

**Summary Report of Tribal Consultation and Engagement Related to the EPA's  
Review of the October 1, 2020 Approval of Oklahoma's Request to Administer  
Environmental Regulatory Programs Within Certain Parts of Indian Country  
Within the State**

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## Background

On July 22, 2020, the Governor of the State of Oklahoma requested approval under 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”), to administer in certain areas of Indian country the State’s environmental regulatory programs that were previously approved by the U.S. Environmental Protection Agency (“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. Subsequently, upon 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 offered consultation regarding the State’s request to federally recognized tribes within Oklahoma from August 25 – September 14, 2020. During this expedited period, a multi-tribal nation consultation was held with thirteen Tribal Nations participating. EPA also conducted eight individual consultations with tribes. 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 consultation period was inadequate to allow a meaningful engagement regarding impacts of the State’s request on tribes. On October 1, 2020, EPA approved the State of Oklahoma’s request.

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 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 conducted a review of the Agency's October 1, 2020 decision approving the State of Oklahoma's request under SAFETEA. Subsequent to October 1, 2020, tribes continued to express concern regarding the State's request to administer environmental regulatory programs in areas of Indian country and with the propriety and potential implications of EPA's approval decision. Numerous tribal leaders requested additional opportunities to meet with EPA and discuss the matter, and a petition was filed in federal court challenging EPA's decision.<sup>1</sup> Based on the EPA's ongoing review of the October 1, 2020 decision and the substantial feedback received from tribes, the Agency initiated consultation with tribes in Oklahoma. The tribal 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.

### Consultation and Engagement

On June 30, 2021, EPA Administrator Michael Regan sent a notification letter to Oklahoma Tribal Nation leaders that the EPA was initiating consultation and coordination regarding the October 1, 2020 EPA decision approving the State of Oklahoma's request to administer regulatory programs under federal environmental laws within certain areas of Indian country in the State. The consultation period was to go from July 15 – October 13, 2021, but was extended through October 31, 2021, to allow more time for written input.

EPA held two open consultation calls with Oklahoma Tribal Nations ("tribes") during this period, on July 29 and August 24. Eighteen tribes participated in these calls. In addition, EPA leadership held individual consultations with the following eight tribes.

- Ottawa Tribe of Oklahoma, September 13
- Wichita & Affiliated Tribes, September 17
- Pawnee Nation of Oklahoma, September 23
- The Osage Nation, September 28
- Cherokee Nation, October 1
- The Choctaw Nation of Oklahoma, October 1
- Quapaw Nation, October 13
- The Muscogee Nation, October 13

In addition to oral comments received during the above-listed consultations, EPA received written comments from five tribes. All comments received were considered by EPA. The consultation opportunity was posted in EPA's Tribal Consultation Opportunities Tracking System (TCOTS) and regular updates were provided to tribal leadership during the consultation period.

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<sup>1</sup> *Pawnee v. Regan*, No. 20-9635 (10<sup>th</sup> Cir.).

## Next Steps Regarding EPA's Review of the October 1, 2020 Approval and in Consideration of Tribal Nation Consultation Input

Having extensively reviewed the October 1, 2020 approval of the State of Oklahoma's request to EPA and the input received during the previous consultation and coordination process conducted by EPA, and having conducted a renewed period of consultation with tribes in Oklahoma, EPA now believes that the appropriate next step is to propose withdrawal and reconsideration of the October 1, 2020 decision. EPA is, therefore, issuing a notice proposing such withdrawal and reconsideration and is inviting comments to inform EPA's reconsideration and decision-making regarding the State's request under SAFETEA. A copy of that notice – which provides additional information regarding the circumstances and bases for EPA's proposed withdrawal and reconsideration – is being provided directly to all Indian tribes in Oklahoma as well as to the State and is being made available for public review on EPA Region 6's web site.

EPA believes that issuance of the notice proposing to withdraw and reconsider the October 2020 decision provides a meaningful next step in response to the significant majority of tribal commenters' concerns described below.<sup>2</sup> As summarized below, commenters asserted, among other things, that insufficient time and consideration had been provided to express and address their concerns regarding the State's request under SAFETEA and potential implications for environmental protection in the covered areas of Indian country, for environmental justice, and for their sovereign interests in such areas. Commenters raised questions regarding the State's past administration of regulatory programs generally, and in the covered areas of Indian country in particular, and proposed ideas for additional tribal roles and enhanced State-tribal engagement and cooperation on environmental issues moving forward. EPA looks forward to additional tribal input during the comment period on EPA's notice as EPA moves forward with reconsideration and final decision making.

## Themes Emerging from Consultation Comment Letters and Meetings

Comments received during the consultation period are summarized below. The EPA carefully considered all tribal consultation comments received during the consultation period.

