



# National Tribal Toxics Council

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October 28, 2019

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Chemical Control Division  
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RE: Comments on the Proposed Rule on Persistent, Bioaccumulative, and Toxic Chemical Under Section 6(h) of TSCA, Docket ID EPA-HQ-OPPT-2019-0080-0001

The National Tribal Toxics Council (NTTC) appreciates the opportunity to provide comments on the proposed rule on Persistent, Bioaccumulative, and Toxic chemicals (PBTs). As an EPA Tribal Partnership Group (TPG), supported by the EPA Office of Pollution Prevention and Toxics (OPPT), NTTC works on issues related to chemical safety, toxic chemicals, and pollution prevention for Indigenous people of the U.S. Through this partnership, we assist OPPT with education and outreach to tribes and, in turn, educate and inform EPA on the effects of chemicals and pollution upon tribal people.

On July 29 2019, the US EPA released a proposed rule intended to reduce exposures to 5 persistent, bioaccumulative, and toxic chemicals (PBTs), pursuant to section 6(h) of the Toxic Substances Control Act (TSCA)—decabromodiphenyl ether (DecaBDE); phenol isopropylated phosphate 3:1 (PIP 3:1); 2,4,6-tris(tert-butyl) phenol (2,4,6 TTBP); hexachlorobutadiene (HCBd); and pentachlorothiophenol (PCTP). The proposed rule would prohibit or restrict manufacture/import, processing, and distribution of four of the chemicals. No regulatory action is proposed for HCBd.

## **Executive Order 13175: Consultation and Coordination with Indian Tribal Governments**

First, for the public record, the National Tribal Toxics Council (NTTC) challenges EPA's reference to NTTC in the July 29, 2019 rule "Regulation of Persistent, Bioaccumulative, and Toxic Chemicals under Section 6(h) of the Toxic Substance Control Act". In Section G - Executive Order 13175: Consultation and Coordination with Indian Tribal Governments, EPA states:

EPA also met with the National Tribal Toxics Council (NTTC) in Washington, DC. During the NTTC meeting, EPA provided background information on the available regulatory options under 6(a) and a summary of the information gathered on the five PBT chemicals. Officials from NTTC expressed support for EPA regulations to reduce exposures to the general population and susceptible subpopulations.

On numerous occasions, NTTC has attempted to convey to OCSPP that meetings with the Council do not stand in for tribal consultation. In fact, our letterhead that has been in use for many years explicitly states that **“The Members of the Council are offering their opinions on toxics issues and do not speak for individual tribes.”** This statement is of great significance to Council members because it allows them to participate on the Council with the support of their tribal leaders. EPA’s reference to the NTTC meeting in the above referenced section on Tribal Consultation in the PBT Rule implies that interactions with NTTC were part of the Consultation process. This public declaration breaks the promise that our Council’s members made to their tribal leadership.

In addition to the issue of EPA inappropriately referring to meetings with NTTC under the heading of Consultation and Coordination, Section G is inaccurate and disingenuous in stating that officials from NTTC “support” EPA’s proposed regulations. NTTC’s letter to EPA dated January 2018, and resubmitted during the PBT rulemaking, is clearly not in support of a rule that leaves PBTs in commerce and does not adequately consider tribal exposures to PBT chemicals. NTTC asked that EPA comply with the mandate of TSCA to consider disposal as a condition of use and to use its regulatory authority and ban PBTs in commerce. NTTC has not changed its position here and continues to request that EPA ban PBTs in commerce.

Executive Order 13175 requires that regulations issued in the Federal Register provide a description of the agency’s consultation with tribal officials, a “summary of the nature of their concerns”, and a statement of the extent to which the concerns of tribal officials have been met. Rather than summarizing NTTC’s concerns, Section G falsely implies that NTTC supports the rulemaking.

Despite the significant consequences of the proposed rule, the EPA has not conducted meaningful consultation with tribal nations on its content. During the pre-rule consultation, tribes were given no indication as to what provisions would be included in the current proposed rule and were therefore unable to offer meaningful comment.

