



National Tribal Toxics Council

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March 20, 2017

Jeffery Morris
Director
USEPA Office of Pollution Prevention and Toxics (OPPT)
1200 Pennsylvania Avenue, NW
Mail Code: 7405M
Washington, DC 20460

RE: Procedures for Chemical Risk Evaluation (EPA-HQ-OPPT-2016-0654-0001) and
Prioritization of Chemicals for Risk Evaluation (EPA-HQ-OPPT-2016-0636) under the
Amended Toxic Substances Control Act

Dear Mr. Morris,

We appreciate the opportunity to comment on the above-referenced regulatory processes under the Toxic Substances Control Act as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act (TSCA). The National Tribal Toxics Council (NTTC, or Council) is an EPA Tribal Partnership Group (TPG) supported by the EPA Office of Pollution Prevention and Toxics. The Council is focused on providing Tribes with an opportunity for greater input on issues related to toxic chemicals and pollution prevention.

The NTTC considers these two potential regulatory procedures as the means to call attention to the millions of consumer products that may be contaminating our Tribal lifeways¹: our water, soil, air, customary and traditional foods, bodies, and traditional cultural materials for spiritual and other uses. We highly applaud the new TSCA requirement to evaluate chemicals in commerce to determine if they

“...present an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use.” [TSCA, Section 6(b)(4)]

Further, we note the significance of the TSCA definition that a “potentially exposed or susceptible subpopulation,” is “a group of individuals within the general population

¹ See definition of Tribal lifeways at the end of this document.

identified by the Administrator who, due to either greater susceptibility or greater exposure, may be at greater risk than the general population of adverse health effects from exposure to a chemical substance or mixture, such as infants, children, pregnant women, workers, or the elderly [TSCA, 15 USC 53 § 2602. Definitions, June 22, 2016].

In implementing TSCA, *we request that EPA add Tribes to the list of example groups*, i.e. “such as infants, children, pregnant women, workers, the elderly, and federal and state recognized Tribes and Tribal communities.” The U.S. Government has a historical, well-defined, and unique legal relationship with Tribes, unlike any other subpopulation example cited in TSCA.

Tribes are a unique, potentially exposed and susceptible subpopulation compared with the general population or other subpopulations. Tribal members consume higher quantities of “wild foods”, and may have higher exposures to environmental media due to a greater number and frequency of natural environment activities, some of which are unique to Tribes or a single Tribe. They often live and conduct activities with aging infrastructure and housing that may provide more or different exposure routes, and in many instances, industrial and resource development is occurring adjacent to or upstream of their traditional and treaty lands.

Our Tribal members can be exposed to chemicals in consumer products after they have been released from commercial products into the environment, like flame retardants breaking down and settling in water, sediment, soil, and air. Our people breathe in the dust, our children ingest the dust, and we consume animals and plants that may have been exposed to the dust via byproduct uptake. Tribal members, like the TSCA example group of “workers”, take and gather, respectfully, the animals and plants, so that we are exposed both “at work” when producing food for our families, and when we consume our foods. Likewise we make many cultural objects, such as baskets and ceremonial regalia, that are derived from the natural environment so that we have contact exposures from production through object use. Tribes are also susceptible due to a number of health disparities, both societal and clinical, that exist as well. These considerations have not been taken into account in previous risk assessments across EPA programs or in EPA’s TSCA risks assessments of individual chemicals prior to determining regulatory action.

As OPPT works through the chemical prioritization and risk evaluation regulatory processes, the NTTC refers you to the previously provided document, “Understanding Tribal Exposures to Toxics” which was presented to the EPA Administrator on June 22, 2015. This NTTC Tribal exposures report provides information to enable readers to recognize situations that require an understanding of how natural resources are used by Tribes for food, medicine, cultural and traditional practices, and/or recreation, what is referred to as Tribal lifeways. Tribal exposure must be considered and quantified across all media programs at the beginning of the risk assessment process by engaging Tribes and including Tribal lifeways in the problem formulation and initial assessments. This also requires EPA technical assistance and funding for Tribes to generate the data needed (“NTTC Letter to EPA Administrator, June 22, 2015.”) This is important for three reasons:

- (1) Tribes may be exposed to higher doses of contaminants in the environment than the general population because of their physical interaction with the environment; and because some of their customary and traditional ceremonial and subsistence foods carry higher toxic burdens. Portions of the animals and plants that store a different toxicity than the rest of the animal may not even be eaten by the general population, and unique preparation of the food may also result in different exposures. Higher consumption of some of these foods results in higher burdens, which should be utilized in dose calculations.

