



July 22, 2024

Kenneth Martin, Director  
American Indian Environmental Office  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue N.W.  
Washington, D.C. 20460

**Re: EPA's Proposed Reorganization of the National Tribal Caucus**

Dear Mr. Martin:

On behalf of the National Tribal Water Council (NTWC), I am pleased to submit these comments on EPA's proposed conversion of the National Tribal Caucus (NTC) into a Federal Advisory Committee (FAC) under the Federal Advisory Committee Act (FACA).

The NTWC provides comments and recommendations on several key aspects of the proposal. First, the NTWC recommends that the NTC continue to operate under the Unfunded Mandates Reform Act (UMRA), rather than the FACA framework. The NTWC believes that implementing the FACA process would undermine the unique federal-tribal relationship that NTOC has maintained for the past three decades. Second, the NTWC continues to advocate for the NTC representation structure as outlined in the existing NTOC charter. Third, the NTWC backs a subcommittee process that will strengthen NTC collaboration with tribal partnership groups (TPGs).

The NTWC believes that implementing the recommendations will provide more clarity regarding the NTC's role as an advisory group to improve its capacity and responsibility to collaborate with the ten regional tribal operations committees (RTOCs) and other TPGs.

**1. FACA Compliance is Not Required.**

EPA asserts<sup>1</sup> FACA compliance is required because the NTC is an external group collectively advising EPA on budgeting and environmental program implementation. That position is, of course, directly opposed to EPA's treatment of the NTC in the three decades since it was created in 1994. Nor did EPA suggest the FACA applied in 2011 when the Agency conducted a

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<sup>1</sup> Unless indicated otherwise, all references herein to EPA statements, claims, assertions, etc. come from the *Consultation and Coordination Plan: Proposed Reorganization of the National Tribal Caucus (NTC) Under the Federal Advisory Committee Act (FACA)* (2024).

“reinvigoration” process for the NTOC, resulting in the current NTOC Charter in 2012. Indeed, the Charter’s Authority clause explicitly states that the NTOC “Charter complies with the statutory provisions as set forth at 2 U.S.C. Sec. 1534(b)(1) & (2), and therefore the NTOC is not subject to the Federal Advisory Committee Act.”<sup>2</sup> As the NTOC could not exist without the NTC, the Charter’s statement that the FACA is not applicable includes the NTC and its related functions.

The Charter’s other statutory reference is to the UMRA, which confirms that the FACA is inapplicable here. UMRA exempts from the FACA certain intergovernmental communications held exclusively between federal officials and elected officers of tribal governments “or their designated employees with authority to act on their behalf.”<sup>3</sup> The NTOC Charter satisfies UMRA’s requirement by defining the NTOC as constituted by elected tribal officials and/or tribally-appointed designees (the NTC) and EPA senior management, including EPA’s Administrator, a presidential appointee.<sup>4</sup> The UMRA also requires the intergovernmental meetings be solely for exchanging views, information, or advice relating to implementation of federal programs with intergovernmental responsibilities or administration.<sup>5</sup> The NTOC Charter follows the UMRA’s language nearly verbatim in providing the tribal and federal officials will work together to “[e]xchange views, information and advice concerning intergovernmental efforts to manage and implement EPA’s programs in Indian country.”<sup>6</sup> The Charter’s Mission Statement makes clear the NTC’s participation in the NTOC is an intergovernmental interaction with EPA: “The NTOC serves as a forum *for federally recognized tribes* to work with EPA Leadership on ... matters related to *tribal capacity building, environmental program development and implementation* in Indian country.”<sup>7</sup> Thus, this is not a public interest group collaboration subject to FACA requirements.

Curiously, EPA does not treat the NTC’s state counterpart as a FAC. The Environmental Council of the States (ECOS), made up of state and territorial environmental agency leaders, meets with EPA’s leadership on a regular basis. This organization expresses state and territorial positions to EPA on environmental programmatic needs, including budgetary recommendations. EPA’s Office of General Counsel (OGC) determined that ECOS is not subject to FACA requirements even though it functions similarly to the NTC. The OGC has not provided the NTC or tribes with any explanation as to why ECOS’ FACA exemption should not apply similarly to the NTC. That is especially incongruent considering the state-like programmatic roles tribes can assume under multiple federal environmental statutes, and EPA’s longstanding Indian Policy recognition of tribes as the primary governmental parties for environmental program implementation in Indian country.

