



**EPA Region 10 Tribal Operations Committee (RTOC)
P.O. Box 689
Spokane, Washington 99210
www.region10rtoc.net**

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Michael Reagan, Administrator
USEPA William Jefferson Clinton Building
Mail code: 1101A
1200 Pennsylvania Avenue N.W.
Washington, DC 20004

SENT VIA EMAIL (regan.michael@epa.gov)

**RE: Proposed Reorganization of the National Tribal Caucus Under the Federal
Advisory Committee Act**

Dear Administrator Regan:

This letter is sent on behalf of the Tribal Caucus members of EPA Region 10's Tribal Operations Committee ("RTOC"). This letter is not sent on behalf of EPA Region 10 or any employees of EPA, but solely tribal government representatives of the RTOC. This letter is sent regarding the proposed reorganization of the National Tribal Caucus ("NTC") under the Federal Advisory Committee Act ("FACA").

Region 10 RTOC writes to oppose EPA's proposed reorganization of the NTC under FACA. The plain meaning of a statute on point, as well as the NTOC Charter, holds that FACA does not apply. If it did happen, such a reorganization would undermine Tribal sovereignty and risk eliminating formal Tribal participation. Further, this move threatens the fulfillment of EPA's trust obligations to Tribes by putting the methods of government-to-government communication on two-year terms with a presumption of termination. This intrusion on Tribal self-government is concerning and unsettling. EPA should abandon its efforts to impose FACA on statutorily exempt organizations that further EPA's historic trust obligations.

EPA's Policy on Consultation with Indian Tribes requires that "Tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect Tribes."¹ Further, "[e]ffective

¹ *EPA Policy on Consultation with Indian Tribes* ("EPA Consultation Policy"), at 1, Dec. 7, 2023, <https://www.epa.gov/tribal/epa-policy-consultation-indian-tribes> (quoting *EPA Policy for the Administration of*

consultation means that information obtained from Tribes be given meaningful consideration and EPA should strive for consensus or a mutually desired outcome.”² EPA’s apparent decision to reorganize the NTC pursuant to FACA prior to engaging Tribal leaders on the issue abjectly fails to satisfy these requirements.

The questions outlined in the April 11, 2024 Consultation Plan are the wrong questions. EPA skipped the initial step of asking Tribes whether they agree with EPA’s view that changes needed to be made to the NTOC and seeks to impose a solution to a problem which EPA defined without any Tribal input. If EPA is serious about meaningful government-to-government consultation with Tribes, the first step is to engage Tribal leaders in a discussion regarding EPA’s concerns with the existing NTOC structure to ensure that any modifications are reasonable and address Tribal *and* EPA interests. Had EPA consulted with Tribes earlier, it would have realized that reorganizing NTC under FACA offends fundamental principles of Federal-Indian policy favoring Tribal sovereignty and self-governance.

I. NTC, NTOC, and RTOCs are Statutorily Exempt from FACA

Agency actions are bound by Congressional statutes. Here, EPA is attempting to impose FACA on meetings between Federal officials and elected officers of Tribal governments, despite a clear statutory proscription of such action and further agency guidance opposing such application. EPA does not need to comply with FACA when seeking collective advice from Tribes, because Tribes are not “an external group.”³ For the purposes of FACA, Tribes are intergovernmental entities, and their meetings with the Federal Government are expressly exempted.⁴

Although FACA generally applies to committees and subcommittees that are “established or utilized by one or more agencies,”⁵ FACA “shall not apply to actions in support of intergovernmental communications where – (1) meetings are held exclusively between Federal officials and elected officers of . . . tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and (2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established by public law that explicitly or inherently share intergovernmental responsibilities or administration.”⁶ Administrative guidelines for implementing the intergovernmental communications exception to FACA suggest that “[i]n accordance with the legislative intent, the exemption should be read broadly to facilitate intergovernmental communications on responsibilities or administration.”⁷ Meetings of NTOC and RTOCs are between EPA officials and Tribal representatives selected by the constituent Tribes

Environmental Programs on Indian Reservations (“EPA Indian Policy”) at 3, Nov. 8, 1984, <https://www.epa.gov/tribal/epa-policy-administration-environmental-programs-indian-reservations-epa-indian-policy>).

² EPA Consultation Policy at 3.

³ Consultation and Coordination Plan at 2.

⁴ 2 U.S.C. § 1534(b).

⁵ 5 U.S.C. § 1001(2)(C).

⁶ 2 U.S.C. § 1534(b).

