EARTHJUSTICE

January 31, 2022

Andrew Byrne
Senior Advisor for Consultation
U.S. Environmental Protection Agency
1300 Pennsylvania Ave NW
Washington, DC 20460
Byrne.Andrew@epa.gov

BY ELECTRONIC MAIL

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 Pawnee 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).[1] The Pawnee Nation strongly supports the proposed withdrawal of the October 1 decision. As described in previous comments, the October 1 decision was arbitrary and capricious, contrary to law, and an affront to the sovereignty of Oklahoma tribal nations. Those prior comments demonstrate why the October 1 decision must be withdrawn. See May 20, 2021 and Sept. 7, 2021 comments, attached as Exhibits 1-2.

The current proposal will not only allow EPA to correct the errors of the October 1 decision, but also to foster greater coordination between Oklahoma tribal nations and state environmental agencies. The Pawnee Nation would welcome an opportunity to work with the State of Oklahoma to hammer out 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 the Pawnee and the state. We urge EPA to encourage these efforts, as described below.

A. Preliminary Issues

As an initial matter the Pawnee Nation wishes to reiterate several points from its prior comments on this matter. First, EPA should finalize its withdrawal of the October 1 decision before making a new decision on Oklahoma's SAFETEA request. Following that withdrawal, EPA will have a clean slate on which to reconsider Oklahoma's request. That clean slate is particularly important for purposes of government-to-government consultation. To be meaningful, consultation must occur before an agency makes its decision—not after the decision

[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).

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 by 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 decision, EPA should deny Oklahoma's request because under well-established precedent, the SAFETEA 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 May 20, 2021 comments at 7–11. The federal Indian law canon of construction that statutes must be construed in favor of Indians further indicates that the rider has expired. See id. at 11.

Third, if EPA does not deny Oklahoma's SAFETEA request, the agency cannot approve it without first determining that each of the 26 affected programs is being implemented in compliance with law. See May 20, 2021 comments at 11–13. No such findings were made for the October 1 decision, despite the plain language of the SAFETEA rider requiring that each program "meets applicable requirements of the law." Pub. L. No. 109-59, 119 Stat. 1144, 1937. As described in our earlier comments, there is substantial evidence indicating that Oklahoma falls short of meeting this requirement. See May 20, 2021 comments at 11–13. Oklahoma cannot be allowed to extend its regulatory authority over Indian country without a showing that its existing programs comply with all applicable requirements.

Fourth, notice and comment and compliance with the National Environmental Policy Act (NEPA) are required before any approval of Oklahoma's request. See May 20, 2021 comments at 14–17.

Fifth, any new approval of Oklahoma's request should impose appropriate conditions to protect tribal interests. EPA has the authority to impose such conditions, Oklahoma Dep't of Envtl. Quality v. EPA, 740 F.3d 185, 190 (D.C. Cir. 2014), and it should exercise that power. Options for appropriate conditions are discussed below.

B. Conditions Under SAFETEA

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

First, EPA should condition any new approval on 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 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.

This threshold requirement provides EPA with an opportunity to direct significant improvements in Oklahoma state programs.[2] For example, as described in our prior comments, EPA has identified significant issues with Oklahoma's implementation of the Clean Air Act. May 20, 2021 comments at 12-13. A new SAFETEA decision can and should be used to impose requirements that correct these issues, such as ensuring Oklahoma timely addresses and reports High Priority violations, and ensuring that the state's Title V permitting program fully complies with 40 C.F.R. Part 70. See id. Similarly, Oklahoma's administration of the Safe Drinking Water Act (SDWA) Class II UIC program has been fraught with issues. See Sept. 7, 2021 comments at 2-4. EPA should condition any new SAFETEA approval on specific steps to ensure that Oklahoma's Class II UIC program complies with SDWA and other laws.

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

For example, the Pawnee Nation is particularly interested in working with EPA and Oklahoma to obtain treatment as a state (TAS) authority over certain Clean Water Act programs in areas that currently are administered by EPA rather than Oklahoma. The Pawnee Nation would welcome a chance to discuss this step with Oklahoma, and terms under which Oklahoma 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 also should exercise its authority under statutes and regulations other than SAFETEA to encourage Oklahoma to coordinate with tribal governments. We suggest several levers EPA can use, and there are undoubtedly others.

1. Funding agreements

First, in future funding agreements with Oklahoma, EPA should require the state to coordinate with tribes. Our understanding is that more than 45 percent of the Oklahoma

[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.