## **2. The FACA is Inconsistent with and Will Undermine the Unique Relationship Between EPA and Indian Tribes.**

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<sup>2</sup> EPA’s National Tribal Operation Committee Charter (2012), Section 2.

<sup>3</sup> 2 U.S.C. § 1534 (b)(1).

<sup>4</sup> NTOC Charter, Section 6.2.

<sup>5</sup> 2 U.S.C. § 1534 (b)(2). *Accord* 41 C.F.R. 102-3.40(f) (GSA regulatory explanation of FACA exclusion).

<sup>6</sup> NTOC Charter, Section 5.1.

<sup>7</sup> *Id.* at Section 4 (emphases added).

We understand that determining whether an advisory group is subject to FACA is frequently decided by EPA on a case-by-case basis using a variety of factors. To the extent the Agency believes it has discretion to require FACA compliance despite the UMRA's clear exclusion for tribal government-federal committees, it should not do so here because of the unique legal, political and historical background for the NTOC's work.

From their inception, the United States courts and Congress have recognized that American Indian tribes *inherently* possess governmental sovereignty over their citizens and territories. One reason tribes generally support EPA is because it was the first federal agency that explicitly acknowledged tribal sovereignty and pledged support for tribal assumptions of environmental program primacy. Every administrator since William Ruckelshaus in 1984 has endorsed the Agency's Indian Policy. Self-proclaimed commitments are modest to be sure, and tribes have suffered more than their share of unfulfilled federal promises. Yet, tribes view sovereignty as central to indigenous identity and to their sacred responsibilities for preserving their living and nonliving relatives. Sovereignty distinguishes tribes from every other disadvantaged group in the United States. Hence, any perception that EPA is retreating from supporting inherent tribal sovereignty threatens to undo five decades of painstaking gains in the Agency's Indian program and hinder future progress.

The FACA process poses that risk, which is inconsistent with and will undermine the unique EPA-tribal relationship. The NTC is a key aspect of that relationship because it is made up of tribal government designees. The NTOC is thus based on a relationship between government officials acting in a government-to-government capacity, consistent with the EPA's long-standing Indian Policy. Yet, under the FACA the final determination regarding tribal representation is made not by tribes, nor by tribal representatives through the ten RTOCs as prescribed by the NTOC Charter,<sup>8</sup> but by EPA's Administrator.<sup>9</sup> That is, EPA decides who speaks for the tribes on their critical environmental protection priorities, values, and concerns. The Agency's proposal for a nationwide public solicitation process is startlingly reminiscent of the Nation's early sordid history when the federal government "appointed" friendly tribal citizens as leaders of their respective tribes to negotiate land cessions, treaties, and other momentous decisions. EPA's selection of NTC members is patently inconsistent with tribes' sovereign authority and discretion to select designated representatives and would significantly undermine the tribal-EPA relationship. Like the NTC, the NTWC strongly disagrees with this approach.

The FACA process would undermine the federal-tribal relationship in another significant regard. Public access and participation are key FACA themes. Interested members of the public must be allowed to attend FAC meetings, appear before FACs, and submit statements to them.<sup>10</sup> Documents considered or prepared by FACs, meeting minutes and transcripts are open records subject to Freedom of Information Act requests.<sup>11</sup> Transparency is generally a desirable attribute of good governance. It is inappropriate, however, in deliberative intergovernmental processes intended for sharing and discussing priorities, values, and goals. Tribal-federal discussion of

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<sup>8</sup> NTOC Charter, Section 6.1. *See also* Section 7.2 (selection of NTC Officers by vote of NTC members).

<sup>9</sup> 41 C.F.R. 102-3.130(a).

<sup>10</sup> 5 U.S.C. § 1009(a)(1), (3).