- (2) Tribes may be exposed to higher doses of contaminants in natural media, or in foods and resources derived from the natural media, due to longer activity contact durations, higher frequencies, or greater breadth of media activities than the general population.
- (3) Impairment of natural resource uses affects Tribal social and cultural well-being beyond nutrition and physical health. Poor well-being of individuals and their communities in turn can impact clinical health.

These reasons should lead one to also consider the issues of bioaccumulation of chemical substances for Tribes. Identifying whether any of the above situations exist and understanding them can help EPA and other regulators in the risk evaluation process. We believe TSCA now requires the determination of whether Tribal lifeways are adequately protected, which in turn may help regulators develop guidelines for evaluating risks and impacts to Tribal well-being.

The standard assessment protocols currently in use must be expanded to meet the amended TSCA goals of fully considering susceptible subpopulations. Unique regional and local conditions must be considered for exposures rather than taking a central tendency perspective. For example, there is Tribal and local fish consumption data for Washington, Oregon and Idaho; rates which are approved by each state. Other Tribes have data for toxic contaminants levels in their mussels harvested from traditional areas, such as the Lower Elwha S'Klallam Tribe.

The scientific models being used to evaluate risk only look at the average U.S. urban lifestyle consuming store-bought foods in the "lower 48" contiguous United States. They don't account for the higher risk for Tribal members through Tribal lifeways. Tribal members have been found to consume orders of magnitude more wild fish, different wild fish, and large volumes of marine mammals and wild game. Members consume and handle wild plants, and have higher and more frequent contact with waters, sediments, and soil. The models must also account for unique situations and exposures in Alaska that are not currently accounted for as "conditions of use," such as materials being legally discarded in Alaska's unique unlined landfills, or being burned at low temperature without emissions treatment. These practices axiomatically result in chemicals released to Tribal lands, air, and waters.

Now that the risk evaluations and assessments must include the susceptible populations, it is clear that Tribal lifeways must be included in risk evaluations and assessments. EPA must examine whether there are different or greater risks to Tribal people. Each Tribe is different, yet together we comprise a large population throughout the country that is negatively and differently affected by many chemicals that end up in the environment.

We ask that you answer these questions when considering whether Tribes are affected in a significant way. If the answer is yes, it is clear the EPA must use an appropriate model to account for our people's exposures:

- o Are Tribal resources affected?
- o How are the resources used, keeping in mind that even seemingly similar uses may be different between Tribes and other communities?
- o How much are people exposed (frequency, intensity, and duration of exposure)?

Prior to the amendment of TSCA last year, EPA did not identify Tribes as a subpopulation that is highly exposed to some chemicals nor identify exposure pathways specific to Tribes when planning human health and ecological risk assessments. For example, EPA's 2010 exposure assessment of polybrominated diphenyl ethers (PBDE) overlooked reasonable risks to fish-consuming Tribal populations and thus missed the

identification of significant exposure pathways and the need to establish corrective regulatory controls to better protect the health of Tribal members as well as the general population. OPPT is responsible for prioritizing work plan chemicals and developing TSCA-chemical risk assessments. It does not appear to us that OPPT considered NTTC recommendations to include “chemicals detected in subsistence or traditional use resources,²” in prioritizing chemicals. Also OPPT did not “consider recommendations to include Tribal exposure pathways when developing conceptual models of potential pathways for their problem formulation and initial assessments of TSCA Work Plan Chemicals.

Tribal exposure must be considered and quantified across all media programs at the beginning of the risk assessment process by engaging Tribes in the problem formulation and initial assessments. This also requires EPA technical assistance and funding for Tribes to generate the data needed. (“NTTC Letter to EPA Administrator, June 19, 2015.”)

