



STATE OF OKLAHOMA
OFFICE OF THE
SECRETARY OF ENERGY & ENVIRONMENT

August 3, 2023

James Ray
United States Environmental Protection Agency
Office of Science and Technology, Standards and Health Protection Division
1200 Pennsylvania Avenue NW (MC 4305T)
Washington, D.C. 20460

Re: Comments related to the Proposed "Federal Baseline Water Quality Standards for Indian Reservations" (Docket ID No. EPA-HQ-OW-2016-0405)

Dear Mr. Ray:

On behalf of the Oklahoma Secretary of Energy and Environment (OSEE) and the Oklahoma Department of Environmental Quality (ODEQ), please accept the following comments related to the U.S. Environmental Protection Agency ("EPA")'s proposed *Federal Baseline Water Quality Standards for Indian Reservations*, 88 Fed.Reg. 29,496 (May 5, 2023).

Since 2016, the State of Oklahoma has been monitoring the progress of EPA's rulemaking efforts related to the above-referenced rule. Beginning with the letter of December 20, 2016, co-signed by the ODEQ and the Oklahoma Water Resources Board, and continuing through today, significant uncertainty has existed around the need for, applicability of, and implementation of Federal Baseline Water Quality Standards (WQS) for Indian reservations in Oklahoma. This letter serves to summarize OSEE and ODEQ's continued concerns with this proposed rulemaking.

1. SAFETEA

After the ruling in *McGirt v. Oklahoma*, 140 S. Ct. 2452, and additional Oklahoma cases expanding the *McGirt* decision, EPA currently recognizes the existence of six (6) Tribal reservations in the State. However, the exterior boundaries of these reservations are not clearly identified. As a result of the impacts of the *McGirt* decision, in July 2020, the State of Oklahoma requested EPA approval under § 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (SAFETEA) to administer, in certain areas of Indian Country, the State's environmental regulatory programs previously approved for administration outside of Indian Country. One of those approved programs addresses water quality standards and implementation plans (33 U.S.C. § 1313; 40 C.F.R. Parts 130 and 131). On October 1, 2020, EPA approved the State of Oklahoma's 2020 SAFETEA request. Based on this approval, EPA has indicated that the proposed Federal Baseline Water Quality Standards would not

apply in Oklahoma.¹

However, although recognizing that Oklahoma's current approval to administer WQS in the stated areas of Indian reservations remains in place, EPA also indicated in that same footnote in the proposed rule that the future status of the 2020 SAFETEA approval is not certain. *See id.* On December 22, 2021, EPA proposed to withdraw and reconsider the 2020 SAFETEA approval, and invited public comments. On January 31, 2022, the Governor of the State of Oklahoma submitted a letter to EPA in opposition to the proposed withdrawal of Oklahoma's authorization under SAFETEA on both substantive and legal grounds. No additional action on this proposed withdrawal and reconsideration has occurred. If EPA withdraws its decision and implements the proposed rulemaking in Oklahoma, then a vast portion of the State of Oklahoma could potentially be controlled by EPA's baseline WQS indefinitely. If EPA does not withdraw its 2020 SAFETEA approval, the State of Oklahoma will continue to appropriately and effectively administer environmental regulatory programs in areas of the State where the SAFETEA statutory elements are met. This uncertainty makes it very difficult to have a meaningful opportunity to comment on the proposed rulemaking's potential impact in Oklahoma. As such, EPA should explicitly exclude Oklahoma from the applicability of the proposed rulemaking. If EPA takes future action on the 2020 SAFETEA request approval, then EPA should initiate a separate rulemaking action prior to applying any Federal Baseline Water Quality Standards in Oklahoma in order to allow the State and the impacted tribal nations a meaningful opportunity to comment on the potential consequences of the applicability of such standards.

2. Economic Impact

The economic impact cannot be accurately calculated without knowing the status of the 2020 SAFETEA approval and a thorough understanding of Tribal reservation boundaries within the State. Do the approximately 164 NPDES individual discharger permits that are located within reservations potentially covered by baseline WQS include permits in Oklahoma? What about the approximately 270 permits located within 5 miles upstream from those reservation? Based on EPA documents, it has acknowledged the recognition of six (6) Tribal reservations in Oklahoma. Did EPA include in its estimated costs the reservations in Oklahoma? It is impossible for ODEQ to have any confidence in the anticipated economic impacts stated by EPA: from \$15.5 million to \$30.5 million annually, plus one-time costs of \$6.1 million and \$1.2 million, respectively.

3. Technical Aspects

While most of the issues outlined above center on legal and jurisdictional aspects of the proposed rulemaking, there are also technical aspects of the proposed standards worth exploring. First, the narrative nature of the criteria relies heavily on translators to arrive at actionable numeric criteria. The decision-making hierarchy created in the proposed translators more often than not would result in use of existing federal proposed WQS. Since Oklahoma's EPA-approved WQS, like those of all states, use the

¹ *See Federal Baseline Water Quality Standards for Indian Reservation Waters*, 88 Fed.Reg. 29,496, 29,498 (May 5, 2023)(“In a few instances, EPA has determined that, due to unique jurisdictional frameworks enacted by Congress, certain states have jurisdiction to administer WQS on Indian reservations under the CWA. These include . . . reservation lands (excluding Tribal trust lands, Indian allotments, and certain Tribal fee lands) in Oklahoma. See, e.g., . . . Letter from Andrew R. Wheeler to The Honorable J. Kevin Stitt, Governor of the State of Oklahoma, Re: Approval of State of Oklahoma Request Under Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (October 1, 2020). (On December 22, 2021, EPA publicized a “Notice of Proposed Withdrawal and Reconsideration of October 1, 2020 SAFETEA Decision and Opportunity for Comment.” EPA's reconsideration is currently ongoing, and Oklahoma's approval to administer WQS in the stated areas of Indian reservations remains in place during that process.)”).

proposed federal standards as a starting point, the end result of the translation proposed in this rulemaking would often be identical to the existing state standards. The main area of departure would result from EPA's proposed introduction of cultural and traditional uses into the Tribal baseline standards. These proposed uses are not well-defined, and these uncertainties will only add more confusion and complexity to the process. Implementation decisions become paramount and absent codified implementation regulations, inconsistencies in implementation between EPA Regions and from one case to the next within a Region will be likely, if not unavoidable.

In cases where the resulting federal standards deviate significantly from the established state standards, the well-established checkboard nature of Indian Country in Oklahoma will make implementation difficult, at best. As noted above, in EPA's own response to comments during its 1991 rulemaking, making assessment and permitting decisions on small segments of waterbodies for which standards have been established by two sovereign entities becomes difficult, if not practically impossible. Fragmenting the WQS framework within Oklahoma is more likely to result in untenable confusion than it is increased protection of Tribal waters.

For all the reasons outlined above, OSEE and ODEQ strongly believe that EPA should not finalize the proposed rule in its current form, and reserve the right to amend and/or supplement these comments if EPA takes future action on the 2020 SAFETEA approval. We look forward to the opportunity for continued constructive dialogue on these very complex but vitally important issues.

Sincerely,

A handwritten signature in cursive script that reads "Ken McQueen".

Ken McQueen
Secretary of Energy and Environment
State of Oklahoma