<sup>11</sup> *Id.* at § 1009(b), § 1011(a).

environmental issues often implicates sensitive topics relating to sacred sites, cultural values and practices, and jurisdiction. Non-Indians have used such information to locate and destroy tribal cultural resources, and states, state subdivisions, non-Indian businesses and others have sued tribes hundreds of times over jurisdiction and reservation boundaries. The NTWC believes that restructuring the NTC would limit tribal participation and communication with senior EPA officials, further slowing progress toward realizing the Agency's Indian Policy goals of tribal capacity development and assumption of federal program primacy.

Finally, the NTWC is concerned a reorganization of the NTC could precipitate changes to its meeting schedule and structure like other FAC operations. Monthly meetings would be reduced in frequency to quarterly ones, with a focus on preparing for the two in-person meetings with the EPA Administrator and senior EPA officials. This frequency would limit the NTC's interactions with EPA officials to four times per year and would reduce the Agency's direct disclosure of critical information about tribal policy, consultation, and rulemaking. Taking this approach may limit the NTC's ability to fulfill its unique role of directly interacting with tribal governments and senior EPA leadership on issues concerning Indian country human health and the environment.

### **3. Increasing Elected Tribal Leadership on the NTC is Neither Practical nor Appropriate for Technical Advisory Discussions with Unelected Federal Partners.**

The NTWC is intrigued by EPA's suggestion of increasing the number of elected or traditionally appointed tribal officials on the NTC. In theory that would enhance the NTC's governmental status and possibly make its advice to EPA more impactful. Practically speaking, though, mastering the legal and technical complexities of environmental law and science require extensive time and experience that challenges even full-time tribal environmental directors. While TPGs like the NTWC exist to help bridge officials' understanding, the pressing nature of the many serious social and economic issues facing Indian country leave little time for elected officials to become well versed in environmental matters, especially for the purpose of offering non-binding advice to federal agencies. Where particular tribal officials have the time and desire to participate, the existing NTOC Charter already provides for their participation in the NTC.<sup>12</sup>

We also note an interesting asymmetry in EPA's suggestion. None of the federal members of the NTOC are elected officials. Like tribal environmental directors, EPA's Administrator is a political appointee with significant authority, but which is subject to review and reversal by an elected official (the President). A true intergovernmental partnership would have tribal chairpersons meeting with the President for high level policy discussions. Occasionally such meetings do occur on a broad variety of shared interests not solely environmental ones. The NTWC would happily join EPA in supporting a First Nations Summit devoted to environmental issues only. Until then, we feel it most appropriate for continued meetings of federal and tribal environmental professionals.

### **4. The Asserted Benefits and Goals of a FAC Can Be Achieved by Minor Revisions to the NTOC Charter.**

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<sup>12</sup> NTOC Charter, Section 6.1 (Elected Official Option).

### **a. Regular Charter Review**

EPA believes that opening the FACA door will ensure a reliable NTOC charter revision process. The FACA would require the General Services Administration (GSA) to review the NTOC Charter every two years and approve any amendments or revisions. This suggestion appears to stem from prior long wait times in amending the Charter. However, NTC members have pointed out those delays were not due to existing UMRA ambiguity or tribal inaction, but rather to the selection of a new American Indian Environmental Office (AIEO) director and awaiting OGC legal opinions.

NTC members are concerned about the GSA process. Taking the NTC process and the NTC's fate from tribes and giving it to the GSA, an agency with no environmental or tribal expertise, is not advantageous for tribal nations. AIEO has stated that EPA's FACA office confirmed that this was not the intent of the reorganization proposal and emphasized the importance of the EPA/tribal relationship, but it could not guarantee the NTC would not be eliminated. The risk seems very real as the FACA presumes that FACs will terminate in two years unless affirmatively renewed.<sup>13</sup> And the FACA's two-year charter review requires performance evaluations and accomplishment reports that unfriendly administrations could use to simply terminate the NTC process.

### **b. Revising the NTC Mission and Goals**

EPA states plainly that reorganization of the NTC “would not affect the mission and goals of the group.” That raises the obvious question why then reorganize? EPA's answers are unpersuasive to the NTWC.

