

NOTICE OF PROPOSED WITHDRAWAL AND RECONSIDERATION OF OCTOBER 1, 2020 SAFETEA DECISION AND OPPORTUNITY FOR COMMENT

Introduction

On October 1, 2020, the U.S. Environmental Protection Agency (“EPA” or the “Agency”) approved a request by the Governor of the State of Oklahoma (“State”) to extend approval of the State’s EPA-approved environmental regulatory programs into certain areas of Indian country¹ within the State (“October 2020 Decision”). The State’s request and EPA’s October 2020 Decision were made under authority provided in Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users, Pub. Law 109-59, 119 Stat. 1144, 1937 (August 10, 2005) (“SAFETEA”). In accordance with Executive Order 13990, EPA has conducted a review of the October 2020 Decision. Consistent with President Biden’s Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (January 26, 2021), from July 13 to October 31, 2021, EPA engaged in consultation with tribal governments as part of that review. As described in further detail below, EPA is now proposing to withdraw and reconsider the October 2020 Decision and is inviting comments to inform EPA’s reconsideration and decision making regarding the State’s request under SAFETEA. Any comments should be submitted in writing to Randy Gee at gee.randy@epa.gov (Subject Line: SAFETEA – Proposed Withdrawal and Reconsideration). Comments must be submitted by January 31, 2022. The State’s SAFETEA request and EPA’s

¹ Indian country is defined under federal law at 18 U.S.C. § 1151 to mean (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Although this definition is codified in the federal criminal code, it is also relevant for purposes of civil jurisdiction. *See, e.g., DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

October 2020 Decision may be viewed at: <https://www.epa.gov/ok/safetea-proposed-withdrawal-and-reconsideration-and-supporting-information>. Pending any final action on this proposal, the State's program authority as currently provided in the October 2020 Decision will remain in place and unaffected.

Background

Many of the regulatory programs under the federal environmental statutes administered by EPA may be implemented by states and eligible Indian tribes in the first instance, with EPA retaining oversight authority. For these programs, states and tribes will submit program applications to EPA, and EPA approves the programs where they meet applicable statutory and regulatory programmatic requirements. EPA retains oversight authority over many specific state/tribal implementing activities and/or over the continuing sufficiency of the state's/tribe's regulatory program.

Because states generally lack relevant regulatory jurisdiction in Indian country, EPA typically excludes Indian country from its approvals of state environmental regulatory programs. In some cases, however, federal statutes provide one or more states with relevant jurisdiction in Indian country. In such instances, states may include areas of Indian country in their applications to EPA for environmental regulatory program approval, and where the applicant state demonstrates that federal law provides the state with sufficient jurisdiction, EPA has approved states to administer programs in the specified areas of Indian country. Indian tribes may also apply to EPA for eligibility to administer regulatory programs and for program approval under federal environmental statutes administered by EPA. Generally, approved tribal environmental programs would apply to areas that qualify as Indian country. In the absence of an approved

tribal or state program, EPA is generally authorized to administer environmental regulatory programs in Indian country.

With some exceptions, prior to October 1, 2020, EPA's approvals of the State of Oklahoma's environmental regulatory programs excluded Indian country located in the State. Currently, the Pawnee Nation and the Cherokee Nation are the only tribes in Oklahoma approved by EPA for eligibility to administer any regulatory programs under a statute administered by EPA – Pawnee Nation for the Clean Water Act Section 303(c) water quality standards and Section 401 certification programs, and Cherokee Nation for the Toxic Substances Control Act lead abatement program. Prior to October 1, 2020, EPA thus retained authority to directly implement most environmental regulatory programs in most of the Indian country located in Oklahoma.

