

January 31, 2022

Andrew Byrne
Senior Advisor for Consultation
U.S. Environmental Protection Agency
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Washington, DC 20460
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Re: Consultation comments regarding proposed withdrawal and reconsideration of EPA's October 1, 2020 decision approving the State of Oklahoma's SAFETEA request

Dear Mr. Byrne:

The Choctaw Nation of Oklahoma appreciates the invitation to engage in consultation regarding 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 SAFETEA rider (the October 1 decision). The Choctaw Nation of Oklahoma strongly supports the proposed withdrawal of the October 1 decision.

The Choctaw Nation believes the EPA's approach and serious consideration towards this issue will not only allow EPA to correct the errors of the October 1 decision, but also to create a more sustainable environmental regime between Oklahoma tribal nations and state environmental agencies. The Choctaw Nation would welcome an opportunity to work with the State of Oklahoma to establish a framework for collaborating on protection of air, water, public health, and other resources affected by the SAFETEA request and protecting the interests of both Choctaw Nation and the state. We urge EPA to encourage these efforts, as described below.

This information specifically applies to land in question that was under the State of Oklahoma's jurisdiction prior to the McGirt Supreme Court decision, which has now been expanded through the Sizemore decision to apply to the Choctaw Nation of Oklahoma reservation. For clarity, the Choctaw Nation does not waive any rights to regulate its own tribally owned land, whether in fee, trust or otherwise, and reserves the right to either continue to regulate such land on its own as a sovereign nation, or have it regulated on its behalf by the EPA.

I. Primary Issues and Actions

First and foremost, the Choctaw Nation of Oklahoma would ask that the EPA and the Administration address the following steps:

1. Immediately withdraw and suspend the October 1, 2020 decision of the Trump Administration to grant the Oklahoma Governor's request for EPA to delegate to the State of Oklahoma authority over a range of EPA programs and responsibilities.
 - If EPA has concerns about how the withdrawal would impact ongoing regulatory programs, the withdrawal could include provisions to address that issue, such as by

delaying the withdrawal's effective date to provide time for a decision that is protective Tribal interests.

2. Prevent any veto or objection without substantial cause by the State of Oklahoma of any Tribal Treatment as a State program request.
3. EPA should condition any new approval on the State of Oklahoma correcting the compliance issues identified as part of EPA's reconsideration. SAFETEA requires EPA to determine that each affected program administered by Oklahoma complies with applicable laws. EPA must therefore first evaluate Oklahoma's performance pursuant to each of the 26 state programs. Where EPA identifies compliance problems with the Oklahoma state programs, it must require corrections before approving Oklahoma's request.

II. Treated Accords and Prior Law

The Choctaw Nation of Oklahoma was granted, through treaties described below, many reserved or implied rights. Namely the right to self-govern and autonomously regulate within our reservation. The Supreme Court of the United States recently reaffirmed our reservation status through *Sizemore v. Oklahoma*. Legislative Acts, comparable but outside these treaties or "supreme law of the land" have also re-enforced the tribe's ability to regulate their environment and other activity within their reservation, thus precluding any state from administering a program within Indian Country. Such laws include:

- The Clean Air Act
- The Clean Water Act
- Surface Mining Control and Reclamation Act

Have any of the Choctaw Nation's associated Treaties expired or any of the associated reserved rights? Such as those mentioned below. Has the United States Federal Government encumbered a previously executed treaty between sovereign nations by enacting Section 10211 of SAFETEA?

1. In regard to our treaties, to which any federal laws of general applicability do not apply to Choctaw Nation; please explain how the treaty guarantees made by the United States to the Choctaw Nation in the Dancing Rabbit Creek Treaty of 1830 do not preclude the EPA from applying the SAFETEA 2005 Rider to the Choctaw Nation? In explaining the EPA's position on this, you may wish to review how another independent federal agency, the National Labor Relations Board, recently complied with this Treaty provision and describe why EPA thinks it is can disregard that Treaty in favor of approving the state's request pursuant to the SAFETEA 2005 rider. 362 NLRB No. 109, page 942 (June 4, 2015).
 - a. Article 4 Treaty of Dancing Rabbit Creek 1830: "...The government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all persons and property that may be within their limits west so that no territory or state shall ever have a right to pass laws for the government of the Choctaw nation of red people and their descendants; and that no part of the land granted them shall ever be embraced in any territory or state; but the United States shall forever secure said Choctaw Nation from and against all laws, except such as from time to time, may be enacted in their own national councils, not inconsistent with the constitution, treaties and laws of the United States..."

- b. Article 7 Treaty of 1866: “The Choctaws and Chickasaws agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory: Provided, however, Such legislation shall not in anywise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw Nations respectively
2. Given our Treaty of Dancing Rabbit Creek Treaty of 1830, please describe in detail how EPA interprets constitutional principles, including federal preemption, in the context of article 6 of the United States Constitution? “...This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any state to the Contrary notwithstanding.” More specifically, and consistent with the U.S. government to government relationship with the Choctaw Nation, how does EPA interpret the treaties we share which would specifically preempt the state’s ability to assume jurisdiction over the Choctaw Nation reservation?

III. Conditions for Cooperation

EPA also should exercise its authority under statutes and regulations other than SAFETEA to encourage Oklahoma to coordinate with tribal governments. First, in future funding agreements with Oklahoma, EPA should require the state to coordinate with tribes. A portion of the Oklahoma Department of Environmental Quality’s budget involves federal funding, making this an important mechanism for driving collaboration.