⁷ Guidelines and Instructions for Implementing Section 204, “State, Local, and Tribal Government Input,” of Title II of Public Law 104-4, 60 Fed. Reg. 50651, 50652 (Sept. 21, 1995).

of each region.⁸ These meetings are about the Federal programs which EPA is tasked with administering, and about how these programs extend to Tribal lands and governments. Therefore, FACA shall not apply to NTOC and RTOC meetings.

Further, the NTC is a Tribal caucus organization solely comprised of non-Federal representatives of Tribal governments. It is constituted pursuant to the sovereign authority of each Tribal representative to the NTC and is completely exempt from FACA.⁹

II. Imposing FACA Would Inappropriately Exert Federal Authority Over Tribal Coordination and Cooperation

FACA provides that “the function of advisory committees should be advisory only, and all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.”¹⁰ Accordingly, FACA mandates that advisory committees “not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government and...with an agenda approved by such officer or employee.”¹¹ FACA’s structure would require that discussions between Tribal leaders be approved by a Federal Government employee first; this is a severe overstep.

EPA’s effort to impose FACA on the NTC, a Tribal caucus is completely contrary to the letter and spirit of the Biden Administration’s policies of respect for the integrity of Tribal self-determination and self-governance.¹² Because advisory committees “shall be utilized solely for advisory functions,”¹³ and the NTOC is the mechanism through which the NTC advises the EPA, FACA is plainly inapplicable to the NTC as an exclusively Tribal entity.

III. FACA Will Subject the NTOC and RTOCs to Administration Vagaries

Contrary to EPA’s assurances that reorganization under FACA would somehow elevate and protect the NTC, the plain language of FACA makes the NTC significantly more vulnerable to elimination. Because FACA is designed to streamline and eliminate unnecessary advisory committees that are

⁸ See NTOC Charter at 4; see, e.g., Region 10 RTOC Charter at 2-3.

⁹ FACA defines an advisory committee as a committee “established or utilized to obtain recommendations for the President or one or more agencies or officers of the Federal Government” and is established by statute or reorganization plan, established or utilized by the President, or established or utilized by one or more Federal agencies. 5 U.S.C. § 1001(2). Groups established pursuant to sovereign Tribal authority do not fall within this definition. See *Wash. Leg. Fund v. U.S. Sentencing Comm’n*, 17 F.3d 1446, 1450–51 (D.D.C. 1994) (interpreting the word “utilized” in FACA to “encompass[] a group ... so closely tied to an agency as to be amenable to strict management by agency officials.” (quotation omitted)); *Food Chem. News v. Young*, 900 F.3d 328, 332 (D.D.C. 1990) (“[E]stablished indicates a Government-formed advisory committee” (quotation omitted)); *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 463–64 (1989) (“A literalistic reading [of the term ‘utilized’ in FACA] would catch far more groups and consulting arrangements than Congress could conceivably have intended.”).

¹⁰ 5 U.S.C. § 1002(b)(6).

¹¹ 5 U.S.C. § 1009(f).

¹² See, e.g., Executive Order 14058, Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination, Dec. 6, 2023, <https://www.federalregister.gov/documents/2023/12/11/2023-27318/reforming-federal-funding-and-support-for-tribal-nations-to-better-embrace-our-trust>.

¹³ 5 U.S.C. § 1008(b).

no longer serving a public purpose, it devotes significant focus to the termination of advisory committees.¹⁴ The default for advisory committees is termination after two years, unless affirmatively extended for another two years.¹⁵

FACA also requires an annual determination of whether the committee “is carrying out its purpose,” whether the committee’s assigned responsibilities should be revised, whether the committee should be merged with another committee, or whether it should be abolished.¹⁶ The GSA and other Federal officials thus have wide latitude to recommend the termination of any advisory committee. Because Tribal interests have historically served as political flashpoints, these provisions make any advisory committee focused on Tribal issues susceptible to the whims and priorities of each administration. Should the GSA recommend abolition of a Tribal advisory committee that replaced the NTC, it is unclear how EPA would continue to carry out the mandates of the Agency’s 1984 Indian Policy, fulfill its trust responsibility, or otherwise satisfy the mission articulated in the existing NTOC Charter. Far from strengthening the operations of the NTC and increasing collaboration with the other EPA Tribal Partnership Groups (as the EPA asserts in its Consultation Plan), reorganizing under FACA would make the NTC significantly more vulnerable and increase the likelihood that the NTC, NTOC, and RTOCs do not continue as an institutional forum for Tribal coordination with the EPA.

