



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

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Michael S. Regan, Administrator
Office of the Administrator
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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
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Earthea Nance
Region 6 Regional Administrator
Environmental Protection Agency
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Re: SAFETEA – Proposed Withdrawal and Reconsideration

Dear Administrator Regan, Dr. Nance, and Mr. Gee:

We write on behalf of the State of Oklahoma and its officers and agencies in response to the Notice of Proposed Withdrawal and Reconsideration of October 1, 2020 Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (SAFETEA) Decision and Opportunity for Comment, issued by the United States Environmental Protection Agency (EPA) on December 22, 2021 (Notice). Section 10211(a) of SAFETEA provides:

Notwithstanding any other provision of law, if the Administrator of the Environmental Protection Agency (referred to in this section as the “Administrator”) determines that a regulatory program submitted by the State of Oklahoma for approval by the Administrator under a law administered by the Administrator meets applicable requirements of the law, and the Administrator approves the State to administer the State program under the law with respect to areas in the State that are not Indian country, on request of the State, the Administrator shall approve the State to administer the State program in the areas of the State that are in Indian country, without any further demonstration of authority by the State.

Pub. L. 109-59, 199 Stat. 1144, 1937. On October 1, 2020 EPA approved Oklahoma’s request to extend approval of the State’s EPA-approved environmental regulatory program into certain areas of Indian country within the State (October 2020 Decision). Under the plain language of the statute quoted above, the EPA has no authority to withdraw the October 2020 Decision for any purpose and

any reconsideration is unnecessary. And to the extent any reconsideration is legally permissible, withdrawal during reconsideration would both be contrary to statute and wholly arbitrary. Withdrawal, even if only temporary, would create enormous uncertainty for thousands of regulated parties and for the economy of Eastern Oklahoma as a whole. It would upend the regulatory structure over numerous environmental programs on which millions of Oklahomans have relied. None of this severe disruption is permitted—and indeed it is forbidden—by the laws enacted by Congress.

I. The October 2020 Decision is mandated by Congress.

The Notice fails to engage with key legal analysis in the October 2020 Decision when suggesting withdrawal and reconsideration is needed. As EPA explained then, SAFETEA “expressly abrogates any prior potentially inconsistent legal requirement or limitation of law” and “provides EPA no discretion to weigh additional factors in rendering its decision.” October 2020 Decision at 2.

The Notice assumes discretion that in the past EPA correctly denied possessing. “[N]ot every action authorized, funded, or carried out by a federal agency is a product of that agency’s exercise of discretion.” *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668 (2007). Instead, actions commanded by the statutory language “shall approve” are mandatory. *Id.* at 661. The word “shall” by its very terms imposes a “discretionless obligation[.]” *Id.* (quoting *Lopez v. Davis*, 531 U.S. 230, 241 (2001)). As a result, the criteria attached to a statutory “shall” are exclusive criteria. *See id.* Adding additional conditions before issuing a required approval improperly purports to amend a Congressional statute. *See id.* at 663-64.

SAFETEA fits within this rule for non-discretionary obligations. It specifies that the EPA “shall approve” Oklahoma’s request to apply its approved state program to Indian country with only one criterion: “request of the State.” Pub. L. 109-59, 199 Stat. 1144, 1937. It offers no room for agency discretion or adding conditions. Nor does it permit EPA to withdraw such approval. “[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.” *Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 374 (1986).

The Notice largely ignores this legal framework when considering a different approach. It entirely relies on imposing additional conditions not listed in SAFETEA. First, it suggests that additional tribal consultation is needed because the first tribal consultation may not have provided sufficient time. Notice at 7. Second, it suggests that EPA may need to perform additional review of the State program, or of implementation of that program, as it applies in Indian country. *Id.* Third, it suggests imposing conditions on the October 2020 decision to require coordination with tribes. *Id.* at 7-8. None of these can form a legal or reasoned basis for withdrawal or reconsideration of the October 2020 Decision.¹