The amended TSCA preempts state authority to regulate chemicals based on local conditions but also requires that EPA consider susceptible subpopulation exposures in their assessments. As such, we reiterate past testimony that general population fish consumption cannot be used to evaluate exposure for Tribal subpopulations. The default fish consumption rate for the general population is often cited as about one 8-ounce portion per month or 6.5 grams per day. This is such a small amount, many Tribal peoples refer to it as “one bite per day”. In Washington and Oregon, the recognized rate is 175 grams per day. Tribal fish consumption surveys in those states showed modern, suppressed rates closer to 800 grams per day and historic average rates at 1,000 grams per day. You will see in our report that these significantly higher rates by fish-consuming Tribal populations can lead to exposures to toxics for our Elders, children, and other sensitive individuals that are 10-100 times greater than that of the general population. In this example, use of a general population fish consumption rate for Tribes under calculates their true exposures of generally higher exposure to the natural environment through fishing and in turn greater exposure to a wild food contaminant.

The NTTC contends that the standard assessment protocols currently in use must be expanded to meet the amended TSCA goals of fully considering susceptible subpopulations, to better consider unique regional and local conditions and exposures rather than taking a central tendency perspective. In this way, the preemption of state authority to limit the use of chemicals in commerce that are regionally problematic will be more easily accepted by those who must now rely on federal rules and authority.

In light of state preemption, EPA must address how to better engage states, Tribes, or other local stakeholders who have the best knowledge of unique, but significant local exposure pathways. The *National Tribal Toxics Council recommends that EPA develop a process with state and Tribes to explicitly gather this information as part of its high level review* in order to ensure that federal regulations are adequately addressing local concerns.

While TSCA includes the requirement to consider the disposal of a chemical substance when determining risk, long absent has been the consideration of waste disposal outside of sanitary landfills. For instance, Alaska Tribal villages and other rural communities face higher exposures to toxics from their permitted landfill facilities. These are unlined as a result of a singular rule for about 275 communities, including over 200 Tribal communities, under the Resource Conservation and Recovery Act (RCRA), the federal statute regulating solid waste. Their landfills have no liner, use open waste burning as a management practice, and

² Comment in response to EPA’s request for comments in Identifying Priority Chemicals for Assessment and Review, “Recommended prioritization factor,” Fred Corey (NTTC Vice-Chair) September 21, 2011.

lack monitoring wells. About three quarters of these are less than a mile from the communities and about one third within a quarter mile. They are typically located nearly adjacent to a river that is a drinking water source and are flooded each year, often several times. On-the-ground burning and contained, untreated burning is a common practice as a means to affordably reduce waste volume and minimize animal vectors. But it releases hazardous gases and particulates for over 12 hour periods often several times per week. A self-report database indicates residents in over one quarter of those communities smell the smoke nearly every day. The waste burning and landfill leachate contaminate drinking water and traditional food and cultural resources with petroleum products, waste oil, battery acid, raw sewage, and the other chemicals and hazardous household wastes from consumer products containing chemicals previously approved under TSCA. Similarly, across the contiguous United States, other Tribal communities face exposures to toxics leachate and open burning at illegal dump sites on rural reservations lands with inadequate law enforcement resources. These toxic exposures from disposal must be considered in risk assessments as EPA includes Tribal communities as exposed and susceptible subpopulations.

THE PRIORITIZATION RULE

The Prioritization Rule describes a pipelined approach for chemical review that results in High-Priority or Low-Priority designations. After the ten in the pipeline from the past Work Plan Inventory, there seems to be no further sorting in the prioritization scheme as more are added. It is important that a method exists for a chemical substance to jump ahead in the queue if needed for emergency situations where there is a potential for high exposures to questionable chemicals or a market substitute in gaining ground.

The process to designate Low-Priority is not clearly defined. Some detail needs to be added. There is no description of how a low-impact chemical can be quickly approved for use. For example, one that would replace a toxic compound existing in commerce. This situation needs to be described to reward green chemistry alternatives and to incentivize manufacturers.

From the law and quoted in the Brief - Procedures for Chemical Risk Evaluation under the Amended Toxic Substances Control Act.

