



# Tier 1 Module 6

**CERCLA 128(a)**

**Tribal Response Program**

**Public Record & Institutional Controls**



# The “Law”

128(b)(1)(C) PUBLIC RECORD..... “*maintain, update not less than annually, 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 are planned to be addressed under the State program that specifically governs response actions for the protection of public health and the environment in the upcoming year.*”



## 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. “*



## 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

Each tribe receiving financial assistance under 128(a) shall maintain and update, not less than annually, 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 are planned are planned to be addressed the next year.



# US EPA Guidance

## Show Me the Record:

- Indian 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.



# 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.

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 or ADEC jurisdiction (i.e. LUST, Superfund or DOD), however, EPA would strongly encourage listing of these actions as well.





## Bottom Line:

- Minimum EPA requirement = Include all response actions taken/planned under the Tribal Response Program.
- Encouraged by EPA = Include all response actions taken/planned, regardless of jurisdiction, on or near Tribal lands or communities.



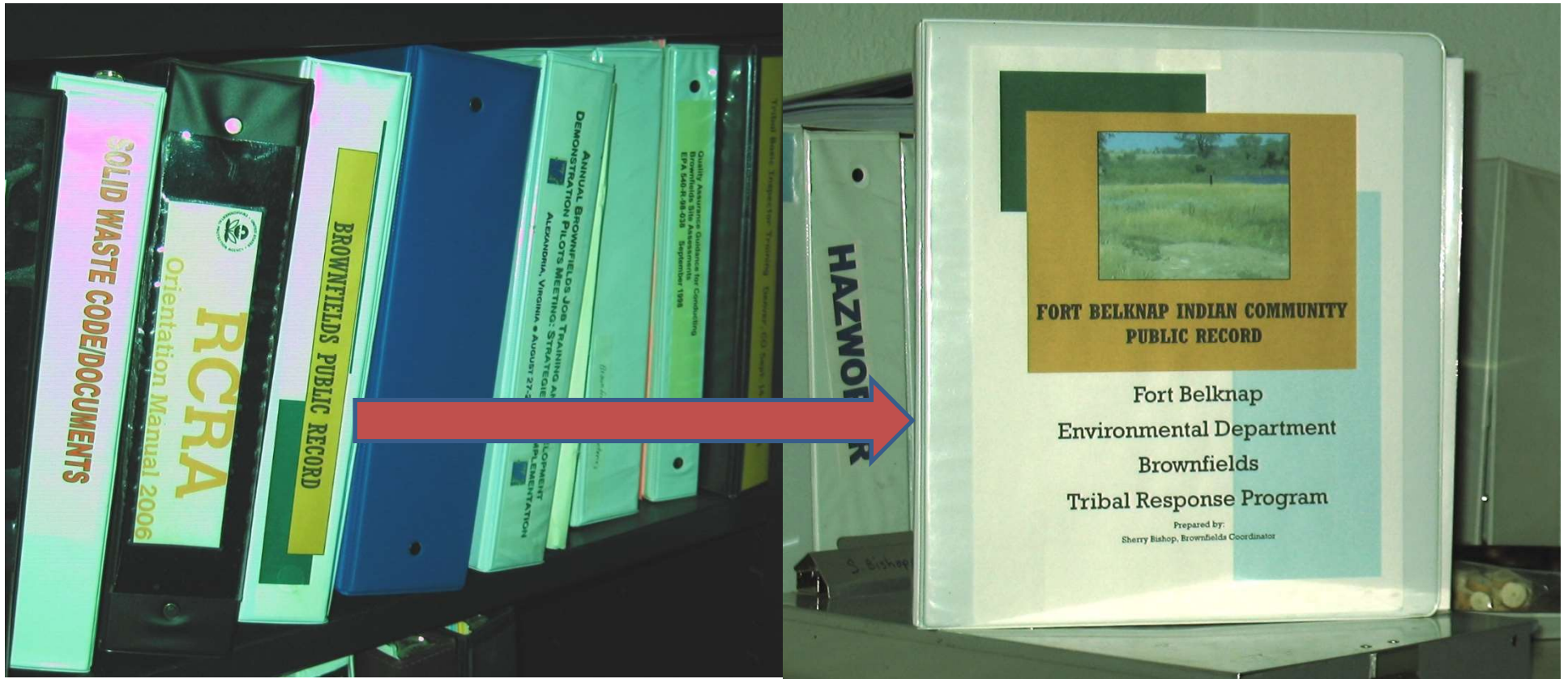
## Record vs Element 3

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



# 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 establish and maintain and make available 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)



**Most 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.**



# AK Tribal TRP Web Sites

- [http://www.kuskokwimcouncil.org/index.php?option=com\\_content&view=article&id=60&Itemid=70](http://www.kuskokwimcouncil.org/index.php?option=com_content&view=article&id=60&Itemid=70)
- <http://www.yritwc.org/Home/tabid/36/Default.aspx>
- <http://www.ptialaska.net/~jeffbens/met/MP.html>



## 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.



# 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.



## 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 required information does not exist yet.



# Tribal Issues

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
- Other agency/program 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 all copies of the public record are located, if there is more than one, and 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.