II. EPA’s prior consultation with tribes was sufficient and no greater consultation is required by SAFETEA.

The Notice’s first suggestion, regarding needing additional time for tribal consultation, misunderstands the relevant legal framework. There is no legal authority that compels EPA to consult with tribes on this matter before EPA complies with its non-discretionary duty under SAFETEA to

¹ For these reasons, the October 2020 Decision is not properly subject to reconsideration under Executive Order 13990 because it is not in “conflict with” national objectives. Rather, it is mandated by the national policy set by Congress in SAFETEA.

approve the State's request. EPA certainly cites to none, pointing instead to EPA policy documents that have no legally binding effect. *See* October 2020 Decision at 6. Nor is there legal authority for EPA to have delayed its non-discretionary duty in order to engage in extended tribal consultation.

Even assuming some tribal consultation was legally necessary or permissible, the prior EPA approval satisfied that requirement. The EPA held a broad tribal consultation meeting open to all tribes in Oklahoma on September 8, 2020 and had further individual consultations with the Muscogee (Creek) Nation (August 25 and September 10), the Ottawa Tribe of Oklahoma (September 9), the Choctaw Nation (September 10), the Cherokee Nation (September 11), the Osage Nation (September 11), the Sac and Fox Nation (September 11), and the Quapaw Nation (September 14). October 2020 Decision at 6; Admin. Rcd. Index at 1, *Pawnee Nation of Oklahoma v. U.S. Environmental Protection Agency*, No. 20-9635 (10th Cir. Oct. 5, 2021). The EPA also responded to comments by those tribes and by the Absentee-Shawnee Tribe of Indians of Oklahoma, the Chickasaw Nation, the Citizen Potawatomi Nation, the Delaware Nation, the Eastern Shawnee Tribe of Oklahoma, the Fort Sill Apache Tribe, the Iowa Tribe of Oklahoma, the Pawnee Nation of Oklahoma, the Peoria Tribe of Indians of Oklahoma, the Ponca Tribe of Indians of Oklahoma, the Seminole Nation of Oklahoma, the Seneca-Cayuga Nation, the Wichita and Affiliated Tribes, the Wyandotte Nation, and the Kaw Nation of Oklahoma. Admin. Rcd. Index at 2-3. Extensive meetings and responses to comments from 22 tribes on a non-discretionary obligation is more than sufficient to account for whatever consultation obligation or discretion EPA had.

Moreover, tribal input into this issue preceded Oklahoma's request. Specifically, as part of their arguments urging the Supreme Court to recognize their reservations, tribes assured the Court that it need not be concerned with disruption to the State's environmental authority because the State could rely on SAFETEA. In *McGirt*, for example, the Choctaw and Chickasaw Nations told the Supreme Court that SAFETEA "requires that when the EPA approves Oklahoma state environmental regulatory plans under federal environmental laws, it must also approve Oklahoma's authority to administer the program in Indian country." Br. of Chickasaw Nation, Choctaw Nation, *et. al.* at 23, *McGirt v. Oklahoma*, No. 18-9526 (Feb. 11, 2020). Similarly, the Creek Nation assured the Supreme Court that recognizing their reservation would not "supplant State regulatory authority under the Clean Air Act or the Safe Drinking Water Act" because "the SAFETEA Act provides Oklahoma with special protection in this regard – where Oklahoma is authorized to implement environmental regulations outside Indian Country, the EPA 'Administrator shall approve the State to administer the State program ... in Indian country[.]'" Br. of Muscogee (Creek) Nation at 33-34, *Sharp v. Murphy*, No. 17-1107 (Sept. 26, 2018). Thus, tribal input began long-before Oklahoma's request—and indeed tribes asked the Supreme Court to rely on the expectation that the State could appropriately make such a request—and tribes at that time did not inform the Supreme Court that approval could or would be conditional or necessitate tribal consultation. Instead, those tribes took the same view of SAFETEA as the State does now: that approval is mandated, full stop.

The Notice's only claim for the need for further consultation is that EPA wants to explore conditions that tribes would like to see imposed on the SAFETEA approval. Notice at 7. Because no conditions are appropriate or permissible, *see supra* Part I and *infra* Part III-IV, and because the tribes had adequate opportunity to propose such conditions and EPA adequate opportunity to consider them, no further consultation is needed.