Section G states that the proposed rule “does not have tribal implications”. NTTC disagrees. Tribes are very much impacted by PBTs<sup>1</sup> (please see “Understanding Tribal Exposure to Toxics”, submitted with this comment letter to docket EPA-HQ-OPPT-2019-0080-0001). The 2016 Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act amendment to TSCA did not grant tribal governments with Treatment-As-State status the authority to develop statutes and regulations

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<sup>1</sup> Understanding Tribal Exposure to Toxics, National Tribal Toxics Council report.

that would allow them to regulate toxic chemicals that impact the health of their communities. Thus, Tribal governments are fully dependent on their Trustee to develop federal regulations that will adequately protect their people. Because of this dependency on federal regulation, consultation with Tribes on this and all other rules is essential. NTTC believes the complete absence of ongoing government-to-government consultation with Indian tribes violates Executive Order 13175, Consultation and Coordination With Indian Tribal Governments, and U.S. EPA's May 2011 Policy for Consultation and Coordination with Indian Tribes (EPA's Consultation Policy), as well as the trust responsibility on which it is based, and renders the current rulemaking deficient. NTTC respectfully urges EPA to initiate a formal tribal consultation process to comply with EPA's Consultation Policy.

### **Comments on Specific PBTs**

- 1) Decabromodiphenyl ether (DecaBDE)** is a flame retardant, used in many products and materials for business and home use, including the plastic for electronic equipment (e.g. stereos, TVs, and computers), as well as in furniture cushions, upholstery, drapery fabric, synthetic carpets, mattresses, and tents. Other uses for DecaBDE include materials used in the transportation and construction sectors, as well as fabrics for automobiles, aircrafts, and in wood used in construction. Under its Children's Safe Product Act, the State of Washington has received reports of children's products that contain DecaBDE, including bibs, bracelets, necklaces, sportswear, undergarments, socks, shoes, craft materials, blankets, dolls, and other toys. Production volume for years 2013 to 2015 is claimed as confidential business information.

The proposed rule would prohibit manufacture (including import), processing, and distribution in commerce of DecaBDE and articles and products to which DecaBDE has been added, except for the following:

- Manufacture, processing, and distribution in commerce for use in parts for new aircraft and aerospace vehicles, and distribution in commerce of the new vehicles containing such parts, for a period of 3 years;
- Manufacture, processing, and distribution in commerce for use in curtains in the hospitality industry, and the distribution of the curtains themselves, for a period of 18 months;
- Manufacture, processing, and distribution in commerce for use in replacement parts for the automotive and aerospace industries, and distribution in commerce of the replacement parts themselves;
- Processing for recycling and distribution in commerce for recycling of plastic that contained DecaBDE before the plastic was recycled (*i.e.*, the plastic to be recycled is from articles and products that were originally made with DecaBDE), as long as no new DecaBDE is added during the recycling process; and
- Processing and distribution in commerce of articles and products made from recycled plastic that contained DecaBDE before the plastic was recycled, as long as no new DecaBDE was added during the recycling process or to the articles and products made from the recycled plastic.

DecaBDE is toxic to aquatic invertebrates, fish, and terrestrial invertebrates. It poses serious risks to human health, such as developmental, neurological, and immunological effects, general developmental toxicity, and liver effects in mammals. There is some evidence of genotoxicity and carcinogenicity.

It is released during disposal of products containing it or during manufacturing. It persists in the environment and can degrade to other toxic chemicals over time. According to EPA's "Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Decabromodiphenyl Ether", in the 2015 Toxics Release Inventory (TRI) reporting year, a total of 70,542 lbs of DecaBDE were transferred offsite to landfills and/or other treatment/disposal facilities and 140,956 lbs were released to air, water, and land.

Several chemical alternatives are already on the market for the substitution of DecaBDE in plastics and textiles, as are non-chemical alternatives like non-flammable materials and physical barriers.

