



THE
MUSCOGEE (CREEK) NATION

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January 31, 2022

VIA ELECTRONIC SUBMISSION

Andrew Byrne
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U.S. Environmental Protection Agency
1300 Pennsylvania Ave NW
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 Muscogee (Creek) Nation (MCN) appreciates the invitation and opportunity to engage in renewed consultation regarding the US 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 within Indian Country in Oklahoma pursuant to the non-germane amendment or rider (the October 1, 2020 decision)¹ attached to Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA) of 2005. The MCN strongly supports the proposed withdrawal of the October 1, 2020 decision in what the MCN considers to be an important Tribal Environmental Justice issue. Through the consultation process it is the goal of the MCN that meaningful discussion and progressive thought on Tribal sovereign rights to protect the land, air, and water resources within Tribal Reservations will help to improve the human health and environment of ALL citizens within those Tribal Reservations. As described in previous comments, the October 1, 2020 decision was uninformed and impulsive, contrary to law, and disrespectful to the sovereignty of Oklahoma Tribal Nations. Those prior comments demonstrate why the October 1, 2020 decision must be withdrawn.

The current proposal will not only allow the EPA to correct the errors of the October 1, 2020 decision, but will also foster greater coordination between Oklahoma Tribal Nations and State environmental agencies. The MCN would welcome an opportunity to work with the State of Oklahoma to establish a framework for collaborating on protection of land, air, water, public health and other resources affected by the SAFETEA request and protecting the interests of both

¹ Section 10211 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users (SAFETEA), Pub. L. No. 109-59, 119 Stat. 1144, 1937 (Aug. 10, 2005).

the MCN and the State of Oklahoma. It is both prudent and necessary for the EPA to encourage these efforts, as described below.

A. Preliminary Issues

As an initial matter the MCN wishes to reiterate several points from its prior comments on this subject. First, EPA should finalize its withdrawal of the October 1, 2020 decision before making a new decision on the State of Oklahoma's SAFETEA request. Following that withdrawal, EPA will have a fresh prospective on which to reconsider the State of Oklahoma's request. This new prospective will be particularly important for purposes of the government-to-government consultation process moving forward. To be meaningful, consultation must occur before an agency makes its decision – not after the decision has already been made. If EPA has concerns about how the withdrawal would impact ongoing regulatory programs, the withdrawal could include provisions to address that issue, such as delaying the withdrawal's effective date to provide time for issuing a more sound decision that protects Tribal interests.

Second, after withdrawing the October 1, 2020 decision, EPA should deny the State of Oklahoma's request under the well-established precedent that Section 10211 of SAFETEA (the Rider) should be presumed to have expired. SAFETEA was a time-limited appropriation and authorization act that expired in 2009, and there is a strong presumption that riders in such acts—like Section 10211—are temporary legislation that do not remain in effect after the acts' expiration. See October 29, 2021 comments for reference. The federal Indian law canon of construction that statutes must be construed in favor of Indians further suggests that the Rider has expired.

Third, if EPA does not deny the State of Oklahoma's SAFETEA request, the agency cannot approve the request without first determining that each of the 26 affected programs under the Oklahoma Department of Environmental Quality (ODEQ), are being implemented in compliance with existing environmental laws and regulations. No such findings were made for the October 1, 2020 decision, despite the plain language of the Rider requiring that each program "meets applicable requirements of the law." Pub. L. No. 109-59, 119 Stat. 1144, 1937. There is substantial evidence indicating that the State of Oklahoma falls short of meeting this requirement. The State of Oklahoma cannot be allowed to extend its regulatory authority over Indian country without a showing that its existing programs comply with all applicable requirements. On July 9, 2020 the Supreme Court of the United States held in *McGirt v. Oklahoma* that the boundaries of the MCN Reservation were never disestablished by Congress. The definition of "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." The MCN Reservation meets this definition of "Indian country"

The MCN's history is a litany of Treaties recorded as early as 1790 and continuing to the final "Reconstruction Treaty" of 1866. The Treaty of 1833 at Ft. Gibson fixed the borders for a "permanent home to the whole Creek Nation of Indians," and the United States promised to continue to uphold this promise, "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them". The Reconstruction Treaty of 1866 at Washington, D.C. ceded the western half of the Creeks domain to the United States post-Civil War – shaping the

current exterior boundaries of the MCN Reservation where its citizens still reside and flourish despite the termination policies of earlier treaties and congressional acts.

