



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

October 1, 2020

THE ADMINISTRATOR

The Honorable J. Kevin Stitt  
Governor of the State of Oklahoma  
Oklahoma State Capitol  
2300 North Lincoln Boulevard  
Oklahoma City, Oklahoma 73105

**Re: Approval of State of Oklahoma Request Under Section 10211(a) of the  
Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005**

Dear Governor Stitt:

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, 199 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. EPA hereby approves Oklahoma’s request.

SAFETEA

The applicable provision of SAFETEA, which is limited to Oklahoma, 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, 199 Stat. 1144, 1937.

EPA recognizes that typically, in the absence of express authorization from Congress states do not have jurisdiction in Indian country<sup>1</sup> to implement regulatory programs under the federal environmental laws administered by EPA. *See, e.g., Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). Therefore, EPA generally excludes Indian country from its approvals of state environmental regulatory programs. However, where a federal statute expressly provides for state program administration in Indian country, EPA must apply that law and approve a proper request for such state administration.

Section 10211(a) of SAFETEA is such a law. The statute mandates that EPA approve a request from the State of Oklahoma to administer regulatory programs in areas of the State that are in Indian country where the statute's elements are met. The statute applies to (1) any regulatory program, (2) submitted by Oklahoma for approval by EPA under a law administered by EPA, where EPA has (3) determined that the program meets applicable requirements of the law, and (4) approved the program with respect to areas in the State that are not Indian country, and (5) the State requests to administer the program in areas of the State that are in Indian country. So long as these circumstances are present, SAFETEA requires approval of the State's request "[n]otwithstanding any other provision of law" and "without any further demonstration of authority by the State." Consistent with Congress's plenary authority over Indian affairs, the statute expressly abrogates any prior potentially inconsistent legal requirement or limitation of law, including any potential jurisdictional impediment to the State's regulation in Indian country or other requirement under federal environmental laws administered by EPA. The statute provides EPA no discretion to weigh additional factors in rendering its decision.

Oklahoma's July 2020 request seeks approval under SAFETEA to administer environmental regulatory programs submitted by the State that EPA has determined meet applicable requirements of federal environmental law and has approved outside of Indian country.<sup>2</sup> Because these basic statutory criteria are met, EPA is required to approve the State's request to

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<sup>1</sup> Section 10211 of SAFETEA does not define Indian country. Indian country, however, 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).

<sup>2</sup> As described above, Section 10211(a) requires approval of the State's request where EPA previously has determined that a regulatory program submitted by the State meets applicable requirements of federal environmental law, and EPA has approved the program to apply outside of Indian country. EPA interprets the required determination that the State's program meets applicable requirements of federal environmental law as applying at the time the program was previously approved outside of Indian country. This is consistent with Congress's intent to mandate approval of the State's request under SAFETEA "[n]otwithstanding any other provision of law," which includes the provisions of the statutes administered by EPA. Although SAFETEA thus mandates approval in the first instance, EPA notes that the Agency's ordinary statutory and regulatory authorities to oversee and review state programs will continue to apply as the programs are implemented.

administer these previously approved regulatory programs in the areas of Indian country described in the State's request.

### Geographic Scope of Approval

As described in the State's July 2020 letter, the impetus for the State's request was the recent decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). In that case, the Supreme Court held that the Creek Nation's Reservation in eastern Oklahoma had not been disestablished by Congress and remained Indian country under federal law. Prior to *McGirt*, the State had, as a practical matter, implemented environmental programs in much of the area that was held by the Supreme Court to be Indian country. EPA understands the State's reference to *McGirt* as an explanation of the State's intent substantially to reestablish the geographic scope of the State's environmental programs as implemented prior to the Supreme Court's decision, but at this time generally not to extend the State's programs into areas of Indian country over which the State had not previously implemented such programs.<sup>3</sup> In keeping with this general intent, the State's request applies to Indian country throughout the State, but expressly excludes three categories of land over which the State had not administered regulatory programs prior to *McGirt*. As stated in the request:

This request does not seek approval to administer any programs in Indian country on lands, including rights-of-way running through the same, that –

(A) Qualify as Indian allotments, the Indian titles to which have not been extinguished, under 18 U.S.C. § 1151(c);

(B) Are held in trust by the United States on behalf of an individual Indian or Tribe; or

(C) Are owned in fee by a Tribe, if the Tribe –

(i) 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

(ii) never allotted the land to a member or citizen of the Tribe.