### Requests to Withdraw the October 2020 Approval

An overwhelming majority of tribal commenters specifically asked for withdrawal of the October 1, 2020 decision approving the State of Oklahoma's request. Some tribes expressed their view that it was inappropriate to have approved the State's request in the first instance. Tribal commenters noted that the consultation and coordination period conducted prior to the October 2020 approval was extremely abbreviated and that the approval was made immediately after the close of the consultation period, reflecting that consultation input was

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<sup>2</sup> A small number of specific comments are also addressed separately below.

not considered. Other comments expressed concern regarding impacts of the State's request on tribal sovereign interests in managing environmental programs within their reservations (see "Sovereignty and Treaty Rights" below).

One tribe also provided extensive feedback regarding actions EPA should take if the Agency were to withdraw or suspend the October 2020 approval. These included direct implementation by EPA of environmental programs within the reservation land affected by the approval and continued consultation with tribes and Oklahoma to identify conditions upon which environmental authority could be re-transferred to the State.

Multiple tribes stated that SAFETEA Section 10211 expired and requested clarity on this issue from EPA. EPA has given considerable thought to this question. EPA has carefully reviewed the provision and its placement in the overall SAFETEA statute, as well as relevant principles regarding expiration of certain types of appropriations legislation. EPA does not believe that section 10211 would be properly viewed as a time-limited appropriations provision or as subject to presumptions regarding the impermanence of appropriations riders. Although SAFETEA contains certain appropriations provisions, the statute is a broader authorization containing numerous substantive provisions with varying expiration dates specific to those particular provisions. Section 10211 in particular is a substantive provision of law with no explicit expiration date that does not condition or limit appropriations and that is not otherwise topically related to the remainder of the statute. Among other things, the provision would not reasonably be viewed as connected to appropriations provisions elsewhere in the statute that may be subject to temporal limitations. EPA is very sensitive to tribal concerns regarding the legislative process underlying inclusion of section 10211 as a rider and late addition to an otherwise unrelated transportation bill. However, EPA does not believe that the provision would reasonably be viewed as having expired.

### **Sovereignty and Treaty Rights**

Nearly every tribe that provided input stated that the October 1, 2020 approval was in direct violation of tribal sovereignty. Some tribal commenters also noted that the approval was contrary to their treaties with the United States government. The tribes stated that treaties are the supreme law of the land, are still in effect throughout Oklahoma, and are of the utmost importance. The tribes requested that the October 2020 approval be reviewed regarding its impacts on treaty rights and stated that the approval is inconsistent with the *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (November 8, 1984), the *EPA Policy on Consultation and Coordination with Indian Tribes* (May 4, 2011), and the *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights* (February 19, 2016). Tribes commented that the August – September 2020 consultation period was inadequate and did not provide a meaningful opportunity to provide input to the EPA. In general, tribes disagreed with Oklahoma's assertion of regulatory authority over Indian country.

In addition, many tribes noted the trust responsibility of the federal government to federally recognized tribes and cited it as an additional reason EPA should have been especially cautious in reviewing Oklahoma's request for program authority. Many comments asserted that the EPA has a trust responsibility to ensure a minimum level of protection for human health and the environment in Indian country.

### **Implementation of Conditions**

The majority of tribal commenters requested that EPA consider conditions that could guide a potential approval of the State of Oklahoma's request under SAFETEA. Tribes highlighted that such conditions should have been considered and implemented by EPA prior to the October 1, 2020 approval.

Conditions suggested by the tribes primarily focused on ways in which they could be more involved in the decision-making and review processes regarding environmental program implementation on reservations. For example, a commenter suggested that there should be conditions in any potential approval of the State's authority in areas of Indian country that would encourage cooperation and dialogue between the State and tribal governments. Another suggested that tribes should be able to provide input into State program evaluations. Multiple tribes suggested that an intergovernmental workgroup or coordination council be set up that would work cooperatively to ensure that the State's programs are implemented within reservations to ensure protection of human health and the environment. As discussed further below, encouraged or required early communication between Oklahoma and the tribes was a frequent comment regarding potential conditions to be considered in any approval of the State's request.

### **Environmental Program Implementation and Enforcement, Tribal-State Cooperation**

A number of tribes expressed concern that the State of Oklahoma would not adequately implement the environmental programs or take enforcement actions in cases of violations. Reflecting these concerns, a number of tribes requested a program-by-program review to ensure that Oklahoma's standards and implementation practices ensure environmental protection within Indian country and meet all minimum federal standards. One tribe asserted that the Oklahoma Department of Environmental Quality is understaffed, underfunded, and overburdened, and would benefit from environmental support of tribes within the State.

Similarly, other tribes expressed concerns regarding adequate enforcement of federal environmental laws when violations are discovered, asserting a history of pollution continuing unabated on reservation lands. Other comments highlighted that tribes may be unable to implement their own permitting and enforcement programs, citing inadequate staff and the large number of environmental programs that they may have to oversee.