Fourth, EPA's understanding of the notice, comments, and compliance with the National Environmental Policy Act (NEPA) are required before any approval of the State of Oklahoma's request.

Fifth, any new approval of the State of Oklahoma's request should impose appropriate conditions to protect present and future tribal environmental program interests. EPA has the authority to impose such conditions, Oklahoma Department of Environmental Quality v. EPA, 740 F.3d 185, 190 (D.C. Cir. 2014), and the EPA it should exercise that power based upon the EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984 Indian Policy). Options for appropriate conditions are discussed below.

B. Conditions Under SAFETEA

EPA should consider imposing conditions on any new approval of the State of Oklahoma's request, including but not limited to the following.

First, EPA should condition any new approval on the State of Oklahoma correcting the compliance issues identified as part of EPA's reconsideration. As noted above, SAFETEA requires EPA to determine that each affected program administered by the State of Oklahoma complies with applicable laws. EPA must therefore first evaluate the State of Oklahoma's performance pursuant to each of the 26 state programs. Where EPA identifies compliance problems with the State's programs, it must require corrections and remedial actions, as necessary, before approving the State of Oklahoma's request.

These requirements will provide the EPA with an opportunity to direct significant improvements in Oklahoma State Environmental programs.² For example, EPA has identified significant issues with Oklahoma's implementation of the Clean Air Act (CAA). A new SAFETEA decision can and should be used to impose requirements that correct these issues, such as ensuring that the State of Oklahoma timely addresses and reports on High Priority violations, and ensuring that the State's Title V permitting program fully complies with 40 C.F.R. Part 70. Similarly, the State of Oklahoma's administration of the Safe Drinking Water Act (SDWA) Class II Underground Injection Control (UIC) program has been beset with issues. EPA should condition any new SAFETEA approval on specific steps to ensure that Oklahoma's Class II UIC program complies with SDWA and other regulatory and compliance laws.

In addition, EPA should require that, before a new SAFETEA approval takes effect, the State of Oklahoma negotiate an intergovernmental agreement or memorandum of understanding with any tribes affected by that SAFETEA decision. Such agreements could be reached either

² The legal authority to impose such a requirement is twofold: both as a necessary precondition of approving Oklahoma's SAFETEA request, and an exercise of EPA's authority to impose conditions on a SAFETEA approval.

with individual tribes or through a broader compact with multiple Oklahoma tribes. It would allow Oklahoma to retain delegated authority over various programs, while protecting the interests of tribal nations in their air, water, land and health and 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 MCN is principally interested in working with EPA and the State of Oklahoma to expand our Treatment as a State (TAS) authority to cover Clean Water Act (CWA) and other regulatory programs in areas that are currently administered by EPA rather than the State of Oklahoma. The MCN would welcome a chance to discuss this step with the State of Oklahoma, and terms under which the State would forego attempting to exercise a SAFETEA veto over such TAS approval. These discussions potentially 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.

C. Conditions Independent of SAFETEA

EPA should also exercise its authority under statutes and regulations other than SAFETEA to encourage the State of Oklahoma to coordinate with tribal governments.

1. Funding agreements

First, in future funding agreements with the State of Oklahoma, the EPA should require the State to coordinate with tribal nations and governments for the environmental concerns of all Oklahomans. Our understanding is that more than 45 percent of the ODEQ's budget involves federal funding,³ making this an important mechanism for driving collaboration.

For example, funding agreements should include terms requiring that for each activity receiving funding: (a) the State of Oklahoma must consult with all tribes within 50 miles and (b) the State of 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 before activities commence. The funding agreements can also: (c) provide an off-ramp from these requirements, under which activity-specific consultation is excused where the State of Oklahoma has a broader memorandum of understanding or agreement with the tribe, the terms of which are being followed by the State. These term agreements would give the State of 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, the Justice40 program and other laws such as Title VI of the 1964 Civil Rights Act.⁴

³ Gov. Kevin Stitt, Fiscal Year 2022 Oklahoma Executive Budget at 235, <https://oklahoma.gov/content/dam/ok/en/omes/documents/bud22.pdf> (\$44.4 million of Department of Environmental Quality's \$97.3 million 2021 budget identified as federal money).

⁴ See Title VI and Environmental Justice at EPA, <https://www.epa.gov/ogc/title-vi-and-environmental-justice-epa>.