On June 9, 2020, the U.S. Supreme Court decided the case of *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In that decision, the Supreme Court held that the Muscogee (Creek) Nation's reservation in eastern Oklahoma had not been disestablished by Congress and remained Indian country under federal law. Prior to the *McGirt* decision, neither EPA nor the State had understood the Muscogee (Creek) Nation's original reservation boundaries to remain intact, and based on that misunderstanding the State had, as a practical matter, implemented environmental regulatory programs in much of the area that was held by the Supreme Court to be Indian country. However, because the State's programs were generally not approved to apply in Indian country, the State's program implementation was no longer appropriate following the Supreme Court's clarification regarding the Indian reservation status of the subject lands.

On July 22, 2020, the Governor of the State of Oklahoma requested approval under Section 10211(a) of SAFETEA to administer in certain areas of Indian country the State's

environmental regulatory programs that were previously approved by EPA outside of Indian country. The applicable provision of SAFETEA states as follows:

SEC. 10211. ENVIRONMENTAL PROGRAMS.

(a) OKLAHOMA. – 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. Law 109-59, 119 Stat. 1144, 1937.

EPA’s understanding is that the State’s request was essentially intended to extend approval of the State’s environmental regulatory programs into those areas of Indian country where, prior to *McGirt*, the State had, as a practical matter, implemented its programs.²

From August 25, 2020, to September 14, 2020, EPA held expedited tribal consultation meetings on the State's request to EPA. During and following these meetings EPA received numerous comments from tribes opposing the State’s request. Among other things, tribal commenters expressed concerns regarding the impact of any approval of the State’s request on tribal sovereign interests in their Indian country lands, questioned aspects of the State’s prior administration of environmental regulatory programs in the affected areas of Indian country, and urged EPA to conduct additional review of the State’s programs and consider appropriate oversight of those programs to address tribal interests prior to any approval of the State’s request under SAFETEA. Tribal commenters also expressed concern that the length of the tribal

² Subsequent to the ruling in *McGirt*, several Oklahoma State court decisions have found that the reservations of other tribes in Oklahoma had also never been disestablished and remained intact. Similar cases remain pending with respect to additional tribes. The State’s request under SAFETEA included categories of Indian country generally and was not limited to the Muscogee (Creek) Nation.

consultation period (three weeks for 38 tribes in Oklahoma) was inadequate to allow a meaningful engagement regarding impacts of the State's request on tribes.

On October 1, 2020, EPA's then-Administrator Andrew R. Wheeler transmitted a letter to The Honorable J. Kevin Stitt, Governor of the State of Oklahoma, approving the State's request. EPA's October 2020 Decision and associated materials detail the Agency's rationale at that time, as well as the programmatic and geographic scope of the approval. By way of summary, EPA's decision approved the State under SAFETEA to administer within the covered areas of Indian country all of the State's environmental regulatory programs that had previously been approved by EPA to apply outside of Indian country, including, but not limited to, a list of environmental regulatory programs identified in the decision letter. Consistent with the State's request, EPA's decision extended to Indian country throughout the State, but expressly excluded three categories of Indian country land: 1) Indian allotments, the Indian titles to which have not been extinguished, under 18 U.S.C. § 1151(c); 2) lands held in trust by the United States on behalf of an individual Indian or Tribe; and 3) lands owned in fee by a Tribe, if the Tribe acquired that fee title to such land, or an area that included such land, in accordance with a treaty with the United States to which such Tribe was a party and never allotted the land to a member or citizen of the Tribe.³

On January 20, 2021, President Biden issued Executive Order 13990 entitled "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 25, 2021). In relevant part, the Executive Order provides that agencies must review regulations, orders, guidance documents, and other similar

³ The October 2020 Decision is the subject of a pending challenge in federal court. (*Pawnee v. Regan*, No. 20-9635 (10th Cir.)).

actions adopted over the last four years to determine whether they conflict with the national objectives stated therein. In accordance with the Executive Order, EPA has reviewed the Agency's October 2020 Decision approving the State of Oklahoma's request under SAFETEA. As part of that review, and consistent with the President's Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (January 26, 2021), EPA conducted consultation with Indian tribes in Oklahoma regarding the October 2020 Decision. The consultation was intended to help EPA better understand the concerns expressed by tribes regarding the decision and to consider appropriate measures to mitigate any adverse impacts on tribes.