Because of the possibility of plastic treated with DecaBDE being recycled into children's toys, or products to which other susceptible populations will be exposed, NTTC urges EPA to remove materials containing DecaBDE, and all PBTs, from commerce beginning immediately. It is not conscionable that new auto and aircraft parts would be allowed to continue to contain this chemical for three years and replacement parts containing it would be manufactured indefinitely.

- 2) **2,4,6-tris(tert-butyl)phenol (2,4,6-TTBP)** is an antioxidant, used as an additive to fuel and lubricants, as an intermediate in the manufacture of other compounds, and as a waste fuel. This proposal would prohibit the distribution in commerce of 2,4,6-TTBP, and products containing 2,4,6-TTBP, in any container with a volume of less than 55 gallons for any use, in order to effectively prevent the use of 2,4,6-TTBP as a fuel additive or fuel injector cleaner by consumers and small commercial operations (e.g., automotive repair shops, marinas). It is EPA's intent that the 55-gallon container restriction will ensure the continued fuel additive or fuel injector cleaner use of this PBT only by commercial operators who have the capacity to protect their workers who may come into contact with 2,4,6-TTBP and whose workplaces are generally subject to the standards promulgated by the Occupational Safety and Health Administration (OSHA). This restriction also would prohibit processing and distribution in commerce of 2,4,6-TTBP, and products containing 2,4,6-TTBP, for use as an oil or lubricant additive, regardless of container size.

2,4,6-TTBP is toxic to aquatic plants, aquatic invertebrates, and fish. It also has harmful liver and developmental effects.

The volume of 2,4,6-TTBP manufactured is confidential business information. There are no requirements to report 2,4,6-TTBP under the TRI. 2,4,6-TTBP is not listed as a hazardous waste under the Resource Conservation and Recovery Act (RCRA).

NTTC and the public are not provided sufficient information on this PBT chemical and, given the toxicity of the substance and given tribes' dependence on the natural environment for their lifeways, NTTC believes EPA has no choice but to ban this chemical, regardless of container size, in order to comply with the Congressional intent of TSCA. Small repair shops and marinas do indeed often order 55-gal drum containers, usually as a way to save money. Many secondary storage and containment supplies are made specifically for 55-gal drums because this container size is often used by businesses. It is unclear how restricting the size to 55-gal containers will prevent all, or even most, individuals and smaller businesses with less-strict OSHA compliance or disposal requirements from purchasing this larger size once smaller container sizes are discontinued.

- 3) PIP (3:1)** is a flame retardant, a plasticizer, and an anti-compressibility and anti-wear additive. According to EPA, it is used in lubricants and hydraulic fluids and in the manufacture of other compounds. According to EPA's June 2018 "Exposure and Use Assessment of Five Persistent, Bioaccumulative and Toxic Chemicals Peer Review Draft", PIP (3:1) is not reported to the TRI and no release data over time were identified. However, the production and use of PIP (3:1) may have increased since the flame retardant pentabromodiphenyl ether was banned and phased out of production in 2013. Since that time, a prominent flame retardant formulation, with PIP (3:1) as a component, began to be used in increasing quantities in upholstered furniture, infant products, and other items, such that it became one of the most commonly detected flame retardants in the U.S. (NTP, 2013). Releases to various media of this flame retardant may have increased proportionally with an increase in production and use volume.

The proposed rule would prohibit processing and distribution in commerce of PIP (3:1) and products containing the chemical substance, except for the following:

- Processing and distribution in commerce for use in aviation hydraulic fluid;
- Processing and distribution in commerce for use in lubricants and greases; and
- Processing and distribution in commerce for use in new and replacement parts for automobiles and other motor vehicles, and the distribution in commerce of the parts to which PIP (3:1) has been added.

In addition, the proposed rule would prohibit releases to water from non-prohibited processing, distribution in commerce, and commercial use activities. Persons manufacturing, processing, and distributing PIP (3:1), and products containing PIP (3:1), in commerce would be required to notify their customers of these restrictions.

PIP (3:1) is toxic to aquatic plants, aquatic invertebrates, sediment invertebrates and fish. Data indicate the potential for reproductive and developmental effects, neurological effects and effects on adrenals, liver, ovary, and heart in mammals.

