



NATIONAL CONGRESS OF AMERICAN INDIANS

March 15, 2013

Thomas R. Frieden, MD, MPH
Administrator, Agency for Toxic Substances and Disease Registry (ATSDR)
Centers for Disease Control
United States Department of Health and Human Services
1600 Clifton Road
Atlanta, Georgia 30333

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RE: CDC Tribal Consultation Policy and Tribal Advisory Committee

Dear Dr. Frieden,

Thank you for requesting tribal leaders and national organizations to provide comments on the draft Center for Disease Control /Agency for Toxic Substances Disease Registry (CDC) Tribal Consultation Policy (TCP). Commitment to the nation-to-nation relationship is critical to improving, updating and extending tribal programs and treaty guaranteed health care. The Department of Health and Human Services (HHS) has been a leader in refining the consultation process and ensuring that high level engagement is an agency-wide priority. The National Congress of American Indians appreciates that CDC is taking the same care and commitment to improve tribal consultation and interactions with tribal communities.

NCAI is the nation's oldest, largest, most representative American Indian and Alaskan Native organization serving the broad interests of tribal governments and communities. As such, NCAI has been a link between agencies and tribal governments in various capacities. Previously, NCAI has provided outreach and communication about upcoming tribal consultations, sample tribal testimony, logistics and coordination, and recommendations. Our commitment to and experience with tribal consultation equips us with the knowledge and expertise to offer the following recommendations and comments on the development of the current policy and the language shared with tribal leaders in February.

NCAI must first express our serious concern and disappointment in the actions taken by the CDC prior to this consultation notice. Deciding to approve the TCP in executive session of the Tribal Advisory Committee (TAC) and without the complete consensus of its members does not adhere to the typical protocol required by tribal governments, the Office of Management and Budget (OMB), or HHS. Each tribal consultation policy must follow certain protocols to be properly vetted and reviewed by tribal leaders and appointees; adhere to the overarching agency requirements; and follow proper notification procedures prior to any finalization of a TCP policy. CDC's action in this case did not adhere to the proper vetting process, nor did it meet full and meaningful consultation with tribes as defined by the OMB guidance issue on September 29, 1995.¹ OMB provides guidance to agencies stating:

Each agency needs to develop an intergovernmental consultation process for that agency. *To do so, the agency should first develop a proposal for that process,*

¹ 60 Fed. Reg. 50651-4

and consult with State, local, and tribal governments (as appropriate) concerning this proposed process, as soon as possible.²

Though the CDC did allow for tribal feedback and consultation initially, it did so over an extended period of time – approximately two and half years. During that time period the agency failed to notify all tribal leaders of its actions or intent to finalize the consultation at its August TAC meeting. In that time period there were numerous changes on the TAC and Indian Country leadership more broadly. Despite these difficulties, we are thankful that there is now an opportunity for open and transparent communication with the agency.

We do, however, join the Cherokee Nation and other tribes in respectfully requesting that CDC extend the comment period for tribes and tribal organizations. This extended comment period should include, at a minimum, an additional 90 days to ensure meaningful input is received from all tribal stakeholders. The current closing comment period is today, March 15, 2013, just thirty days from the release of the policy. This time period does not provide adequate time for a thorough review and analysis or discussion among tribes as to the impact of the proposed consultation policy. A 90 day extension would move the comment period to June 15, 2013, a more acceptable closing date.

NCAI continues to engage with tribal leaders and representatives on issues affecting tribal communities across the nation – and truly believes that a thoughtful, meaningful consultation is essential to ensure federal policy furthers the safety and welfare of American Indians and Alaska Natives. Further incorporating recommendations from Indian Country will guarantee a final policy that is effective, as well as supportive of an ongoing dialogue between CDC and tribal nations. Based on our initial review and shared concerns with tribal leaders we offer the following recommendations on the TCP as it is currently presented.

Include a firm consultation notice requirement. Tribal leaders, as representatives of their respective nations, have numerous obligations to track. As such, they need as much advanced notice as possible of upcoming consultations. Providing tribal leaders with this advanced notice will allow them to have adequate time to prepare comments, coordinate their schedules, and secure travel arrangements. The policy should add a provision which requires the CDC Director to notify tribal leaders of the date, time, and location of upcoming consultations no less than 45 days prior to the consultation. Most tribal leaders would prefer even more advanced notice, but at the very least, CDC should provide 45 days minimum notice.

Clarify that CDC will not disrupt the work of tribal leaders at national conferences. NCAI recognizes that consultation hosted in conjunction with national tribal meetings maximizes resources of both tribal leaders and federal employees. However, NCAI's Executive Board consistently urges agencies, including the CDC, to be respectful to all national tribal organizations in scheduling consultations. There are few times when tribal leaders from across the nation gather and work on issues directly related to all of their communities. CDC must be respectful of these opportunities, coordinate with national organizations and provide to ensure the greatest number of participants in both, conference activities and important consultation sessions.

Maintain national membership on the Tribal Advisory Committee. In section 4.C the CDC clarifies the role of the CDC TAC. We are concerned that CDC appears to be retaining an option to decide even what law it will apply with regard to the membership of the TAC. Given the complexity of the issues that must be addressed by the TAC in order to fulfill its mission, we believe it is critical that TAC

² Id. At 50652 (emphasis added).

membership not only include at least one tribal representative from each of the twelve areas based on the Indian Health Service (IHS) Area Office structure, but also representatives of national tribal organizations. National tribal organizations play an immeasurable role in preparing tribal leaders for meetings with the federal government. Tribal leaders, similar to leaders of other nations, have staff to assist and advise them. The leaders of our tribal nations must be given the same opportunities and access to experts as others.

Furthermore, OMB instructed agencies in its guidance that “[a]n agency will be able to obtain the fullest range of meaningful input from state, local, and tribal governments by undertaking the following kinds of consultation.” OMB goes on to list the groups of people agencies should consult with as “(1) Heads of Government,” “(2) Both Program and Financial Officials,” “(3) Washington Representatives,” and “(4) Small Governments.”³ We believe the ‘Washington Representatives’ description permits national tribal organizations to play a critical and substantial role in TAC.

On another note, NCAI understand the CDC’s concern about the Federal Advisory Committee Act (FACA) and its application to recommendations and comments collected during tribal consultations. However, we support the legal analysis conducted by the National Indian Health Board and the protocols utilized by the HHS Secretary’s Tribal Advisory Committee to ensure all meetings are FACA compliant.

Align consultation communication with that of the Department of Health and Human Services (HHS) TCP. We are concerned specifically with section 3, paragraph 2 of the policy, which appears to limit consultation to communication, “with elected Indian Tribal Leaders or their designated representatives”. This is not consistent with the HSS TCP that provides consultation with Indian tribes, and furthers communications with tribal officials and Indian organizations. Tribes are not represented solely by their elected leadership, and, in fact, the leaders of some tribes are actually appointed rather than elected. Moreover, when a tribal government appoints a representative, that official is entitled to the respect and deference given to the officials of HHS who are not elected, but are held as representatives of the United States government. Tribes should be able to decide for themselves who can speak for them.

NCAI is hopeful that CDC will continue to work toward establishing a transparent, government-to-government relationship with tribal communities through consistent tribal consultation. We look forward to working with you as you develop continued guidance. If you have any questions, please contact Terra Branson at tbranson@ncai.org or 202-466-7767.

Sincerely,

A handwritten signature in black ink that reads "Jefferson Keel". The signature is written in a cursive, flowing style.

Jefferson Keel
President
National Congress of American Indians

³ OMB Guidelines at 50652 (emphasis added).