“In designating the priority of a chemical substance, EPA must screen a candidate chemical substance against certain criteria specified in TSCA section 6(b)(1)(A). The results of this screen will help inform EPA’s proposed priority designation. These include

- The hazard and exposure potential of the chemical substance (e.g.,
 - persistence and bioaccumulation,
 - potentially exposed or susceptible subpopulations,
 - and storage near significant sources of drinking water),
- The conditions of use or significant changes in the conditions of use of the chemical substance, and
- The volume or significant changes in the volume of the chemical substance manufactured or processed.

As EPA is prioritizing which chemical substances are “High-Priority Substances,” and then evaluating them, where will Tribes fit into this process? Of concern is when and how Tribes will be included in the prioritization process. While there are specific sections that point out public participation, Tribal consultation is not specifically referenced in the law and in the Briefing, Section III C Summary of Proposed

Rule, Timeframe references that the nine-month timeframe for prioritization ensures that Tribal governments along with multiple other groups have ample notice and time to engage EPA. We know that EPA has dedicated Tribal liaison staff to guide programs in implementing Tribal consultation and we suggest that those staff work with the leads on these several TSCA rules to develop specific timelines for Tribal consultation within both the prioritization process and the risk evaluation process, and then distribute the proposed timelines for consultation with the Tribes. Tribal consultation must be provided because EPA has a federal trust responsibility to Tribes, has treaty responsibilities to Tribes, and has legal obligation to Tribes as a potentially exposed or susceptible subpopulation.

Further still, we remind EPA that Tribes do not have their own offices of pollution prevention and toxics, nor staff dedicated to this large topic, therefore it's difficult to imagine that Tribes will be able to follow each initiation for prioritization of a chemical substance, as well as each risk evaluation of all high-priority chemical substances. Therefore we reiterate that EPA must include Tribal lifeways in risk evaluations and assessments, and must look at the harmful effects to Tribal people, as a subpopulation that is negatively affected by chemicals that end up in the environment. We refer you to the questions bulleted above this section on the prioritization rule as a basis to begin including Tribal exposures. Additionally, the NTTC looks forward to continuing to work with OPPT to create an understanding of the breadth of exposure potential for Tribes.

The NTTC agrees with the law to default a chemical substance to the High-Priority Substance designation when there is insufficient information to enable the designation of a chemical substance as a Low-Priority Substance [15 U.S.C. 2605(b)(1)(C)(iii)].

THE RISK EVALUATION RULE

In the document brief "Procedures for Chemical Risk Evaluation" is the statement: "One of the key features of the new law [TSCA] is the requirement that EPA now systematically prioritize and assess existing chemicals, and manage identified risks." Across the country, we've all been using many existing chemicals that were not evaluated as safe but allowed in consumer products. This is a priority concern for Tribes because many of these chemicals are now in our environment, which again, Tribes depend upon for spiritual, mental, and physical well-being, and are interacting with every day.

A key part of the risk evaluation process is the identification of a "potentially exposed or susceptible subpopulation," and the NTTC deems that Tribes are such for the three reasons cited from our document "Understanding Tribal Exposures to Toxics." On this subject, we have the following questions.

- How will the EPA Administrator decide to consider, and then include, "potentially exposed or susceptible subpopulations"? Will there be a means for a Tribe to appeal that decision?
- How does a Tribe bring our exposure to the attention of the Administrator so our risk will be considered in the risk evaluation?

Regarding the requirement that "each risk evaluation must also: (1) integrate and assess available information;"

- What happens if information is not available regarding a potentially exposed or susceptible subpopulation, given that exposure assessments in the "pipeline" must be complete within three years with a possible 6 months extension? How is this requirement balanced if there is no data at all

to make an adequate assessment of effects, especially for exposure by Tribes and other subpopulations?