NTTC notes that the proposed rule does not restrict releases to water from disposal conditions of use. Given that these types of wastes are likely to be discarded into landfills that are not

required to monitor for PIP 3:1 and may often be discarded into landfills, salvage yards, and transfer stations that are not lined, this is a serious omission.

NTTC further does not agree that processing and distribution of PIP (3:1)-containing lubricants and greases, as well as that of new and used automobile parts, is acceptable. Clearly, both workers and consumers are likely exposed. Working with lubricants and greases is common for non-workers, as well. In fact, it is common for many households to include children in conducting maintenance on home vehicles. OSHA does not apply in these commonplace cases and the general population is most likely unfamiliar with the science of exposure.

- 4) Hexachlorobutadiene (HCBD)** is a byproduct in the production of chlorinated solvents. HCBD has also been used in the past as an absorbent for gas impurity removal and as an intermediate in the manufacture of rubber compounds. EPA has evaluated the uses of HCBD and is proposing no regulatory action.

According to EPA, HCBD is toxic to aquatic invertebrates, fish, and birds. HCBD has been identified as a possible human carcinogen and there is evidence for renal, liver, and developmental effects in mammals.

HCBD is toxic, persistent, and bioaccumulative. Reports from manufacturers to the State of Washington's Department of Ecology under the Children's Safe Product Act indicate that HCBD was detected in 5 of 88 consumer products. Reports from 2018 indicate that HCBD was detected in jewelry, surface coatings of headwear, homogenous mixtures (likely adhesive) in underwear, and **surface coatings of dolls, and soft toys**. Manufacture of these products may lead to occupational exposures. For example, occupational exposures in the textile manufacturing industry (inhalation and dermal exposure to organic dust and chemicals) are expected during production and packaging operations. Use of the consumer products, if HCBD is present, may lead to consumer exposures (inhalation and dermal exposure) when products are worn or used.

Dozens of studies show that HCBD has been detected in a wide variety of media. Therefore, NTTC does not agree that HCBD needs no regulation. We understand that HCBD presence appears to have diminished in recent years due to changes in chlor-alkali processing. However, if HCBD was detected in children's products, clearly EPA does not have adequate information to make a non-regulatory determination.

- 5) Pentachlorothiophenol (PCTP)** is used in the manufacture of rubber compounds. This proposal would prohibit the manufacture (including import), processing, and distribution in commerce of PCTP, and products containing PCTP, unless in concentrations at or below 1% by weight.

According to EPA, PCTP is toxic to protozoa, fish, terrestrial plants, and birds. Data for analogous chemicals (pentachloronitrobenzene and hexachlorobenzene) indicate the potential for liver effects and systemic effects in mammals.

The National Institutes of Health (NIH) report that PCTP is banned in most parts of the world because it forms several teratogenic decomposition products. According to Ullmann's Encyclopedia of Industrial Chemistry, PCTP has been replaced by 2,2'-dibenzamidodiphenyl disulfide (DBD), which reacts similarly, but is less toxic. NTTC believes that a less toxic alternative should be required for all products containing PCTP, not simply those that are more than 1% by weight. PCTP is persistent and bioaccumulative. High duration use of multiple products of low concentration is possible.

### **Comments on Proposed Exemptions**

The above regulatory restrictions come with several important exemptions, which are of concern to NTTC, most notably the omission of disposal and that of occupational exposures from consideration in this proposed rule. NTTC believes these exemptions would disproportionately affect tribal people, tribal lands, and tribal waters. EPA is issuing this proposed rule to fulfill its obligations under TSCA section 6(h) to take timely regulatory action on PBT chemicals. Specifically, EPA is required by law "to address the risks of injury to health or the environment" and "to reduce exposure to the substance to the extent practicable." By electing to not regulate disposal and occupational exposures, EPA cannot meet these requirements.