III. The EPA is prohibited by statute from treating the State's environmental programs differently in Indian country.

The Notice's second suggestion, regarding additional review of the State's program in Indian country, or the State's administration or implementation of its program in Indian country, is prohibited by SAFETEA. The statute's mandatory language does not permit different considerations for Indian country. Instead, the language of SAFETEA explains precisely how the EPA is to handle Indian country in Oklahoma. If the Administrator has approved a State program "with respect to areas in the State that are not Indian country," the Administrator "shall approve the State to administer the State program"—that same program—"in the areas of the State that are in Indian country." Pub. L. 109-59, 199 Stat. 1144, 1937. The only conditions for approval provided in SAFETEA is that the State environmental programs at issue be approved in areas of the State that are not Indian country and the State request approval to administer those programs on Indian country. Moreover, consideration of whether the State is appropriately administering or implementing environmental regulatory programs (other than the State meeting "applicable requirements of the law" for continued approval of such programs outside Indian country) would be a requirement for "further demonstration" that SAFETEA flatly prohibits, or is otherwise not contemplated by SAFETEA before approval of the State's request.

Since all the programs at issue have been approved by EPA in areas of the State that are not Indian country, EPA does not have the authority or discretion to condition or withdraw that approval on any other factor. Allowing the imposition of further criteria for or conditions on such approval would provide EPA with the ability to circumvent the text and express purpose of SAFETEA. The statute provides no room for separate review of the State program in Indian country, and any withdrawal or reconsideration for such a review is prohibited by law. And even if such consideration were allowed by law, reasoned decisionmaking would require EPA to allow the State to respond to any specific concerns about the State's existing implementation of environmental programs in Indian country before relying on such considerations to form the basis of reconsidering or withdrawing the October 2020 Decision. The Notice, however, does not specify any such areas of concern and thus arbitrarily deprives the State the opportunity to provide comment or response.

IV. EPA lacks authority to impose tribal coordination conditions on the October 2020 Decision.

The Notice's third suggestion, regarding imposing tribal coordination conditions, is again prohibited by SAFETEA. Any imposition of conditions is unlawful. *See supra* Parts I & III. But imposing coordination conditions is particularly prohibited because it attempts to infringe the State's exclusive authority under SAFETEA. The statute provides that the approval to Oklahoma shall be "without any further demonstration of authority by the State." Pub. L. 109-59, 199 Stat. 1144, 1937. Attempts to review whether the tribes approve of the State's authority in Indian country, or to impose procedural requirements for such reviews, are requirements for "further demonstration" that SAFETEA flatly prohibits. Any withdrawal or reconsideration for the purpose of requiring further demonstrations of authority, either during the reconsideration or through the imposition of procedural conditions, is prohibited by law.²

² Although the State does not believe EPA has authority under SAFETEA to order enhanced engagement as a condition to approval of the State's SAFETEA request, the State voluntarily initiates

All of this is made doubly clear by subsection (b) of SAFETEA, which permits treating a tribe in Oklahoma as a state for purposes of EPA-administered programs only if the State of Oklahoma “enter[s] into a cooperative agreement” by which the State “agree[s] to treatment of the Indian tribe as a State and to jointly plan administer program requirements.” The absence of such language in subsection (a) further demonstrates Congress has not permitted EPA to impose conditions requiring tribal agreement or coordination in order for the State to obtain the approval mandated by subsection (a). See *Florida Pub. Telecommunications Ass’n, Inc. v. F.C.C.*, 54 F.3d 857, 860 (D.C. Cir. 1995) (“[W]hen Congress uses different language in different sections of a statute, it does so intentionally.” (citing *Russello v. United States*, 464 U.S. 16, 23 (1983))).