- How will the EPA gather data that is Tribally-collected under EPA-approved QAPPs? This is data that EPA already has in its possession, submitted by Tribes to EPA regional offices. It is difficult and time-intensive for Tribes to handle duplicate data submissions to multiple different EPA offices. With all of the work that we as Tribes and EPA have carried out collectively, it would be an inefficient use of money to not use this data.
- We appreciate that risk evaluations must now “encompass all manufacture, processing, distribution in commerce, use, and disposal activities that constitute the conditions of use... all known, intended, and reasonably foreseen activities associated with the subject chemical substance.” It seems reasonable to expect a model be used then that includes disposal pathways. When considering existing chemicals, consider that there are 1000’s of consumer products with labels directing that *the product should be disposed of only in certain types of landfills or as a household hazardous waste*. Unfortunately, that does not account for communities where disposal occurs outside of sophisticated, well-funded solid waste facilities. This includes more than 200 Alaska Tribal villages and many Tribal lands in the lower 48 states where residents face higher exposures to toxics from their permitted landfill facilities as well as from illegal dumping by non-members who use the reservation because they think that they will not be prosecuted. But chemicals previously approved under TSCA and/or their byproducts from consumer household hazardous products contaminate the Tribes lands . The on-the-ground waste burning and unlined landfill result in leachate migrating and flowing to rivers and ponds used for drinking water and hunting and fishing. The untreated smoke from open waste burning is breathed by residents in about 80% of villages and the ash also settles in town and around the adjoining area creating other potential pathways.

It is necessary for EPA to particularly include Tribes in implementing these rules. There will be times when there seem to be holes in the data. How will EPA account for those situations where manufacture, use and disposal is in or near Tribal communities?

In the background material provided with the announcement for Tribal consultation, there is this statement: “The Agency has evaluated the risk of chemical substances to all sectors of the population, with particular attention to workers, indigenous peoples, pregnant women,” and so on.

- Please provide examples and references to where EPA has evaluated with particular attention to indigenous peoples as it would help Tribes to see where this was done in the past and provide EPA with guidance to improve this in future evaluations. The Agency must not just “consider” subpopulations, it must act to protect us. Consideration is not sufficient, particularly when States are pre-empted from implementing local protections and banning toxics. Central tendency—essentially looking at the range and average of “typical” urban populations—is even less acceptable to Tribes now that States cannot act to protect local populations/lifeways because of amendments to TSCA.

Please explain the reference to “draft risk-evaluations by interested parties” in the background information document. Who is an example of an interested party?

Under Section 6. Metals and metal compounds, the brief states that EPA must use the March 2007 “Framework for Metals Risk Assessment:”

- The exposures described in this document may not consider all Tribal exposures that are described in the National Tribal Toxics Council report. How can these be added or amended when needed?

The NTTC is focused on representing Tribal interests in chemical risk management and pollution prevention initiatives that impact Tribal lifeways. We look forward to continuing our work with OPPT on the amended TSCA and reducing impacts to Tribal lifeways. You may respond to me at 503-731-1259 or bard@critfc.org, or to our NTTC Coordinator, Kristin K'eit, at 907-444-5616 or kkeit@zendergroup.org.

Sincerely,



Dianne C. Barton, Chair
National Tribal Toxics Council

cc: EPA OPPT Liaison Branch

Enclosure: Tribal Exposure Pathways

Definition of Tribal lifeways included in the NTTC report “Understanding Tribal Exposures to Toxics”, 2015.

Tribal lifeways are inclusive of but not limited to, economic, cultural, ceremonial, recreational, and subsistence practices, often occurring in complex and intense relation to the natural environment. Many Tribal cultures are essentially synonymous with and inseparable from the land and its resources.

Examples include, but are not limited to:

- Hunting, fishing, gathering
- Husbandry (farming/growing)
- Gathering, consumption, and everyday use of plants and plant materials (food, teas, different types of combustibles for smoke generation, collection of firewood or tipi poles, etc.)
- Water collection (untreated)
- Collecting materials for, and making baskets and other weaving, arts, tools, clothes (using feathers, skin, bones, hides, oils, antlers, etc.; wood or stone carvings)
- Building/carving canoes, sweat lodges, other structures
- Bathing/sweat lodge use
- Traditional medicine
- Ceremonial or powwow activities (dancing, traditional games)
- Smoke houses and ceremonies with smoke (fire, sage, cedar, alder, etc.)
- Making and use of traditional pottery (made from local clays, etc.)