# Further Implementation

- Using a multi-media approach that will reach all of the community.
- Improved coordination with other cleanup authorities (EPA, ADEC & DoD) and the use of the Public Record as a means to inform the community of all response actions that have or will take place in, or in the vicinity of, their community.



## Part 2: 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 unrestricted use. If not, the Public Record must identify the Institutional Controls relied upon in the remedy.**



# Institutional Controls?

- What are they?
- What are they used for ?
- Who implements them?
- Who enforces them?
- How long do they last?





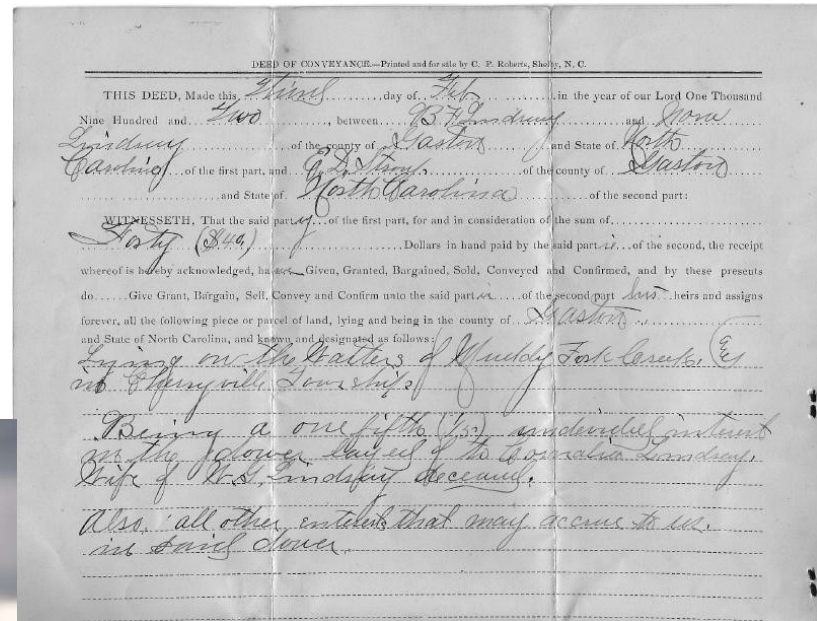
# I.C.s are:

**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.**



# Example I.C.s

Notice in the Deed,  
Zoning, Resolutions,  
Lease Terms & Signs





# 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.**



# WHO?:

- **Federal Agencies (BIA, BLM, NPS, etc.)**
- **ADEC or other State office?**
- **Tribal Council**
- **Tribal Court**
- **Village Corp.**
- **Tribal Land/Real Estate Office**
- **Incorporated towns or Boroughs**
- **Other local non-tribal govt.?**
- **Property owner**



## 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**
- **Delayed Cleanup (not done yet)!**



# 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**



## Examples of Physical or Engineering Controls

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







# Failure of I.C.s: Love Canal , NY

## Love Canal, NY had Institutional Controls



**They were ignored by the developers and local govt.**



# What can happen without I.C.s?

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



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# Fundable Activities

EPA considers activities related to maintaining and monitoring institutional controls 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.





# Monitoring & Enforcement

Signs are a form of Institutional Control



**Someone must monitor  
And enforce the controls**



# Monitoring of I.C.s

- **Inspections**
- **Pre-approvals of changes in land use**
- **Pre-approval for construction**
- **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 tribal legal procedures have been developed.
- I.C.s must often be coordinated with multiple Tribal government departments and functions as well as the BIA, ADEC and other federal agencies.
- Authority, responsibility and jurisdiction for enforcement and monitoring of I.C.s can be a problem.



## Tribal Issues (cont.)

Checker-boarding of land ownership and relevant jurisdictions, as well as unclear land ownership, 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:

- The lack of land use controls or institutional controls had led to some 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 the procedures or coordination that may be necessary to establish, implement and monitor such controls.



# Further Implementation

- The sharing of tribal legal research and implementation issues between tribes is important.
- Coordination with ADEC and federal agencies will be important to implement this requirement and include it in the Public Record.





# 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>



**The End**