PBT chemicals remain in the environment for a significant period of time, they are toxic, and bioaccumulative. Congress directed EPA in TSCA section 6(h) to take expedited regulatory action for certain PBT chemicals. EPA states that it "is proposing risk management actions to reduce exposures to the PBT chemicals to the extent practicable for the general population, potentially exposed or susceptible subpopulations, and the environment". NTTC has argued in previous letters that tribal people often represent a susceptible and potentially exposed subpopulation and should be considered as such. We are aware that no risk evaluations or risk estimates were performed for these five PBTs, and there was no consideration of unique tribal lifeways or exposures, including those from disposal of products containing PBTs in open dumps that are unlined and that practice open burning of wastes. NTTC submitted a letter to EPA on January 12, 2018 describing in detail the chronic exposures tribal people experience. In that letter, NTTC also expressed concern at the paucity of data on tribal risks, as well as the observation that tribal people are underrepresented or absent from EPA's risk evaluations and proposed actions. It is well documented in the scientific literature that Native Americans experience significant health disparities from the general population and the practice of leaving them out of any protections will only contribute to further health disparities. Evidence of these impacts is found in the higher levels of adverse health outcomes associated with PBTs within Tribal communities and membership than the general US population<sup>2</sup>.

If EPA is to conduct no risk evaluations, and does not consider tribal lifeways, then the protective and conscionable conclusion should be to ban these PBTs from commerce and to

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<sup>2</sup> (Berner 2015), (Burger 2011), (Dunn L.), (Harper 2011) (Kmieciak 2007), (Hightower J., 2006), (Lipscomb TS 2017), (Miller 2007), (Norgaard K. 2004), (Sloan 2014), (Wetzel 2012) (Xue J. 2012).

regulate their disposal, as disposal is the main route that toxic chemicals from consumer products transfer to the environment and the communities within that environment.

### **Exemption of Disposal**

EPA is proposing to not regulate disposal, despite having the authority to do so, and despite the fact that disposal is a TSCA-mandated condition of use. Consideration of disposal is of critical importance to tribal populations. Tribal people are more highly exposed to contaminants with environmental fate and transport than other populations, and in unique ways, because their lifeways revolve around environmental activities for dietary sustenance, socio-cultural activities, ceremonial and spiritual purposes, recreation, and general well-being. Tribal lifeways can lead to chronic exposures to toxins in the environment, making tribes a potentially exposed and susceptible subpopulation, and EPA must consider them as such. It is unacceptable to exclude disposal, and the resulting exposures to toxic chemicals, from consideration. Disposal is the primary way in which contaminants, including PBTs, make their way to the natural environment. If disposal is not considered, then tribal people's exposures and risks are excluded, as well.

According to EPA, under the Resource Conservation and Recovery Act (RCRA), "there are comprehensive regulations governing the disposal of hazardous and non-hazardous wastes." This assumption that RCRA is protective of tribal communities, tribal lands, and tribal waters is unfounded and very concerning. NTTC has raised this issue in previous comments, including comments submitted in January 2018 on these five PBTs. We have brought to EPA's attention the fact that in evaluating risks, long absent has been the consideration of waste disposal and transfer facilities that are not required under RCRA to have liners, leachate treatment, groundwater monitoring, daily cover material, and/or other protective features. Such landfills are predominantly found in tribal communities.

For example, all rural landfills in Alaska, serving communities of approximately 6,500 or less, lack all of these features. Roughly over one-third of the state's population, and 222 of the 229 federally recognized tribes, live in proximity to such landfills. Additionally, the state's federally delegated RCRA Subtitle D program allows contained open burning of solid wastes for these communities – typically carried out in steel barrels and tanks, without emissions treatment. Well over half of these landfills are within one mile of town, and the majority are accessed regularly by the general population. Alaska Native communities, and other rural communities, face higher exposures to toxics from their Subtitle D permitted landfill facilities than urban communities. It is clear that RCRA is not protective of these populations and RCRA regulations do not result in a reduction of exposures.