Even if the committees are not formally terminated, they may be functionally silenced through the control given to the designated Federal officer overseeing the committee. Under FACA, each advisory committee shall have a designated “officer or employee of the Federal Government,” and the committee “shall not conduct any meeting in the absence of that designated officer.”¹⁷ However, the agency administering an advisory committee is “entirely at liberty” to refrain from convening that committee at all.¹⁸ Reorganizing the NTC pursuant to FACA’s requirements would prohibit Tribal representatives from meeting together without approval from EPA leadership, which plainly undermines Tribes’ sovereign authority to establish their own procedures, protocols, and grounds for coordination. FACA would also impose an additional layer of Federal control over the NTC by requiring regular reporting to the General Services Administration (“GSA”), which is empowered to reframe the committee’s mandate or abolish it altogether.¹⁹

IV. FACA’s Public Notice and Reporting Requirements will Discourage Sharing of Tribal Data and Information

FACA requires that each advisory committee meeting be opened to the public and that—unless national security is implicated—timely notice of each meeting be published in the Federal Register and all interested parties be notified of meetings.²⁰ Any “interested person” must be “permitted to

¹⁴ See 5 U.S.C. § 1013; *see also* Executive Order 12838, Termination and Limitation of Federal Advisory Committees, 58 Fed. Reg. 8207 (Feb. 10, 1993) (ordering each agency to terminate at least one-third of existing advisory committees).

¹⁵ See 5 U.S.C. §§ 1013(a)(2), (c).

¹⁶ 5 U.S.C. § 1006(b)(1).

¹⁷ 5 U.S.C. § 1009(e), (f).

¹⁸ *Dabney v. Reagan*, 559 F. Supp. 861, 865 (S.D.N.Y. 1982) (holding that agency had discretion to avoid ever convening a Congressionally created committee).

¹⁹ 5 U.S.C. § 1006(b)(1).

²⁰ 5 U.S.C. § 1009(a)(1), (2).

attend, appear before, or file statements with any advisory committee,” and all “records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying.”²¹ Further, each advisory committee must keep detailed minutes and a complete description of “all matters discussed and conclusions reached,” and transcripts of advisory committee meetings must be made available to any person.²²

The public notice and disclosure requirements of the FACA fundamentally intrude upon the government-to-government relationship between Tribes and EPA. Further, these requirements present grave concerns for the protection and preservation of sensitive Tribal data and will significantly hamper the NTC’s ability to utilize sensitive Tribal data in advising the NTOC and EPA on critical environmental matters.

V. Imposing FACA Would Require Non-Tribal Perspectives to be Represented in Inter-Tribal Strategic Discussions

FACA establishes guidelines for agency heads and other Federal officials creating an advisory committee, including that advisory committee membership “be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.”²³ These requirements are not discretionary.²⁴ Tribal advice to the EPA via the NTC, NTOC, and RTOCs is advice between governments. This provision in FACA could be read to require the NTC to include industry representatives or other non-Tribal groups’ perspectives in its deliberations and advising.²⁵ EPA, as trustee for Tribal beneficiaries, is obligated by its Federal trust responsibility to pursue the best interests of its Tribal beneficiaries. EPA cannot inject other interests into Tribes’ representation in government-to-government discussions, which are intended to uphold trust responsibilities to those Tribes.

VI. Applying FACA Here Would Violate Intent of FACA

FACA was passed to minimize the number of advisory committees, so advisory committees should not be formed when their intended purpose is already met. In passing FACA, Congress noted that “new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary.”²⁶ Further, a “discretionary advisory committee may be established only when . . . the information to be obtained is not already available through another advisory committee or source within the Federal Government.”²⁷ Here, the

²¹ 5 U.S.C. §1009(a)(3), (b); *see, e.g., Nader v. Dunlop*, 370 F. Supp. 177, 179 (D.D.C. 1973) (“Congress has expressly ordered the door be open except on the rarest occasions”).

²² 5 U.S.C. § 1009(c); 5 U.S.C. § 1010(b).

²³ 5 U.S.C. § 1004(b)(2).

²⁴ 5 U.S.C. § 1004(c) (“To the extent they are applicable, the guidelines set out in subsection (b) shall be followed”); *see Nat. Res. Def. Council v. Dep’t of Interior*, 410 F. Supp. 582, 606 (S.D.N.Y. 2019) (holding that restricting membership on advisory committee based on viewpoint violates FACA).