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<sup>3</sup> EPA has identified two instances in which the State's July 2020 request deviates from the geographic scope of the State's programs as implemented prior to *McGirt*. First, the State's request seeks extension of its Safe Drinking Water Act Underground Injection Control Program (other than Class II wells) into Osage County. Prior to *McGirt*, EPA had regulated all classes of wells under this program in that county. Second, consistent with the D.C. Circuit's decision in *Oklahoma Dept. of Environmental Quality v. EPA*, 740 F.3d 185 (D.C. Cir. 2014), the State's Clean Air Act State Implementation Plan ("SIP") applies on non-reservation areas of Indian country – most notably, Indian allotments – in the State. Prior to *McGirt*, the State had thus implemented its SIP on Indian allotments, including allotments that are now understood (per the Supreme Court's decision) to be located within the exterior boundaries of an Indian reservation. To the extent an allotment is located on an Indian reservation, it would be excluded from the D.C. Circuit's holding that SIPs apply on non-reservation areas of Indian country. The State's July 2020 request excludes Indian allotments, and thus does not request extension of Oklahoma's SIP onto such reservation allotments.

The request also expressly excludes the Safe Drinking Water Act Class II Underground Injection Control program in Osage County, Oklahoma.<sup>4</sup>

Consistent with the State's letter, EPA's approval of the State's request applies to Indian country throughout the State but does not extend to any of the excluded areas. EPA will retain authority to directly implement environmental regulatory programs under statutes administered by the Agency in all such excluded areas. Nothing in this decision is intended to change or address tribal authority under tribal law outside the scope of a program under a statute administered by EPA.

### Programmatic Scope of Approval

The State's July 2020 letter requests approval under SAFETEA with regard to all of the State's existing EPA-approved environmental regulatory programs,<sup>5</sup> including a series of programs identified in the letter that are administered by the Oklahoma Department of Environmental Quality, the Oklahoma Department of Agriculture, Food and Forestry, the Oklahoma Water Resources Board, and the Oklahoma Corporation Commission. Consistent with the State's request, EPA is approving the State under SAFETEA to administer all environmental regulatory programs approved by EPA to apply outside of Indian country, including, but not limited to, the environmental regulatory programs identified below. Each of the programs covered by this approval has been submitted to EPA – *i.e.*, they involve a submission by the State for EPA's consideration under a law administered by EPA – and approved by EPA as meeting applicable requirements of federal environmental law outside of Indian country. These programs thus satisfy the necessary criteria of SAFETEA Section 10211(a). To the extent EPA's prior approvals of these State programs excluded Indian country, any such exclusions are superseded for the geographic areas of Indian country covered by this approval under SAFETEA. Because each of the programs identified below is now approved to include the requested areas of Indian country, any future revisions or amendments to these identified programs will similarly extend to the covered areas of Indian country without any further need for additional requests under SAFETEA.<sup>6</sup>

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<sup>4</sup> Section 10211(a) of SAFETEA does not specify any required minimum geographic area of Indian country to be included in a request from Oklahoma. EPA interprets the provision as providing sufficient flexibility for the State to exclude certain areas of Indian country from its request and to mandate EPA approval of such a limited request so long as the basic criteria of the statute are met.

<sup>5</sup> Section 10211(a) of SAFETEA addresses only "regulatory program[s]" administered under federal environmental laws. The provision does not address funding provided under EPA grant programs. The provision also does not address any exercise of State regulatory authority outside the scope of a program approved by EPA under a federal environmental statute administered by EPA.

<sup>6</sup> However, should the State apply to EPA in the future for approval of any program that has not been previously approved outside of Indian country, the State would also need to submit a request under SAFETEA to the extent the State wishes to administer that program in any area of Indian country. This is consistent with the language of Section 10211(a), which contemplates that a request from Oklahoma will relate to a regulatory program that has already been submitted to EPA and approved by EPA to apply outside of Indian country.

## List of Programs<sup>7</sup>

### RCRA:

- Subtitle C hazardous waste program (42 U.S.C. § 6921, *et seq.*; 40 C.F.R. Part 272, Subpart LL)
- Subtitle D permit program (42 U.S.C. § 6941, *et seq.*; 40 C.F.R. Parts 239 and 258)
- Coal Combustion Residual State Program (42 U.S.C. § 6945(d); 40 C.F.R. Part 257, Subpart D)
- Subtitle I Underground Storage Tank Program (42 U.S.C. § 6991, *et seq.*; 40 C.F.R. § 282.86)

### CAA:

- State Implementation Plan (42 U.S.C. § 7410; 40 C.F.R. Part 52, Subpart LL – 40 C.F.R. §§ 52.1920 -52.1960)
- Standards of Performance for New Stationary Sources (42 U.S.C. §§ 7411(b) and (c), 7429; 40 C.F.R. Part 60)
- National Emission Standards for Hazardous Air Pollutants (42 U.S.C. § 7412; 40 C.F.R. Part 61, Subpart A – 40 C.F.R. § 61.04(b)(38) and § 61.04(c)(6)(iv))
- Approval and Promulgation of State Plans for Designated Facilities and Pollutants (42 U.S.C. §§ 7411(d) and 7429; 40 C.F.R. Part 62, Subpart LL – 40 C.F.R. §§ 62.9100 – 62.9191)
- National Emission Standards for Hazardous Air Pollutants, Delegation Status for Part 63 Standards—State of Oklahoma (42 U.S.C. § 7412; 40 C.F.R. Part 63, Subpart A – 40 C.F.R. § 63.99(a)(37))
- State Operating Permits Program (42 U.S.C. §§ 7661a(d) – 7661f; 40 C.F.R. Part 70, Appendix A, Oklahoma)
- Ambient Air Monitoring Reference and Equivalent Methods and Ambient Air Quality Surveillance, 42 U.S.C. §§ 7601(a), 7619 (40 C.F.R. Parts 53 and 58)