Tribes are disproportionately affected by the assumption of RCRA protection further due to available enforcement mechanisms over non-members. Due to a poor Supreme Court decision, Tribes do not currently qualify for federal delegation of RCRA programs and, for RCRA purposes only, have treatment as a municipality instead. Landfills that are on reservations, or other tribal lands, are permitted under the delegated authority of the State where the land is located, and often strained historical and current relationships between Tribes and States result in a

jurisdictional vacuum. The jurisdictional issues over non-members and checkerboard land status of reservations make it difficult for many Tribes to effectively stop non-tribal members, including contractors, from illegally disposing toxic waste in unlined and/or unmanaged landfills and municipal waste transfer stations.

In our letter to EPA in January 2018, we described in detail the exposure scenarios present in Indian Country. The bulk of used consumer products in Alaska Native tribal communities are disposed of via burning or placement nearby in an unlined and uncovered landfill that commonly floods at least annually and joins community snowmelt and breakup waters, in which residents walk and children play. These leachate-containing waters flow to rivers and ponds, from which Alaska tribes obtain drinking water and foods. About three quarters of landfills are less than one mile from homes and about one-fifth are within one quarter mile. Most of the state is located in wetland. Landfills are often only a few feet above the water table and are proximate to surface drinking water intakes and traditional (untreated) household use water, particularly for unplumbed communities.

With inadequate storage facilities, poor economies of scale, and a lack of recycling options, electronic wastes containing PBTs and other toxic chemicals are often not sorted from the waste stream and are discarded in these unlined landfills. Inhalation of disposal site emissions is prevalent. Low temperature burning, either on the ground or contained in a steel receptacle, is a common and federally compliant practice, as a means to affordably reduce waste volume, provide safer site use conditions, reduce odor, and minimize animal vectors. The municipal solid waste incinerator units that are used lack any emissions controls and are exempt from CAA emissions standards. Toxic smoke, containing hazardous gases and particulates, emits directly to the ambient air. A self-report database with information collected from tribal environmental professionals, whose positions are paid and trained through EPA Indian General Assistance Program (IGAP) monies, indicates residents in over one-quarter of those communities smell the smoke three or more days each week, with nearly nine in ten communities experiencing emissions odors in town at least monthly. Without burn controls, the fire is left to self-extinguish, and can smolder for up to two days with associated low-temperature emissions. These disposal circumstances result in contamination of drinking water and traditional food and cultural resources with petroleum products, waste oil, battery acid, raw sewage, PBTs, flame retardants, and other hazardous household wastes from consumer products containing chemicals previously approved under TSCA.

Similarly, across the contiguous United States, burn barrel use by individuals is a common practice throughout Indian country and rural America, in general. Toxic exposures from PBT - containing consumer and commercial product disposal must be considered in risk assessments, evaluations, and proposed actions, as EPA is required to consider susceptible and highly exposed subpopulations, such as tribes.

These examples of community exposures from RCRA-regulated landfills make it clear that EPA's assumption of RCRA regulations as protective is unsubstantiated and inadequate. The above disposal situation presents clear exposure pathways, as well as human and environmental

health implications. Indeed, associations between open dump sites and negative health outcomes in Alaska have been identified. In a community-level retrospective study, adverse health effects were found for newborn babies associated with community landfills characterized to be of moderate to high hazard threat, including low birth weight, preterm birth, and intrauterine growth restriction (IUGR). Infants born to mothers residing in communities with high hazard site contents were more likely to have “other” birth defect(s) than other infants, and positive odds ratios were found for all categories of congenital anomalies. In a preliminary retrospective cohort study, residents living near dumpsites had greater incidences of self-reported vomiting and fever. Burning waste near residences was associated with vomiting and dizziness. Odor complaints (a wind direction proxy) and dumpsite visits were correlated with increases in several symptoms with indications of dose-response, including fever, vomiting, cough, and headache. Because of their unique unlined nature and open burning of hazardous materials, Alaska tribal community landfills can be considered to simulate hazardous waste sites to some extent. All of the information above was presented to EPA in NTTC’s letter from January 2018 on the PBT rule making.