²⁵ *See Nat’l Anti-Hunger Coal. v. Exec. Comm. of the President’s Private Sector Survey on Cost Control*, 711 F.2d 1071, 1074 (D.C. Cir. 1983) (lacking consumer welfare representation may violate FACA depending on scope of committee); *Pub. Citizen v. Nat’l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419 (D.C. Cir. 1989) (severely fractured court failed to agree on justiciability and nature of “fairly balanced” requirements).

²⁶ 5 U.S.C. § 1002(b)(2).

²⁷ 41 C.F.R. § 102-3.30(a).

information and input that EPA would gain through an advisory committee is already available through the NTOC and RTOCs. To establish a new Federal advisory committee would exacerbate the very problem that Congress sought to resolve by passing FACA.²⁸

Further, FACA contemplates discrete committees that are created to fulfill a particular purpose and are designed to sunset after two years, unless extended.²⁹ However, the NTC, NTOC, and RTOCs have a much broader mandate to address environmental issues impacting Indian country; they are not issue-specific and do not have a discrete end date. In particular, the NTOC works with “EPA Senior Leadership on policy and resource matters related to tribal capacity building, environmental program development, and implementation in Indian country” and “identifies mechanisms for Federally recognized tribes and EPA to facilitate actions that protect human health and the environment in Indian country.”³⁰ The RTOCs have similarly broad mandates.³¹ Reorganizing under FACA would limit the scope and function of the NTC and hamstring its ability to broadly address Tribal interests across the full range of environmental impacts. Making the NTC and RTOCs into advisory committees would either: (1) limit the efficacy of EPA in Indian country by shoehorning the organizations into a Federal advisory committee mold, or (2) deviate from the intent of FACA by creating permanent (continually renewed) advisory committees with expansive purposes. Neither option is an improvement over the present situation.

VII. Tribes Retain Sovereign Authority to Appoint Own Representatives

As separate sovereigns, with inherent authority as political entities that predate the U.S. Constitution, Tribes have the exclusive power to decide on their own representatives. “The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights.”³² As independent political entities, Tribes possess the fundamental aspects of political bodies. Self-determination requires the right to choose one’s representatives. EPA unilaterally dictating the qualifications for NTOC representatives is an egregious intrusion upon the sovereign rights of Tribes. Whether representatives are qualified through expertise in environmental administrative work or qualified by nature of being elected Tribal officials, the representatives are nevertheless acting with the support and endorsement of the Tribes that appointed them. The internal methods by which NTOC representatives are selected do not affect their position as representatives of Tribes, and EPA should not attempt to interfere.

Lastly, it is not adequate consultation if EPA precludes the participation of certain officials or employees who are designated as representatives by the Tribe. EPA’s consultation policy defines “Tribal official” as “an elected or appointed official of a Tribe, or an official or employee of a Tribe designated by an elected or appointed official of a Tribe.”³³ The ability of the Tribe to delegate this authority is inherent in sovereignty. To restrict this delegation authority under the guise of

²⁸ See *Carpenter v. Morton*, 424 F. Supp. 603, 606 (D. Nev. 1976) (finding that Congress’s intent in passing FACA was, *inter alia*, to eliminate advisory committees).

²⁹ See 5 U.S.C. § 1004(b)(1), (c) (requiring agency heads or Federal officials to have a “clearly defined purpose for the advisory committee”); 5 U.S.C. § 1013(b), (c) (setting two-year expiration period for advisory committees, with options for renewal).

³⁰ NTOC Charter §§ 3-4.

³¹ See, e.g., Region 10 RTOC Charter § 3.0.

³² *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832).

³³ EPA Consultation Policy at 2.

“strengthen[ing] EPA’s ongoing commitment to collaboration and partnership with Tribes” is duplicitous.

VIII. EPA Should Abandon this Proposal

If EPA wishes to consult on how the NTC might more effectively fulfill the goals of the EPA’s Consultation Policy and the trust responsibility, it should first engage Tribes on that question. Region 10 RTOC urges the EPA to abandon its efforts to impose FACA where it does not belong and to instead begin this process on solid footing with true consultation on any concerns EPA has with the existing NTOC structure. Only then can EPA and the Tribes design a solution that has legitimacy and Tribal support.

The RTOC appreciates your consideration of these comments.

Sincerely,

Raymond Paddock

Raymond E. Paddock III
Central Council of the Tlingit and Haida Indian Tribes of Alaska
Region 10 Tribal RTOC Chair