Department of Environmental Quality's budget involves federal funding,[3] and that EPA provides funding for several other Oklahoma state agencies, making this an important mechanism for driving collaboration.

For example, funding agreements can include terms requiring that for each activity receiving funding: (a) Oklahoma must confer with all tribes within 50 miles, and (b) 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 (c) provide an off-ramp 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. Terms (a)-(c) 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, the Justice40 program (discussed below) and other laws such as Title VI of the 1964 Civil Rights Act.[4]

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. For example, EPA should require these terms for the Oklahoma Clean Water State Revolving Fund. We understand that following passage of the 2021 infrastructure bill, EPA anticipates allotting more than $91 million to Oklahoma in FY 2022 under the revolving fund.[5] EPA should consider requiring terms (a)-(c) when disbursing these funds (e.g., in capitalization grants or as part of Oklahoma's annual intended use plans for the fund, 40 C.F.R. Part 35). In addition, EPA could consider requiring that 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 Clean Water Act Section 319 nonpoint source management program,[6] and the agency's Brownfields program. In addition, funding agreements to support Oklahoma's permitting and other programs should also require the consultation steps described above. For example, EPA allotted $2.5 million to Oklahoma in fiscal year 2021 for Clean Water Act Section 106 (33

---

[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.

[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).

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 also 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.[8]

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. Justice40 Guidance at 7-9. 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.

In addition, for several programs, EPA is specifically directed to develop Justice40 plans to engage stakeholders and maximize benefits to disadvantaged communities. Id. at 9-10. 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. Id. Appendix 1. The steps described above to require consultation between 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.

We would welcome an opportunity to discuss these and other programs further with EPA as part of the current consultation process.

2. Permit issuance

In addition, EPA should exercise its oversight authority for state-issued permits to encourage coordination between Oklahoma and affected tribal nations. For example, Clean Water Act section 402 authorizes EPA to object to proposed state-issued NPDES permits and identify conditions that should be included in the permits. 33 U.S.C. § 1342(d). When EPA lodges a timely objection, Oklahoma may not issue the permit. Id.; see also Model National

[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.

Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement (August 2012) at 19-22.[9]

As part of this process, Oklahoma must provide EPA with copies of proposed permits, 33 U.S.C. § 1342(d)(1), as well as any additional information EPA requests that is relevant to compliance with the Clean Water Act. 40 C.F.R. § 123.44(d); see also, Model MOU at 14 (state agrees that "upon request by EPA, the State will submit specific information and allow access to any files necessary for evaluating the State's administration of the NPDES and pretreatment programs"). Further, the state must maintain and submit to EPA on request copies of "timely public comments received in writing . . . and the State's response to comments." Model MOU at 12-13.

EPA should apply this 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. See 40 C.F.R. § 123.44(d)(3) (prior to objecting, EPA has "discretion [to] . . . afford to interested persons an opportunity to comment on" a potential objection). And ultimately, EPA can object to the permit if Oklahoma fails to involve the tribe and address substantive tribal concerns. See, e.g., 40 C.F.R. §§ 123.44(c)(2), (5), (7).

EPA can take a similar approach for Clean Air Act Title V permits. Section 505 of the Clean Air Act requires that Oklahoma provide 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). 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). EPA then has an 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 EPA to lodge an objection. 42 U.S.C. § 7661d(b)(2). The permitting state may not issue the permit over an EPA objection. Id. § 7661d(b)(3).

These authorities would allow EPA to require 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 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 undoubtedly other opportunities for EPA to use its permitting oversight under other statutes as well. We urge EPA to cast a wide net in this regard.

[9] https://www.epa.gov/sites/default/files/2013-08/documents/finalepastatemoa-attach2.pdf.

D. Other Issues

The Pawnee Nation would welcome an opportunity to discuss the above options with EPA. In addition, many of the conditions discussed above may require a significant investment of time and staff resources by affected tribes. The Pawnee Nation would be interested in exploring potential grant opportunities to support its efforts to engage with 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 me, or President Walter Echo-Hawk of the Pawnee Nation ((303) 746-5836, wechohawk@pawneenation.org).

Sincerely,

Michael S. Freeman
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
(303) 996-9615
mfreeman@earthjustice.org

Counsel for the Pawnee Nation

cc:
President Walter Echo-Hawk
Attorney General Chad Smith
Rumela Roy
Meghan Greenfield