Funding agreements could include terms requiring that for each activity receiving funding: Oklahoma must confer with all affected tribes, 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 conditional relief from these requirements, under which activity-specific consultation is excused where Oklahoma has a broader memorandum of understanding or agreement with the tribe, the terms of which are being followed by Oklahoma. This would give Oklahoma an incentive to work with tribes on memoranda of understanding or agreements. It would also advance EPA’s efforts to achieve environmental justice under Executive Order 12898.

Below are reported metrics from the Oklahoma Department of Environmental Quality [Annual Report](#). We believe there is ample opportunity to work with the State to ensure the demand for environmental compliance is met in a manner respectable of EPA’s delegated authority for each program. With help from the EPA the Choctaw Nation has developed considerable capacity in a number of environmental programs. These programs are an example of how the State and Tribe could cooperate to accomplish more comprehensive environmental protections within our reservation.

Stormwater – note the discrepancy between number of complaints received and number of inspections.

- 1,007 construction authorizations issued, 763 terminated
- 113 industrial authorizations issued, 97 terminated

- 198 active permit inspections, 1,001 Notice of Termination inspections, 30 no exposure inspections
- 40 technical assistance actions
- 240 complaints received
- 14 Notices of Violation issued

Lead-based paint –

- Certifications issued: 6 inspector, 82 risk assessor, 7 abatement worker, 31 supervisor, 59 firm
- 5 compliance inspections
- 3 complaints received

Public Water Supply –

- 509 PWS permits issued
- 476 minor water systems approved
- 1,272 monitoring inspections
- 8 boil advisories, 196 NOVs, 23 consent/final actions

Water Quality –

- 10 TMDLs started, 10 TMDLs completed
- 303(d) delisting info not released for 2021
- TMDL and 303(d) list are both very long as of 2020

Solid waste –

- 84 local governments assisted with dump cleanups and recycling programs

Brownfields –

- 3 phase I/II site assessments, 0 sites cleaned, 19 brownfields certificates issued
- 177 communities and non-profits assisted with brownfield funding

All land protection programs –

- 231.40 acres cleaned up or restored to beneficial use

Tires –

- 221 Community-wide collection events held
- 240,491 Tires diverted from illegal dumping through community-wide collection events
- 66 Illegal tire dumps remediated
- 51,067 Abandoned tires remediated from illegal dumps

USTs –

- 2,972 in-use facilities, 280 temporarily closed facilities
- 7,598 in-use tanks, 754 temporarily closed tanks
- 3,144 facilities inspected

IV. Other Concerns

- a. How does this correlate with pre-existing treaty and reserved rights?
- b. Has the delegation of authorities to the State for the multitude of programs been done appropriately?
 - i. Without tribal consent or consultation
 - ii. Do programs address specific tribal needs, in regard to cultural or natural resources?
 - iii. Other NEPA considerations for each State administered program
 - iv. Potential degradation of reservation resources as the result of poorly run or inadequate program consideration or enforcement.
 - v. Proper oversight of State programs by EPA.

V. Environmental Justice

Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This goal will be achieved when everyone enjoys:

- The same degree of protection from environmental and health hazards, and
- Equal access to the decision-making process to have a healthy environment in which to live, learn, and work.

How is it fair that most tribes across the nation enjoy the opportunity to regulate environmental programs on their reservations when the those in Oklahoma do not? Does the EPA's unilateral delegation of authority of environmental programs and implementation of the SAFETEA provision contribute to a greater Environmental Justice situation?

A different or more collaborative approach to this issue could help advance President Biden's Justice40 initiative, which aims to ensure that 40 percent of the benefits of federal investments flow to disadvantaged communities. Disadvantaged communities include, among other places, geographic areas within Tribal jurisdictions. The Justice40 initiative covers many relevant programs in which EPA has a role, including federal investments that address climate change, clean energy and energy efficiency, remediation of legacy pollution, and development of clean water infrastructure.

The White House has directed EPA and other agencies to calculate how much of the benefits from covered programs flow to disadvantaged communities, and report that information to the Office of Management and Budget. Requiring consultation and coordination with tribes for grants in these and other programs could generate useful data on whether and how much benefits flow to disadvantaged tribal communities.

In addition, for several specific programs, EPA is specifically directed to develop Justice40 plans to engage stakeholders and maximize benefits to disadvantaged communities. These programs include EPA's Drinking Water State Revolving Fund and Clean Water State Revolving Fund, the Brownfields Program and Superfund Remedial Program, the Diesel Emissions Reductions Act Program, and the Reducing Lead in Drinking Water program. These efforts would provide a basis for assessing and maximizing benefits to disadvantaged tribal communities.

Ultimately, the Choctaw Nation of Oklahoma enjoys its relationship with EPA and Region 6. We have developed great capacity of many environmental programs from our own internal efforts and from the resources received from the EPA's General Assistance Program. EPA is always forthcoming with technical and administrative guidance that help us tremendously with overall tribal growth. However, these endeavors seem empty when the EPA allows the relegation of tribal rights to regulate, protect, and sustain a healthy environment within our own reservation's.

Thank you for your consideration and resolution to these comments and the opportunity to do so. If you have questions regarding this matter, please feel free to reach out to me at tbaker@choctawnation.com. We look forward to working with you all in the future.

Yakohe,

Tye Baker
Sr. Director, Environmental Protective Service
Choctaw Nation of Oklahoma