Key Questions Will be Answered:

1. What are the sources of Tribal legal authority?

2. What are the policy reasons for Tribes to develop their own regulatory programs?

3. What tools do Tribes need to provide for due process of law?

4. Why should Tribes develop their own hazardous substance cleanup laws and standards?
Why a Tribe or Band Should Enact Its Own Cleanup Standards

- Assertion of the Tribe or Band’s inherent sovereign powers
- Demonstrates a Tribe or Band’s governmental process, self-confidence and authority
- Enables a Tribe or Band to apply its own values to determine how clean is “clean” (and for what purpose)
Why a Tribe or Band Should Enact Its Own Cleanup Standards

• Exercise Tribe or Band’s right of self-determination and protects its interests, both on and off the Reservation (extra-territorial jurisdiction)

• Regulation of the Reservation Population under Tribal due process of law.
Civil Regulatory Authority: The Three Sovereigns

- Federal Government
- States
- Indian Tribes/Bands
Sources of Tribal Civil Regulatory Authority

- Tribe and Bands as property owners
- Powers conferred by Congress through statute or treaty
- Retained Inherent sovereignty

Atkinson Trading Co. v. Shirley, 121 S.Ct. 1825 (May 29, 2001)
Tribes / Bands as Property Owners

- Concept of the reservation land base
- Geographic criterion that governs the extent of the Tribe’s authority
- Extraterritorial reach of Tribal regulatory programs
Reservation-wide Land Acquisition Policy

• Applicable to all lands (fee and trust) within the exterior boundaries of the Reservation

• Means to acquire fee lands to convert into trust lands and expand the Tribal / Band land base

• Acceptance of land into trust requires compliance with applicable Federal and Tribal law
Powers Conferred by Congress

• Several federal environmental statutes provide for Treatment as State designations for Tribes that meet certain regulatory standards (e.g., *Clean Air Act*, *Clean Water Act*)

• By contrast, CERCLA is *not* delegable.
Retained Inherent Sovereignty

• To regulate the activities of nonmembers who have entered into *consensual relationships* through commercial dealing, contracts, leases or other arrangements; and

• To exercise civil authority over conduct of nonmembers on the Reservation that directly affects the Tribe’s *health, welfare, political integrity, or economic security*

Tribal Hazardous Substances Control Act (‘‘HSCA’’)

- Tribal equivalent to CERCLA (remedial statute)
- Tribal exercise of inherent sovereignty and civil regulatory authority
- Remedial measure to protect human health and the Reservation Environment
Tribal HSCA

• Provides for the cleanup of sites contaminated by hazardous substances
• Requires use of Tribal administrative procedures and exhaustion of the Tribal administrative process
• Provides for judicial review in Tribal Court (on the record/arbitrary and capricious standard)
• Creates Tribal cause of action for Natural Resource Damages
Elements of a Tribal HSCA

• Departmental powers and duties
• Standards of liability
• Enforcement
• Private right of action (for contribution/cost recovery)
• Interim Remedial actions
• Final Cleanup actions
HSCA – Law of the Tribe

Provides the basis for the Tribe’s legal authority in terms of:

- Program development
- Program implementation
- Due process of law
- Enforcement
- Judicial review
Liability under CERCLA and HSCA

- Strict liability (without regard to fault)
- Status liability of the party
  - “Potentially Responsible Party” (CERCLA)
  - “Potentially Liable Party” (HSCA)
  - Based on status (owner, operator, generator)
- Joint and several liability
- Remedial (retroactive)
Status Liability of the Party

- Current owner or operator of contaminated property;
- Former owner or operator (or lessee) of contaminated property at the time of release;
- “Generator” of hazardous substances; or
- “Arranger” of hazardous substance disposal or treatment (incl. “Transporters”)
All Roads Lead to Tribal Cleanup Standards

Whether the Tribe is acting in its capacity as a property owner, asserting its civil regulatory authority or working in cooperation with EPA to implement remedial measures under CERCLA, the process is driven by the need to comply with Tribal cleanup standards.
Tribal Cleanup Standards as ARARs

Under § 121 of CERCLA, cleanup of a contaminated site must comply with all “legally applicable or relevant and appropriate . . . requirements,” or ARARs, including Tribal environmental requirements that may be “more stringent” than federal requirements.
Tribal Cleanup Standards

- No federal cleanup standards (or ARARs) in CERCLA
- EPA looks to states and Tribes for guidance
- Tribes can develop their own cleanup criteria
- Tribal ARARs are powerful regulatory tools
Tribal Cleanup Standards

• Protect human health against risks presented by lands, and surface waters and groundwaters contaminated by releases of hazardous substances
• Important means for determining what is baseline against which to measure injury to natural resources
• Establish Tribal fish consumption rates to protect Tribal members, cultural practices and traditional uses
- Summary –

Tribal cleanup standards are important because:

• Exercise of Tribe’s inherent sovereignty
• Demonstrates a Tribe’s competence and authority
• Enhances a Tribe’s authority to determine how clean is “clean”
• Exercise of a Tribe’s right of self-determination
• Protects a Tribe’s interests, both on and off the Reservation (extra territorial effect)
• Important means for measuring injury to natural resources
Conclusion

• The creation of Tribal law serves notice on the world that the Tribe and its members have set standards to preserve Tribal values, cultural practices and the quality of the Reservation Environment.

• The vision of Tribal leaders is reflected in the laws they put in place that make that vision a reality.
QUESTIONS?

Richard A. Du Bey
Tribal Practice Group
rdubey@omwlaw.com