The D.C. Circuit’s discussion of SAFETEA adds nothing to the analysis and in no way justifies reading the statute to permit imposition of conditions on the State’s SAFETEA approval. See *Oklahoma Dep’t of Env’tl. Quality v. EPA*, 740 F.3d 185, 189-90 (D.C. Cir. 2014) (discussing SAFETEA in addressing argument that the possibility of invoking it defeated Oklahoma’s standing for purposes of challenging a rule issued by EPA under the Clean Air Act regarding state authority on non-reservation Indian country). To start, the D.C. Circuit case was only discussing Oklahoma’s observation that SAFETEA is not a perfect solution to Indian country issues because the EPA might need to be dragged through litigation or mandamus procedures before it would comply with the clear terms of SAFETEA. See *id.* at 190; see also Supp. Brief of Petitioner, *Oklahoma Dep’t of Env’tl. Quality v. EPA*, 740 F.3d 185 (D.C. Cir. 2014), 2013 WL 6200034 at *4 (noting that Oklahoma might have to bring litigation or even a mandamus action if EPA were to impose conditions or requirements under SAFETEA). The court determined that the mere opportunity of invoking SAFETEA did not impact the State’s ability to challenge EPA’s actions unlawfully depriving the State of authority on non-reservation Indian country. In doing so, the court did not hold EPA had the authority or discretion to add conditions to a SAFETEA approval. Nor was it the State’s position that EPA had the authority or discretion to issue a conditional SAFETEA approval; instead, it was the State’s concern that EPA may attempt to impose a condition even if contrary to law.

Further, the D.C. Circuit’s passing comment that *Chevron* deference “might” allow the agency to win such litigation is ultimately unavailing because *Chevron* deference only applies when a statute is ambiguous. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). As explained above, the language of SAFETEA unambiguously mandates the action taken in the October 2020 Decision and does not authorize any additional conditions. The Notice does not cite any statutory text that would impugn that plain reading of SAFETEA. Thus, because the statute unambiguously prevents further conditions at step one of *Chevron*, the EPA would not receive any deference in any attempt to act in a manner contrary to, and wholly unauthorized by, clear statute.

The Notice also points to tribal comments on the impacts on tribal sovereign interests, but it is unclear how such interests would be impacted. Tribal sovereignty is subject to Congress’s plenary power, see, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), so by following the dictates of congressional statute in SAFETEA, by definition, any tribal sovereign interests already abrogated by enactment of SAFETEA are not impacted. Moreover, because the State’s request is generally limited to formal reservation lands that are not under federal restrictions on alienation, those tribes without such lands (e.g., tribes like the

meaningful engagement with our tribal partners and has done so long before EPA’s decision to reconsider its SAFETEA approval. Examples of the State’s continuing efforts on this front include sharing copies of permit applications with tribal nations and entering into agreements for remediation and cross-deputization.

Pawnee Nation whose reservations were disestablished, *see* 27 Stat. 612, 644 (1893)) could not be impacted by the October 2020 Decision.

V. At a minimum, withdrawal is unnecessary for reconsideration.

The Notice errantly conflates withdrawal and reconsideration as though they were one action. They are separate actions, and EPA must justify them independently.

By itself, reconsideration “merely begins a process that could culminate in no change to the rule.” *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017). Nothing in statute appears to prevent the EPA from beginning a reconsideration process, even if such reconsideration is ultimately futile.

In contrast, revoking or withdrawing a rule is a final agency action subject to the standards of the Administrative Procedure Act. *See id.* Because EPA can begin a reconsideration process without taking any final agency action, it necessarily does not need to withdraw a rule to begin a reconsideration process. Nor is reconsideration alone a sufficient basis to withdraw a rule: if it were, no reconsideration would ever be possible without affecting regulated parties before the reconsideration occurs.

Moreover, because State administration of EPA programs in Indian country as requested by the State is mandatory under SAFETEA, the ultimate end-result of any reconsideration will inevitably be approval of the State’s request. Thus, the effect of withdrawal would be to arbitrarily yo-yo the State and regulated entities between the State-administered programs that existed prior to *McGirt* and that exist now under the October 2020 Decision, to federally-administered programs during the unknown time EPA will take to reconsider, and then back to a State-administered programs that are the required resolution of the State’s SAFETEA request. Yanking around such an important part of the State’s governance and economy could not serve any legitimate purpose, nor would the costs of such extreme regulatory whiplash (*see infra* Part VI) be justified by any more important benefit.