Among other things, tribes have continued to express concerns regarding certain aspects of the State's existing administration of environmental regulatory programs in the covered areas of Indian country and the effects of State regulation on tribal sovereign interests. Although some tribes have questioned the adequacy of the October 2020 Decision under the terms of the applicable SAFETEA provision, many tribes have also expressed interest in opportunities for engagement with the State during program implementation to help ensure appropriate coordination and consideration of tribal interests.

Proposed Withdrawal and Reconsideration and Opportunity for Comment

Based on EPA's review of the October 2020 Decision and the SAFETEA authority underlying that decision, and in consideration of the feedback provided by tribes during consultation, EPA is now proposing to withdraw and reconsider the decision and is providing an opportunity for comment to help ensure that the Agency's reconsideration and final decision making are well informed, are consistent with the requirements of SAFETEA, and provide an

effective and durable framework for implementation of the environmental regulatory programs established under statutes administered by EPA in the covered areas of Indian country.

EPA believes that the abbreviated period between the State's submission of its request under SAFETEA and EPA's approval may not have provided sufficient time for tribal consultation and for coordination with the State on program implementation in the affected areas of Indian country. Tribes have raised specific environmental issues of concern and have consistently requested more time for consultation to ensure that their concerns are factored into EPA's decision making under SAFETEA and, ultimately, into the administration of the environmental programs in their areas of Indian country. Additional efforts are appropriate to identify such areas of concern and work with our State and tribal partners to help ensure that such concerns are appropriately addressed as part of EPA's SAFETEA decision making.

Relatedly, it may be appropriate for EPA to undertake additional review of the State's existing implementation of its environmental regulatory programs in the covered areas of Indian country. The State's SAFETEA request sought EPA approval of the State's environmental regulatory programs in broad areas of Indian country across much of the eastern half of the State. Additional program review, and engagement with the State and tribes on material issues that are identified, may be appropriate as a programmatic matter and under the terms of Section 10211(a) of SAFETEA in connection with approval of such a broad extension.

EPA also acknowledges that potential complexities may arise in the unusual circumstances where multiple sovereigns have environmental regulatory interests in an area of Indian country. Some tribes have expressed interest in opportunities for enhanced engagement with the State during program implementation in Indian country. The October 2020 Decision does not include any mechanisms to promote such intergovernmental engagement and

coordination during program implementation or oversight by EPA. It may be appropriate to consider such procedures and conditions as part of EPA's SAFETEA decision making.

EPA believes that proposing to withdraw and reconsider the October 2020 Decision is an appropriate first step to address the issues described above and to improve EPA's decision making under SAFETEA. EPA invites comment on each of these issues and any other issue germane to EPA's decision on the State's SAFETEA request. In particular, EPA seeks input on specific environmental and program implementation concerns in the covered areas of Indian country and on the means to most appropriately address such concerns, consistent with the authority and requirements of SAFETEA. EPA seeks input on the scope of the Agency's authority or obligation to review and consider such programmatic issues in our decision making on the State's request. EPA also seeks input on the scope of the Agency's authority to include conditions or procedures, and on the substance of any such conditions or procedures, to address appropriate roles and responsibilities or other issues in connection with program implementation and/or oversight by EPA. *See, e.g., Oklahoma Department of Environmental Quality v. EPA*, 740 F.3d 185, 190 (D.C. Cir. 2014) (discussing potential for EPA to include conditions in an approval under SAFETEA).

As part of this reconsideration – and prior to taking any final action on this proposal – EPA intends to initiate additional consultation, consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), with the tribes in Oklahoma and to invite the State to participate directly in discussions with EPA and interested tribes on potential paths forward to improve EPA's decision making under SAFETEA. EPA expects to host a consultation call with tribes in Oklahoma and to engage with the State in January 2022. During

the pendency of these processes, the State's program authority will remain in place as currently provided under the October 2020 Decision.