In stating that RCRA is protective, EPA is also not considering Municipal Waste Transfer Stations. With closure of many smaller landfills due to RCRA, many rural communities, including most tribal communities, turned to operating transfer stations instead. These stations are not required to have any of the protective features that EPA relies on. All waste materials, including hazardous wastes, are often placed directly on the ground, uncovered. Dumpsters are often in the open and may rust and deteriorate. Public access at rural transfer stations, which can often be unstaffed, is usually unrestricted.

Additionally, RCRA design regulations for “Industrial Landfills” and C&D landfills do not specifically have a liner requirement, or a number of the other federally set requirements that most Subtitle D landfills have. Much of the governing regulations are state specific. Many states allow unlined C&D landfills, which will accept wastes. Regulations also allow unlined salvage yards, including automobile salvage yards, with the clear probability that some discarded auto parts and fluids contain PBTs, such as DecaDBE and PIP (3:1), and 2,4,6-TTBP respectively. Under RCRA, C&D landfills and other Non-Municipal and Non-Hazardous Waste Disposal Landfills that receive less than 20 Tons of waste daily on an annual average may generally receive Very Small Quantity Generator Waste. Again, given that the majority of tribes are located in rural areas, these types of landfills are disproportionately more likely to be proximate to tribal lands, including customary and traditional off-reservation areas, that are protected by treaty rights.

An additional disposal pathway of concern is disposal of disaster debris. This type of material is also under a RCRA exemption for design criteria, is specific to the State or county, and open burning is allowed, as is disposal in unlined areas. According to the EPA OIG 2016 report titled “EPA Has Developed Guidance for Disaster Debris but Has Limited Knowledge of State Preparedness”, States are not federally required to develop debris management plans, and the EPA has no authority to ensure that States have adequate plans or that they follow their plans during a disaster response. In EPA’s 2014 Climate Change Adaptation Plan, the

agency specifically recognized disaster debris management as a potential vulnerability in its climate change planning efforts by stating: “Increased frequency and intensity of extreme weather events may affect EPA’s capacity to manage debris and respond to emergencies.” It is clear that RCRA will not be protective of tribal people, if this waste, which can contain many toxic chemicals, including PBTs, is disposed in unlined landfills with open burning.

Finally, RCRA exempts Subtitle D landfills from subparts D and E (Design criteria & Groundwater monitoring and Corrective Action, respectively) that accept less than 20 tons per day (equivalent to about 9,000 people), and serve communities that experience interruptions of surface transportation for 3 months or more each year, *or* have no practicable waste management alternative and receive less than 25 inches of precipitation annually. These facilities are likely to be rural and remote, and in the Western and Plains states, where the majority of tribes outside of Alaska is located. These landfills are not required to have a liner or monitoring wells or leachate treatment. While they are not exempt if groundwater contamination of the reportable chemicals is known by the operator, without a monitoring mechanism, they are in practicality exempt regardless.

NTTC has provided much of the above information to EPA in previous comments and much more is readily available. It is clear that a disposal exemption for PBTs, or any other toxic chemicals, is unacceptable. Reliance on RCRA is clearly insufficient.

### **Occupational Exposure**

In this proposed rule, EPA is also proposing to not regulate occupational exposure directly, because of assumed reliance on mandated controls, such as engineering controls or use of personal protective equipment (PPE). According to the proposed rule, EPA “expects there is compliance with federal and state laws, such as worker protection standards, unless case-specific facts indicate otherwise, and therefore existing OSHA regulations for worker protection and hazard communication will prevent occupational exposures that are capable of causing injury from occurring.” EPA acknowledges that OSHA has not established permissible exposure limits (PEL) for any of the five PBT chemicals, but states that under Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (OSH Act), “each employer has a legal obligation to furnish to each of its employees a place of employment that [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm.” EPA “expects that employers will require, and workers will use, appropriate PPE consistent with 29 CFR 1910.132, taking into account employer-based assessments, in a manner sufficient to prevent occupational exposures that are capable of causing injury.” Reliance on OSHA worker protection standards does not adequately evaluate risks to tribal populations. It is well-established in the occupational health and safety literature that small business workers are less likely to comply, and those with 10 or fewer employees and self-employed workers are exempt from many OSHA laws, including reporting and inspections. Small businesses are the norm in Indian Country. Additionally, neither OSHA laws nor RCRA will protect waste collection workers, be it household or transfer station collection.