EPA says reorganization “would formalize the [NTC's] advisory role with EPA and distinguish it from the almost twenty other TPGs.” The negative implications are that the NTC's advisory role is informal and duplicative of other TPGs. That confuses us. A simple Google search immediately reveals the NTOC's official Charter, which details the NTC's membership and officer selection processes, its substantive roles, and its mission and goals (shared with EPA). The NTOC's Charter is no less formal, and in many respects very similar to the two examples the Agency offers as an implicit claim of a trend toward FACs. We note EPA neglected to mention those two agencies—the Department of Agriculture and the Department of Veterans Affairs—were explicitly directed by congressional statutes to create their FACs.<sup>14</sup> No environmental statute directs EPA to create a tribal FAC. Like courts do, we presume Congress is aware of the NTOC and the NTC's role in it. If Congress felt the NTC's role was unclear or informal or duplicative it obviously knows how to direct a reorganization and yet has not done so.

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<sup>13</sup> 5 U.S.C. § 1013(a)(2).

<sup>14</sup> See 7 U.S.C § 6921(b) (Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994); 38 U.S.C § 547 (Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020). We note that in both statutes Congress explicitly exempted the tribal FACs from the FACA's requirement that FACs terminate automatically in two years unless affirmatively renewed. See 7 U.S.C § 6921(b)(7) and 38 U.S.C § 547(i). Such clear language makes it easier for opponents of the NTC to argue EPA lacks authority to create a tribal FAC exempt from the FACA two-year limitation.

The substantive provisions of the NTOC's Charter establish the NTC's advisory role as national, cross-media, and program-wide. That very clearly distinguishes the NTC from every media-specific TPG and every Regional Operations Committee. EPA's claim that in light of the proliferation of the TPGs the NTC's engagement with EPA leadership is "less clear" thus rings hollow. The claim is further belied by EPA's recognition that "the NTC is the sole Tribal group that has recurring annual meetings with the Administrator's Office and has a unique platform by which Tribal collaboration is provided directly to the highest tier of EPA leadership."

Perhaps the NTC could better collaborate with the TPGs. We offer some initial recommendations on improving NTC-TPG coordination in the section below. And there may be some duplication; the same is often said of the many federal agencies. Duplication, though, is not inherently bad and in fact may be critically important. Since EPA offers no examples, we cannot consider whether duplication actually exists and is wasteful or ineffective. But once again such concerns do not warrant discarding a long-functioning group that even the Agency sees as "the preeminent group that engages with OITA and the EPA Administrator's Office." These concerns can be addressed in self-evaluation of the NTOC and NTC processes, and converting to a FAC does not guarantee that no duplication will occur.

Other alleged benefits of the FAC structure can similarly be addressed within the current processes. "Charge questions" from EPA are easily accommodated under Section 5.3 of the Charter. The creation of needed subcommittees and workgroups are already envisioned under Section 9 of the Charter. The FACA's provision for members' terms of two years is mirrored by under Section 6.1 of the Charter. The only concepts EPA raises not currently addressed by the NTOC Charter are public access, which we addressed above as inconsistent with the NTC and NTOC processes, and regular reports to and review by the GSA, which is not inherently bad but offers no environmental or Indian law expertise. Nonetheless, there is no reason the NTOC could not seek input from GSA at any time when the NTC and/or EPA leadership feels outside review could be helpful. The FAC structure is not required for seeking such input.

## **5. Strengthening Collaboration Between the NTC and TPGs.**

The NTWC supports EPA's proposal to clarify the NTC's relationship with TPGs and position it as the primary tribal advisory group for meetings with senior EPA officials. Since 2008, the NTWC has been involved in supporting the NTC by providing budget and policy recommendations for EPA tribal water programs. The NTWC agrees the NTOC charter is unclear on TPG relations, and the proposal offers an opportunity to improve those interactions.

The NTWC proposes a subcommittee structure to improve collaboration between the NTC and TPGs. This subcommittee structure would apply to the seven TPGs supported by the EPA.<sup>15</sup> Each subcommittee would include the NTC's media-specific goal leader, other interested NTC members, and TPG executives and members. The NTWC, for example, would work directly with the NTC's goal lead for safe and clean water as the primary point of contact when creating meeting agendas, objectives, and recommendations. The NTWC recommends that the NTOC

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<sup>15</sup> The seven TPGs based at the EPA Headquarters are the National Tribal Air Association, National Tribal Toxics Council, National Tribal Water Council, Tribal Exchange Network Group, Tribal Pesticide Program Council, Tribal Science Council, and Tribal Waste and Response Steering Committee.