We urge EPA to apply this approach to as broad a range of funding programs as possible to maximize the State of Oklahoma's motivation to work with tribal nations toward an agreement. Additionally, EPA should require these terms for the Oklahoma Clean Water State Revolving Fund. It is our understanding that following the passage of the 2021 infrastructure bill, EPA anticipates allotting more than \$91 million to the State of Oklahoma in FY 2022 under the revolving fund.⁵ EPA should consider requiring the same terms mentioned above when disbursing these funds (e.g., in capitalization grants or as part of the State's annual intended use plans for the fund, 40 C.F.R. Part 35). In addition, EPA may consider requiring that the State of Oklahoma's environmental reviews for revolving fund projects address concerns of tribal nations. See, e.g., 40 C.F.R. § 35.3140.

This approach could also be incorporated for other EPA programs, such as grants under the CWA Section 319 nonpoint source management program,⁶ and the agency's Brownfields program. In addition, funding agreements to support the State of Oklahoma's permitting and other programs should also require the consultation steps described above. For example, EPA allotted \$2.5 million to the State in fiscal year 2021 for CWA Section 106 (33 U.S.C. § 1256) water pollution control programs.⁷ See also 42 U.S.C. § 7405(a)(1)(A) (grants for cost of implementing air pollution prevention and control programs).

The steps described above will 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.⁸

The White House has directed the 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 based upon the Justice40 Guidance. Requiring consultation and coordination with tribes for grants in these and other programs could generate useful data on whether and how many benefits flow to disadvantaged tribal communities.

⁵ EPA, Bipartisan Infrastructure Law: Environmental Protection Agency 2022 State Revolving Fund (SRF) Estimated Allotments to States, Tribes, and Territories by Program, <https://www.epa.gov/system/files/documents/2021-12/fy-2022-bil-srfs-allotment-summary-508.pdf>. This figure includes funding for the SDWA Drinking Water State Revolving Fund, for which EPA can take a similar approach with conditions (a)-(c).

⁶ EPA, Section 319 Grant Program for States and Territories, <https://www.epa.gov/nps/319-grant-program-states-and-territories> (\$172 million disbursed nationally in 2020).

⁷ EPA, Section 106 FY 2021 Funding Targets, https://www.epa.gov/sites/default/files/2021-03/documents/fgam_fy21_standard_report.pdf.

⁸ See Executive Office of the President, Memorandum M-21-28, Memorandum for the Heads of Departments and Agencies: Interim Implementation Guidance for the Justice40 Initiative at Table 1 (July 20, 2021) (Justice40 Guidance), <https://www.whitehouse.gov/wp-content/uploads/2021/07/M-21-28.pdf>.

In addition, for several specific programs, the EPA has been 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. The steps described above to require consultation between the State of Oklahoma and affected tribes on specific grants, and reporting to EPA, can be adopted as part of Justice40 stakeholder engagement efforts. These efforts would also provide a basis for assessing and maximizing benefits to disadvantaged tribal communities within the State.

We hope to discuss these and other programs with EPA as part of the current and ongoing consultation process.

2. Permit issuance

In addition, EPA should exercise its oversight authority for state-issued permits to encourage coordination between the State of Oklahoma and affected tribal nations. For example, CWA Section 402 authorizes EPA to object to proposed state-issued National Pollutant Discharge Elimination System (NPDES) permits and identify conditions that should be included in the permits. 33 U.S.C. § 1342(d). When EPA lodges a timely objection, the State of Oklahoma may not issue the permit. This oversight authority should be exercised as part of the overall mission of the EPA to protect human health and the environment.

As part of this process, the State of Oklahoma must provide the EPA with copies of all proposed permits, 33 U.S.C. § 1342(d)(1), as well as any additional information EPA requests that is relevant to compliance with the CWA. 40 C.F.R. § 123.44(d). Further, the State of Oklahoma must maintain and submit to EPA, upon request, copies of "timely public comments received in writing" and the State's "response to those comments" for accountability and compliance.

The EPA should also apply this authority to direct that, along with each proposed permit, the State of Oklahoma submit a report describing its conferral with each affected tribe regarding the permit and how any tribal concerns have been addressed. If the State of Oklahoma fails to provide this information, the EPA can initiate a conferral with the affected tribe itself. See 40 C.F.R. § 123.44(d)(3). Ultimately, the EPA can object to the permit if the State of Oklahoma fails to involve the tribe and address substantive tribal concerns. e.g., 40 C.F.R. §§ 123.44(c)(2), (5), (7).