### **Legacy**

According to the law (Sections 6(h) of TSCA), EPA is required to address the risks PBTs pose to human health and the environment and reduce exposure to them “to the extent practicable”. This goal cannot be accomplished without considering legacy use. NTTC believes that, in addition to requiring manufacturers and processors to repurchase or replace these products under section 6(a)(7) of TSCA, the use and unsafe disposal of legacy PBT-containing products should be prohibited under sections 6(a)(5) and (6). There is no mention of legacy use of products containing PBTs in the proposed rule, as published. Not considering legacy use, and the risks it poses, disproportionately affects tribes’ exposures. Low income housing, which may contain decaBDE and/or other PBTs, is prevalent in tribal communities today. Older electronics, furniture, and thrift store purchases can lead to PBT-containing dust inside people’s homes. NTTC strongly urges EPA to consider the impacts of legacy use of these PBTs on tribal populations.

### **Conclusions:**

“EPA requests comment on all aspects of this proposal, including the proposed regulatory actions for each of the PBT chemicals, the primary alternative regulatory actions, and any other options that EPA has considered or should consider. In particular, EPA is requesting comment on its proposed determinations with respect to *whether exposure is likely* and whether EPA’s proposed regulatory actions achieve the statutory directives to “address the risks of injury to health and the environment that the Administrator determines are presented by the chemical substance and [. . .] *reduce exposure to the substance to the extent practicable [emphasis added].”*

The likely exposure of tribal members to the five PBTs via disposal of PBT-containing products in commerce should be clear to EPA. NTTC is able to provide extensive photographic and narrative testimony from Alaska tribes that exposure for them via this condition of use is very likely.

Additionally, as commented above, exposure is likely for many of the non-disposal related exceptions that EPA proposes. Because these chemicals will persist and accumulate over time, this exposure is unacceptable.

With alternatives on the market for all five PBTs, it is clear to us that exposure is not being reduced to the extent practicable and tribes, as well as susceptible subpopulations such as workers, including disposal facility workers, are not being given due consideration or protection.

We agree with EPA that, per Congress’ direction in TSCA to expeditiously regulate PBTs in the 2014 Work Plan, EPA may prepare a fit-for-purpose summary of the hazards presented by the five PBT chemicals. However, given that the combined properties of these chemicals as being toxic, bioaccumulative, and persistent pose a clear risk to tribal lifeways, as well as other subpopulations like children and workers, these risks and subpopulations must be considered.

The purpose of expedited rulemaking is precisely because of the clear risks that chemicals under this action pose. Sufficient information on these PBTs to make a final rule exists and is readily available, and NTTC requests that EPA removes all exceptions and exemptions that allow continued processing, distribution, use, and disposal of products containing these chemicals. Tribes are likely the most highly exposed to chemicals in the natural environment and, therefore, as a susceptible and potentially exposed subpopulation, have the right to be free from this risk in the future. If EPA is to take expedited action on a chemical that has such properties, and in this action does not remove all reasonably foreseen risk, then EPA is circumventing the intention of TSCA.

We look forward to the Agency's written response to these comments within 90 days. Should you or your staff have questions or comments regarding our letter, please contact myself, Dianne Barton, NTTC Chair, at (503) 731-1259 / [bard@critfc.org](mailto:bard@critfc.org) or Fred Corey, NTTC Co-Chair, at (207) 764-7765 / [fcorey@micmac-nsn.gov](mailto:fcorey@micmac-nsn.gov).

Sincerely,

A handwritten signature in cursive script that reads "Dianne C. Barton".

Dianne C. Barton, Chair  
National Tribal Toxics Council