes & native villages need to partner with an eligible entity)



Tribal Funding Sources

Tribes may need to establish an emergency or environmental response fund for such situations and, where possible, establish some fees to provide the funds.

{e.g. a 1% of total contract solid waste permit fee?}



Tribal Accomplishments

- Conducting site specific cleanups utilizing DoD funds to gain experience
- Conducting oversight of DoD Cleanups
- Verification of past cleanups using TRP Funds
- Reviews of contractor reports documenting results of a cleanup



Tribal Accomplishments

- Utilizing tribal staff and capacity to conduct some cleanup work
- Observing and assisting EPA & ADEC actions
- Referrals to the U.S. EPA or ADEC for appropriate compliance and enforcement action.



Alaska Examples

- Utilizing the NALEMP to implement cleanup actions (Villages of Yakutat & Eyak).
- Conducting Site sampling to determine if cleanup completed (Village of Yakutat)
- DoD/Air Force contracting tribal staff to implement cleanup activities and conduct sampling (Port Heiden)



Tribal Issues

- Sites under jurisdiction of another Agency.
- Uncertainties of Tribal/Village jurisdiction or authority to impose the TRP.
- Small Tribe/Village land base but is directly impacted by a nearby site.
- Lack of existing Tribal authorities and/or rules or policies in place for environmental programs.



Tribal Lessons Learned

- It is important to determine and document site ownership, responsibility and jurisdiction;
- Adopting and implementing tribal policies, requirements, etc. to establish the tribal authority to conduct these actions may be necessary;
- Need to have appropriate internal policies & procedures in place;



Tribal Lessons Learned

- There is a 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.
- Make maximum use of RABs/CAGs, etc. to provide input into cleanups by other agencies.



Tribal Implementation

- Identify existing response sites where Tribal involvement or oversight may be necessary and appropriate.
- Determine what tribal or other policies or authorities exist or need to be improved or created to fully implement this Element.
- 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;
and
- More opportunities for tribal staff to learn in the field and shadow or observe experienced EPA/ADEC response staff and contractors.
- Tribes hire Tribes



The End