



# Ottawa Tribe of Oklahoma

P.O. Box 110 Miami, OK 74355

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**VIA ELECTRONIC MAIL**

Andrew Byrne, Senior Advisor  
Policy & Partnership Team  
American Indian Environmental Office  
United States Environmental Protection Agency  
[byrne.andrew@epa.gov](mailto:byrne.andrew@epa.gov)

Re: Consultation comments regarding EPA's October 1, 2020 decision approving the State of Oklahoma's SAFETEA request

The Ottawa Tribe of Oklahoma ("Tribe") submits the following comments on the Environmental Protection Agency's (EPA) proposed withdrawal and reconsideration of its October 1, 2020 decision approving the State of Oklahoma's request to administer numerous environmental regulatory programs on Indian lands in Oklahoma pursuant to the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA) rider (the October 1 Decision). The Ottawa Tribe strongly supports the proposed withdrawal of the October 1 Decision. As stated in previous comments, the October 1 decision was arbitrary and capricious, contrary to law, and a blatant disregard to the sovereignty of Oklahoma tribal nations.

The Ottawa Tribe requests that EPA finalize the withdrawal of the October 1 Decision *before* making a new decision on Oklahoma's SAFETEA request. Only with this withdrawal can EPA achieve meaningful government-to-government consultation with Oklahoma tribal nations. Meaningful consultation can only occur before an agency makes decisions impacting tribes – not after the decision is already made.

After withdrawing the October 1 Decision, EPA should then deny Oklahoma's request because Section 10211 of the SAFETEA should be presumed to have expired. SAFETEA was a time-limited appropriation and authorization act that expired in 2009. There is a strong presumption that riders in such acts are temporary legislation that do not remain in effect after the acts' expiration.

If Oklahoma's request is not denied, EPA must determine that the 26 programs covered by Oklahoma's request are being implemented in compliance with the law. As noted in previous comments, there is evidence to suggest that the Oklahoma Department of Environmental

programs. Oklahoma cannot be allowed to extend its regulatory authority into Indian country without showing that its existing programs comply with all applicable requirements. Any new approval of Oklahoma's request should impose conditions and provisions to protect tribal interests. ODEQ v. EPA, 740 F.3d 185, 190 (D.C. Cir. 2014) recognized that EPA has the authority to impose such conditions. Options for appropriate conditions and provisions are discussed below.

1. Any new approval should be conditioned upon Oklahoma correcting compliance issues identified as part of EPA's reconsideration. As mentioned above, SAFETEA requires EPA to determine that each affected program administered by Oklahoma complies with applicable laws. Where EPA identifies compliance problems with Oklahoma's state programs, it must require corrections before approving Oklahoma's request.

This base requirement provides EPA with an excellent opportunity to direct significant improvements in Oklahoma's programs. Any new SAFETEA decision should be used to impose requirements that correct any compliance issues.

2. *Before* any new SAFETEA approval, EPA should require that Oklahoma negotiate and enter into an intergovernmental agreement or memorandum of understanding/agreement with any tribe affected by the SAFETEA decision. Such agreements would protect the interests of tribal nations in the protection of their air, water, land, and health. Additionally, these agreements would ensure to the maximum extent possible that state administered programs are compatible with, and do not impinge upon or undermine, the lawful administration of tribal environmental laws, policies, and programs.

The Ottawa Tribe is particularly interested in working with EPA and Oklahoma to expand our treatment in a similar manner as a state (TAS) authority to cover Clean Water Act and other regulatory programs in areas that currently are administered by EPA rather than Oklahoma. The Ottawa Tribe welcomes an opportunity to discuss this step with EPA and Oklahoma. These discussions could also be used to coordinate application of multi-tribal water quality standards for certain basins that could be coordinated with Oklahoma state water quality standards.

3. In future funding agreements with Oklahoma, EPA should require the State to coordinate with tribes. Our understanding is that a significant amount of the Oklahoma Department of Environmental Quality's budget involves federal funding making this an important mechanism for driving collaboration.

Funding agreements can include terms requiring that for each activity receiving funding: Oklahoma must confer with all tribes within 50 miles and Oklahoma must submit a signed statement of non-opposition from each such tribe or a written explanation of the tribe's concerns and how they are being addressed. The funding agreements can also provide an exemption from these requirements, under which activity-specific

consultation is excused where Oklahoma has a broader intergovernmental agreement or memorandum of understanding or agreement with the tribe, *the terms of which are being followed by Oklahoma*. These terms would give Oklahoma an incentive to work with tribes on intergovernmental agreements or memoranda of understanding or agreements. We urge EPA to apply this approach to as broad a range of funding programs as possible to maximize Oklahoma's motivation to work with tribes toward an agreement.

4. In addition, EPA should exercise its oversight authority for state-issued permits to encourage coordination between Oklahoma and affected tribal nations. EPA should use their authority to direct that, along with each proposed permit, Oklahoma submit a report describing its conferral with each affected tribe regarding the permit, and how any tribal concerns have been addressed. If Oklahoma fails to provide this information, EPA can initiate a conferral with the affected tribe itself. And ultimately, EPA can object to the permit if Oklahoma fails to involve the tribe and address substantive tribal concerns. There are several opportunities for EPA to use its permitting oversight under multiple statutes. We urge EPA to cast a wide net in this regard.

The Ottawa Tribe looks forward to the opportunity to discuss the conditions and procedures identified during this consultation process with EPA. In particular, the Tribe would like additional details on how EPA may formalize, implement, and enforce conditions under SAFETEA and other statutes.

In addition, many of the conditions discussed above may require a significant investment of time and staff resources by affected tribes. The Ottawa Tribe would be interested in exploring potential grant opportunities to support its efforts to engage with Oklahoma on collaboration in environmental protection programs.

Sincerely,



Ethel E. Cook  
Chief