Charter be amended to include the subcommittee framework, providing clarity and improving the relationships between TPGs and NTC.

On a case-by-case basis, the subcommittees may consult with environmental specialists who have professional and/or technical expertise to assist in media discussions. To prepare for the annual NTC budget recommendation and programmatic meetings with senior EPA officials, a minimum of two meetings should be scheduled virtually each year. Additional meetings could be held via teleconference to address national tribal issues that require a subcommittee's immediate collaboration.

Using this structure, the TPGs could interact with the NTC in greater detail. Concerns could be addressed through a variety of methods, including verbal, written, and PowerPoint presentations. A TPG could explain the importance of collaborative efforts and why particular issues should be brought before EPA senior officials. The TPG chair and NTC goal lead could share the subcommittee's recommendations with NTC executives and members. In addition, the subcommittees should conduct annual self-evaluations to assess progress toward achieving their goals and the articulation of those goals to senior EPA officials in a common tribal voice.

Incorporating this framework into the NTOC charter is possible through the existing UMRA structure. FACA does not apply “to subcommittees that report to a parent advisory committee and not directly to a federal officer or agency,” but the formation and operation of a subcommittee “must be approved by the agency establishing the parent advisory committee.”<sup>16</sup>

NTC leadership will benefit from this coordination effort by having the information and knowledge necessary to effectively address important national tribal issues with EPA senior officials, including the EPA administrator, when they arise.

Furthermore, the NTWC proposes the establishment of a reference website that will facilitate the linking of all TPG websites. This would offer NTC members a platform that is easily accessible, allowing them to view the diverse and complex environmental issues that affect tribes across the country without the need to navigate between each group's individual website. This would be advantageous for both NTC members and any TPG or EPA. We are of the opinion that this will offer a strong, united tribal voice, finesse, and clarity to any NTC or TPG members who may wish to further their understanding of a specific tribal issue.

The NTWC recommends that the creation and maintenance of this website should be assigned to AIEO, as AIEO has previously provided both administrative and logistical support to TPGs. Given that all TPGs already have websites, this task is the logical next step in developing more efficient communication channels between the NTC and all other TPGs.

In preparing these comments, the NTWC reviewed a document prepared and released by AIEO on August 16, 2011, titled *Overview of Straw Proposal for a Strategic Regular Process Between the EPA Tribal Partnership Group and the National Tribal Caucus*. The NTWC submits this document with our comment letter. At the outset of the straw proposal, AIEO claims that the goal is to advance an “approach for more regular and strategic interactions among EPA TPGs as part of the NTOC Reinvigoration process.” The NTWC supports more frequent and strategic

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<sup>16</sup> 41 C.F.R. §102-3.35.

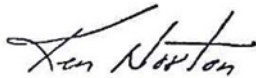
interactions with TPGs and requests that the EPA review, consider, and meaningfully engage the NTWC and other TPGs on the benefits and drawbacks of the 2011 straw proposal with the goal of developing a revised plan that meets the needs of Indian country.

## Conclusion

The NTWC appreciates the opportunity to provide feedback on the proposal to reorganize the NTC under the FACA. The NTWC is convinced that this reorganization will have far-reaching negative consequences by limiting the functions of the NTC and TPGs, undermining the effectiveness of Indian country's environmental and human health protection. The NTWC strongly opposes the EPA's reorganization proposal. Subjecting the NTC to FACA regulations reduces tribally appointed representation, which was designed to improve tribal-EPA government-to-government relations. The Biden/Harris administration has made significant progress in improving tribal-federal relations, and this proposal appears to undermine that effort. However, the NTWC is encouraged by the EPA's proposal to strengthen the relationship between the NTC and TPGs. The EPA and tribal governments will benefit from increased collaboration, including the establishment of a subcommittee.

Should you have any questions regarding our comments and recommendations, you may contact me at [Kenpnorton@gmail.com](mailto:Kenpnorton@gmail.com), or Elaine Wilson, NTWC Project Manager, at [Elaine.Wilson@nau.edu](mailto:Elaine.Wilson@nau.edu).

Sincerely,



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