EPA cites nothing that would justify withdrawal other than its interest in reconsideration. Because the withdrawal is unnecessary for reconsideration, EPA should at a minimum begin its desired reconsideration process without a withdrawal of the October 2020 Decision. Nevertheless, because SAFETEA does not permit any course other than the October 2020 Decision, not even reconsideration is justified.

VI. Withdrawal would be needlessly punitive and arbitrary, causing many practical problems that harm Eastern Oklahoma.

Withdrawal of the October 2020 Decision would impose enormous harm on Oklahomans and, even if that decision were to be reconsidered, it makes more sense for the State’s program authority to remain in effect during any reconsideration rather than waffling the State administration back and forth. To start, it is important to acknowledge that the vast majority (approximately 1.6 million) of the 1.9 million Oklahoma citizens that reside in these areas are not members of the Tribes that were given that land hundreds of years ago. The State, regulated entities, and the Oklahoma public at-large have legitimately relied on the State’s consistent administration of EPA programs for decades—either because, prior to *McGirt* and related decisions, Eastern Oklahoma was universally understood not to be wholly constituted of Indian country, or later because of the October 2020 Decision. What’s more, shifting environmental requirements throughout the State would be more difficult for the regulated community to navigate, impeding economic development and impacting the public welfare and safety.

Whereas Congress recognized the value of consistency and reliability in administration of environmental protections through SAFETEA, EPA's proposed withdrawal would have the opposite effect.

For decades, Oklahoma has successfully administered numerous environmental programs within the State to protect the people of Oklahoma and their environment. Through the years, Oklahoma has developed expertise in the local implementation of programs under numerous federal statutes including the Resource Conservation and Recovery Act, Clean Air Act, Clean Water Act, Safe Drinking Water Act, Federal Insecticide, Fungicide, and Rodenticide Act, and Toxic Substances Control Act. Congress recognized the value of continuity in Oklahoma's administration of such programs by enacting the mandate of SAFETEA. And EPA correctly recognized that mandate when it approved Oklahoma's request in its October 2020 Decision. But EPA's proposed withdrawal interjects uncertainty into crucial programs that the State has long maintained for the protection of public health and the environment.

Further, EPA's proposal threatens to impose a new regulatory regime over a vast number of regulated facilities in Eastern Oklahoma. To illustrate, the number of Oklahoma Department of Environmental Quality ("ODEQ"), Oklahoma Department of Agriculture, Food, and Forestry, and Oklahoma Corporation Commission regulated facilities located within the impacted areas of the State includes approximately:

- 5844 facilities with air quality permits (4258 minor permits, 1415 synthetic minor permits, 127 major permits, and 44 PSD permits);
- 806 water supply systems (including 630 public water supply systems and 76 minor water systems);
- 7,313 wastewater systems (OPDES permits) (including 2,600 industrial dischargers, 1,779 municipal dischargers, 323 water treatment plant dischargers, 245 land application of biosolids sites, 25 MS4 Stormwater programs, 1,100 multisector industrial stormwater sites, 1,000 construction stormwater sites, 62 industrial total retention facilities, and 179 municipal total retention facilities);
- 14,170 EPCRA Tier II Facilities (including: facilities w/ Extremely Hazardous Substances; Facilities w/ Non-Extremely Hazardous Substances; Oil & Gas Facilities; Risk Management Plan Facilities; and Wind Turbines);
- 73 Solid Waste Disposal facilities (including: Construction and Demolition facilities; Coal Combustion Residual facilities; Incinerators; Medical and/or Medical Transfer Stations; Municipal Solid Waste facilities; Non-Hazardous Industrial Waste facilities; Tire facilities; and Transfer Stations)
- 5 Class I Underground Injection Control (UIC) Wells;
- 1,113 Class V UIC Wells;
- 92 Voluntary Clean-up Program sites;
- 377 Radiation Materials licenses;
- 41 Brownfields; 86 RCRA - Large Quantity Generators;
- 193 RCRA - Small Quantity Generators;
- 8 RCRA - Treatment, Storage, Disposal Facilities;
- 18 RCRA Corrective Action sites