Other comments highlighted positive examples of cooperation among the tribes and the State of Oklahoma and said that they have been able to work cooperatively with the State. One tribe

cited an interagency agreement that is currently in place with Oklahoma which could be a template for future cooperative agreements between the State and interested tribes. Another tribe noted that their relationship with the Oklahoma environmental department is positive, and they have worked cooperatively with them for years. One tribe noted that they have had a positive collaboration with officials at the county level, and another tribe highlighted the strong relationships that have been developed at the staff level that have led to positive environmental results for both the tribe and Oklahoma. One tribe suggested creation of an environmental working group or coordination council with Oklahoma to maintain strong relationships and collaboration regarding the implementation of environmental programs, highlighting that this type of approach could have benefits for all parties. Regardless of whether the comments received were positive or negative, tribes overwhelmingly noted that increased communication with Oklahoma is desired and that they would welcome further opportunities for direct engagement. One tribe commented that a membership on the Oklahoma Department of Environmental Quality Board and on each Advisory Council should be reserved for a tribal representative.

### **Program-Specific Input**

Several tribal comments focused on specific program areas, primarily air quality and water quality. These comments highlighted the importance of a healthy environment to tribes, with some comments expressing concern that the State would not protect tribal interests in program implementation. In several cases the tribes stated that they would like to expand their own capacity to implement certain programs within parts of Indian country, either through cooperation with the State or through the treatment in a similar manner as a state (TAS) process.

The majority of program-specific comments highlighted the importance of water quality to tribes, noting that clean water is a necessity for life. As mentioned above, several tribes asserted that the State's water quality standards are out of date and should be updated, regardless of the October 2020 approval. Several comments expressed a desire for tribes to have strong protections under the Clean Water Act, such as water quality standards and total maximum daily loads. One tribe noted that a number of streams flowing through their lands are listed as impaired under Clean Water Act Section 303(d) and questioned whether the October 2020 approval will further degrade the water. Further, many tribes expressed concern regarding Oklahoma's implementation of the Safe Drinking Water Act Underground Injection Control program, with one tribe writing that groundwater contamination resulting from inadequate program implementation is likely to directly impact reservation drinking water.

Similarly, many comments highlighted concerns regarding the State assuming additional authority to implement the Clean Air Act in areas of Indian country. One comment asserted that Oklahoma has ongoing problems fulfilling its obligations under existing Clean Air Act authorities, and several tribes pointed out that air pollution does not stop at jurisdictional lines and that additional air pollution allowed by Oklahoma will adversely affect reservation lands.

Many tribes expressed interest in assuming additional authority to protect their environment through the TAS process, recognizing that under Section 10211(b) of SAFETEA a cooperative agreement with Oklahoma is required for Oklahoma tribes to assume regulatory program authority. Some tribes noted that EPA could support tribal efforts to apply for and receive regulatory TAS eligibility by facilitation of a collaborative discussion with Oklahoma, with other tribes noting that they would be very interested in assuming regulatory program approval for some reservation lands. Several tribes mentioned that the requirement in SAFETEA for tribes to enter into a cooperative agreement with Oklahoma has a chilling effect on tribal efforts to pursue TAS authority and impedes tribal environmental program development. One tribe requested that EPA prevent Oklahoma from blocking a tribe's ability to achieve a regulatory TAS approval, unless there is substantial cause. A number of tribes expressed interest in TAS eligibility for non-regulatory functions under either the Clean Air Act or the Clean Water Act. The tribes noted that a grant of such eligibility may further allow them to work cooperatively with EPA and Oklahoma while developing technical expertise.

A few comments were received regarding the Superfund program. These comments noted that there have been positive interactions with Oklahoma and that the cooperative agreements entered into under this program could be a model for future tribal-state cooperation. These comments also noted that continued progress in cleanup of Superfund sites would not be affected by the October 1, 2020 approval.

#### **Other Comments (Environmental Justice and Grant Funding)**

The above summaries represent the significant majority of comments received. In addition, comments were received regarding environmental justice and grant funding.

Several comments noted that the Biden-Harris Administration has made environmental justice a priority, and further stated that standing by the October 1, 2020 approval would be in contrast to that priority. Asserting concerns about Oklahoma's past implementation of several environmental programs, tribes commented that environmental protection should be assured within reservations in Oklahoma, and standards should be as stringent as elsewhere. One tribe commented that tribes located within other parts of the United States are able to administer environmental regulatory programs within their reservations while those in Oklahoma do not. Other tribes noted that the October 2020 approval raises clear environmental justice concerns which merits a heightened level of review of the decision. One tribe noted that the approval may have impacts beyond environmental protection, citing potential impacts to cultural practices by the tribe.

Several tribal commenters discussed funding and the inability of tribal environmental programs to properly monitor environmental concerns stemming in part from the October 1, 2020 approval. One tribe noted that a recurring problem is that smaller tribes may be unable to adequately staff environmental programs due to limited resources, while several other tribes



stated that the October 1, 2020 approval should not lower funding providing to Oklahoma tribes under the Indian General Assistance Program (GAP).