EPA can take a similar approach for CAA Title V permits. Section 505 of the CAA requires that the State of Oklahoma shall provide the EPA with applications for Title V permits, along with written responses to all significant comments and state recommendations received on the proposed permit, among other documents. 42 U.S.C. § 7661d(a); 40 C.F.R. §§ 70.8(a)(1), (b)(2). The State of Oklahoma must also give notice of the permit application to all states within 50 miles of the source to be permitted. 42 U.S.C. § 7661d(a)(2). This action will provide the EPA with the opportunity to object to the proposed permit for (among other grounds) failure to "submit any information necessary to review adequately the proposed permit." 40 C.F.R. §

70.8(c)(3)(ii). If EPA does not initially object, any person may petition the EPA to lodge an objection. 42 U.S.C. § 7661d(b)(2).

These authorities would allow EPA to require the State of Oklahoma to submit a report with all Title V permit applications describing the state's conferral with affected tribes and how tribal concerns have been addressed. If the State of Oklahoma fails to do so, EPA can (on its own initiative or in response to a petition) object to the proposed permit for failure to "submit any information necessary to review adequately the proposed permit." 40 C.F.R. § 70.8(c)(3)(ii).

There are a multitude of other opportunities for the EPA to use its permitting oversight under other statutes as well. The MCN encourages the EPA to cast a wide net in this regard of State accountability to citizens and tribal nations within the State of Oklahoma and to the environment we all share and hope to protect.

D. Other Issues

The use of a non-germane amendment to a Transportation Act should not allow the State of Oklahoma to hold the natural resources and the environmental concerns within Tribal Reservations under control. The ODEQ workforce is understaffed and overburdened which has resulted in serious environmental impacts to the State of Oklahoma. The State needs environmental support from the tribes, through Traditional Ecological Knowledge (TEK) and advanced expertise of our tribal lands and natural resources. The tribes of Oklahoma are here and willing to help all Oklahomans.

Working together on these environmental impacts should be celebrated and applauded not rejected and scorned. We can best improve the land, air, and water quality in Oklahoma by working together; we only wish to help, not to control. The request from Governor Stitt to administer environmental regulatory programs in certain areas of Indian country should be revisited by the EPA. The fact that the MCN Reservation and other Tribal Nations' lands within Oklahoma are undeniably reservations entitled to the rights assigned to this designation necessitates EPA's reconsideration of this matter. In reconsidering we must ask, evaluate, and answer the following important questions:

- Is there a way for the MCN, along with the other Tribal Nations of Oklahoma, and the State of Oklahoma to work together on environmental impacts respectively that does not involve one side yielding all the power on the final decision making process?
- Can the MCN work together with the State of Oklahoma on communal environmental impacts that affect all Oklahomans, or will we continue to have to ask permission from the State of Oklahoma to address those concerns?

The MCN will endeavor to continue to be an effective resource and collaborative partner for the EPA that will turn assets into action which will improve the human health and environment of Oklahoma for ALL citizens.

The MCN would welcome an opportunity to discuss the above options with EPA. In particular, we would like additional details on how your agency may formalize, implement and enforce conditions, both 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 MCN would be interested in exploring potential grant opportunities to support its efforts to engage with the State of Oklahoma on collaboration in pollution control programs.

Thank you for your consideration of these comments. If you have any questions or need further information, please feel free to contact James Williams, Director of the Office of Environmental Services via email (jwilliams@muscogeenation.com) or telephone (918-549-2580). We look forward to future discussions regarding this consultation.

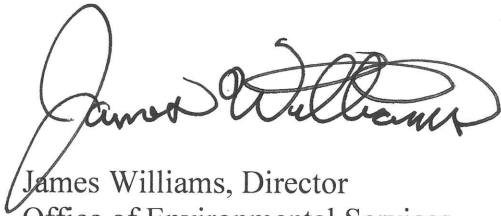
Sincerely,



David Hill, Principal Chief
Muscogee (Creek) Nation



Del Beaver, Second Chief
Muscogee (Creek) Nation



James Williams, Director
Office of Environmental Services
Muscogee (Creek) Nation

cc: Jesse Allen, Secretary of Interior, Muscogee (Creek) Nation
Kyle Haskins, Interim Attorney General, Muscogee (Creek) Nation