- 3 AgPDES Concentrated Animal Feeding Operation General Permit authorizations;
- 35 AgPDES Construction Storm Water General Permit authorizations;
- 10 AgPDES Pesticide General Permit authorizations
- 4,080 Petroleum Storage Tanks (PST) (including retail, non-retail, bulk, emergency generators and agriculture underground and above ground tanks)
- 169 active release cases currently proceeding towards clean-up supervised by the Corporation Commission
- 1,970 PST Facilities
- 5,175 Class I or II UIC Wells for oil and gas production subject to 3,984 Permits/Orders (including operations of such Wells in 617 Secondary Recovery Units).³

Withdrawal would bring disruption and harm to eastern Oklahoma on many fronts. In the impacted areas, it would: call into question Oklahoma’s regulation of hazardous waste, landfills, coal combustion residuals disposal, and underground storage tanks; interject a changed system for Clean Air Act protections; disrupt issuance of permits and undermine the validity of existing permits under the Clean Water Act’s National Pollutant Discharge Elimination System (NPDES) Programs; leave much of the State without any water quality standards until another system is in place; eliminate existing programs for groundwater protection through underground injection well control; end Oklahoma’s rapid response systems for earthquakes caused by underground injection; reduce public drinking water system protections, reduce efforts aimed at prevention and remediation of pesticide damages, and eliminate training and abatement programs for addressing lead-based paint contamination and asbestos in schools.

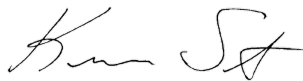
Take the example of just one program: if the October 2020 Decision is withdrawn, there would be great uncertainty as to whether every single OPDES permit issued by ODEQ in the Eastern half of the State is no longer valid. If so, every regulated entity in that area with such a permit may have to apply for a new permit directly from EPA. But the time and expense of obtaining such Clean Water Act permits are significant. *See, e.g., U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590, 594-95 (2016) (citing *Rapanos v. United States*, 547 U.S. 715, 721 (2006)) (noting that for some Clean Water Act permits, “the average applicant ‘spends 788 days and \$271,596 in completing the process,’ without ‘counting costs of mitigation or design changes’” and for others, “permits took applicants, on average, 313 days and \$28,915 to complete”). And before any permit could issue, EPA would have to take the time to develop and promulgate the relevant Water Quality Standards. During that time, all such regulated entities may have to entirely cease operations lest they risk severe penalties and citizen suits. *See Sackett v. E.P.A.*, 566 U.S. 120, 123, 127 (2012) (describing civil penalties of up to \$75,000 per day); *see also Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1489 (2020) (Alito, J., dissenting) (citing *Hawkes*, 578 U.S. at 602-03 (Kennedy, J., concurring)). If such dire economic risks metastasize across every program covered by the October 2020 Decision throughout the entire Eastern half of the State, the potential economic effects of EPA’s proposed withdrawal could be fiscally debilitating or ruinous to many individuals, businesses, and the economy of the State as a whole.

³ There are also 8 Superfund sites and 2 Nuclear Regulatory Commission decommissioning sites in the impacted portions of the State.

Neither EPA nor the Tribes have existing frameworks (*e.g.* Water Quality Standards) or resources (*e.g.* local personnel for requisite inspections, permit processing, laboratory testing, etc.) sufficient to step in and implement these programs throughout the Eastern half of the State. EPA has very few employees in Oklahoma and the regional office is located in Texas. Because Oklahoma has comprehensive programs in place to address environmental harms, if any reconsideration of the October 2020 Decision were to occur, these programs must remain in place during any reconsideration period. To do otherwise by withdrawing the October 2020 decision would be nothing less than punitive and arbitrary.

For all these reasons, EPA's proposed reconsideration is unnecessary and the October 2020 Decision should not be withdrawn.

Sincerely,



KEVIN STITT
Governor of the State of Oklahoma



KENNETH WAGNER
Oklahoma Secretary of Energy and Environment



JOHN O'CONNOR
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