### CWA:

- Pretreatment (33 U.S.C. § 1317; 40 C.F.R. Parts 129 and 403)
- National Pollutant Discharge Elimination System Programs authorized for Oklahoma Department of Environmental Quality and Oklahoma Department of Agriculture, Food, and Forestry (33 U.S.C. § 1342; 40 C.F.R. Parts 122-125)
- Disposal of Biosolids and Sewage Sludge (33 U.S.C. § 1345; 40 C.F.R. Part 503)
- Water Quality Standards and Implementation plans (33 U.S.C. § 1313; 40 C.F.R. Parts 130 and 131)

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<sup>7</sup> EPA has reorganized the list of regulatory programs included in Oklahoma's July 2020 letter to track the statutes administered by EPA, avoid unnecessary references and duplication, and reference relevant statutory and regulatory provisions that reflect the requested programs. Consistent with the State's request to include all regulatory programs approved by EPA outside of Indian country (and the statement that the list of programs included in the July 2020 letter was non-exclusive), EPA has included certain regulatory programs that were not separately identified in the State's July 2020 letter. Because Section 10211(a) of SAFETEA applies only to regulatory programs, EPA has not included any references to environmental grant authorities under EPA statutes or regulations that were included in the State's July 2020 letter.

#### SDWA:

- Underground Injection Control (UIC) Program for Classes I, II (excluding Osage County, Oklahoma), III, IV and V wells, (42 U.S.C. §§ 300h-300h-8; 40 C.F.R. §§ 147.1850 and 1851)
- Public Drinking Water System Program (42 U.S.C. § 300f, *et seq.*; 40 C.F.R. Part 143-149)

#### FIFRA

- State Pesticides Certification and Training Plan (7 U.S.C. §136i; 40 C.F.R. Part 171)
- Experimental Use Permits (7 U.S.C. § 136c; 40 C.F.R. Part 172)
- Delegated State Enforcement and Training (7 U.S.C. § 136u)
- Enforcement Primacy (7 U.S.C. § 136w-1)
- Public Health, Quarantine, and Crisis Exemptions (7 U.S.C. § 136p; 40 C.F.R. Part 166)
- Special Local Needs Registrations (7 U.S.C. § 136v; 40 C.F.R. Part 162)

#### TSCA

- Lead-Based Paint Activities in Target Housing and Child-Occupied Facilities (“Lead-Based Paint Program”) (15 U.S.C. § 2682; 40 C.F.R. Part 745)
- Lead-Based Paint Renovation, Repair and Painting, and Pre-Renovation Education Activities in Target Housing and Child Occupied Facilities (15 U.S.C. § 2684; 40 C.F.R. Part 745)
- Asbestos in Schools (15 U.S.C. § 2643; 40 C.F.R. Part 763)

#### Tribal Consultation

EPA greatly values its government-to-government relationships with the federally recognized tribes in Oklahoma. Section 10211(a) of SAFETEA includes no procedural requirements to govern EPA’s mandatory decision. However, consistent with longstanding Agency policy,<sup>8</sup> EPA invited Indian tribes located in Oklahoma to consult with the Agency and to provide their views regarding the State’s July 2020 request. On September 8, 2020, EPA conducted a tribal consultation meeting open to all tribes in Oklahoma. The Agency also conducted individual consultation meetings with seven tribes in Oklahoma. EPA has carefully reviewed and considered input provided by the tribes in developing this decision.

Consistent with the Agency’s various statutory and regulatory authorities, EPA will continue to exercise oversight of the State’s environmental programs as they are implemented throughout Oklahoma, including in the areas of Indian country covered by this approval, consistent with its general trust responsibility to federally recognized tribes. EPA encourages coordination and cooperation among the tribes, the State, and EPA, and the Agency is prepared to work collaboratively with our inter-governmental partners on environmental issues of mutual interest.

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<sup>8</sup> See, e.g., EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 8, 1984; EPA Policy on Consultation and Coordination with Indian Tribes, May 4, 2011.

Conclusion

As required by Section 10211(a) of SAFETEA, EPA approves the State of Oklahoma's July 22, 2020, request to administer the environmental regulatory programs described above in the specified areas of Indian country.

Sincerely,

A handwritten signature in blue ink, appearing to read "A. Wheeler", with a long horizontal flourish extending to the right.

Andrew R. Wheeler