THE PETROLEUM ALLIANCE
OF OKLAHOMA

August 8, 2022

Submitted via electronic mail:
OW-Docket@epa.gov
and the Federal eRulemaking Portal:
http://www.regulations.gov

Water Docket EPA-HQ-OW-2022-0128
U.S. Environmental Protection Agency
EPA Docket Center
WJC West Building, Room 3334
1301 Constitution Avenue NW
Washington, D.C. 20004

Re: Docket EPA-HQ-OW-2022-0128
Clean Water Act Section 401 Water Quality Certification Improvement Rule

Dear Sir/Madam:

The Petroleum Alliance of Oklahoma (The Alliance) is pleased to provide these comments respecting the above-captioned docket. The Alliance represents more than 1,400 individuals and member companies and their tens of thousands of employees in the upstream, midstream, and downstream sectors and ventures ranging from small, family-owned businesses to large, publicly traded corporations. Our members produce, transport, process and refine the bulk of Oklahoma's crude oil and natural gas.

In these comments, The Alliance focuses principally on the impacts to The Alliance's members that would result from delegation of Section 401 authority to eligible tribes situated in Oklahoma. In addition to submitting these comments, The Alliance has joined with the American Petroleum Institute, the American Exploration & Production Council, and others in submitting comprehensive and detailed comments on the proposed rule, including proposed changes from the 2020 rule, and incorporates those comments here by reference.

I. Executive Summary

The U.S. Environmental Protection Agency (EPA) must recognize the State of Oklahoma's existing unique legal framework as it relates to tribes. Section 401 certifications are uniquely complex in Oklahoma, which is home to 39 federally recognized tribes. To address these complexities, Congress enacted a provision of federal statute called the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (SAFETEA)[1] designed to limit significantly in Oklahoma the general delegation rule promulgated by the EPA. Under this federal statute, as intended by Congress, and for Oklahoma in particular, EPA lacks the authority to delegate Section 401 responsibility to an eligible Oklahoma tribe

[1] Pub. L. 109-59, 119 Stat. 1144, 1937 (August 10, 2005).

without the State of Oklahoma agreeing to said delegation and executing a cooperative agreement between the tribe and the appropriate state agency to jointly plan and administer program requirements.

The State of Oklahoma is very successful in administering this program under existing certification authority and procedures. Through this administration, Oklahoma provides project proponents and stakeholders with consistency and regulatory certainty in the approval process. Any rules promulgated and finalized by EPA regarding Section 401 certifications must not exceed this existing federal statutory framework or otherwise circumvent the existing and fully functional legal framework regarding treatment of eligible tribes in a manner similar to states (TAS).

In addition to ensuring the proposed rule does not circumvent existing federal statutes addressing Oklahoma's unique circumstances and complex legal landscape, The Alliance urges EPA to reduce the jurisdictional complexity of Section 401 certification decisions by recognizing Oklahoma state agencies' roles in making such decisions.

Moreover, EPA should bifurcate and defer the TAS components of the Section 401 rulemaking so that this significant and inherently complex issue can be fully analyzed and ensure that all interested stakeholders and parties are properly and fairly noticed to ensure robust and substantive participation.

EPA must also remain mindful of recent U.S. Supreme Court legal precedent in *Oklahoma v. Castro-Huerta*, its narrowing of tribal jurisdiction, and its emphasis that a state is generally "entitled to the sovereignty and jurisdiction over all territory within her limits."

II. Introduction

The Alliance's members are dedicated to conducting their operations in an environmentally responsible manner. The Alliance's members diligently strive to comply with regulations promulgated by Oklahoma state agencies and the EPA. Our members routinely work with those agencies to identify more efficient and effective means of ensuring environmental protection. In turn, Oklahoma state agencies have a long and documented track record of working with and consulting its citizens as the agencies work to carry out their mandate.

The Clean Water Act (CWA)[2] provides that a federal agency cannot issue a license or permit to conduct any activity that involves the discharge into a water of the United States unless a state or tribe with TAS where the discharge would originate grants either a Section 401 certification that the discharge will comply with applicable provisions of the CWA or waives certification.[3] While the Section 401 certification rule proposed by EPA could significantly affect the ability of The Alliance's members to produce the energy resources that fuel the nation and the world, the industries potentially affected by the proposed Section 401 rule extends well beyond the oil and gas sector.

[2] Technically known as the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq*.

[3] 87 Fed. Reg. 35318 (June 9, 2022). The certification must affirm the discharge will comply with Sections 301 (effluent limitations), 302 (water quality related effluent limitations), 303 (water quality standards), 306 (national standards of performance), and 307 (toxic and pretreatment effluent standards) of the CWA.

A project proponent's need to secure timely Section 401 certification can determine the fate of road and bridge infrastructure development and improvements, the construction of oil and natural gas pipelines, the construction of transmission lines that are essential to meeting the nation's growing demand for electrical energy, renewable energy projects seeking interconnections with those transmission lines, airport expansion and modernization, and the agricultural industry, to name a few.

We urge the EPA to keep this context in mind in considering changes to the 2020 Section 401 rule.

Revision and Action Requested. The EPA should ensure that the final rule facilitates efficient and timely responses keyed to impacts to water quality resources from states that receive requests for Section 401 certification. Section 401 must not become a device used to fatally delay projects based on non-water quality criteria.

III. Deferral of Finalizing Rule until after WOTUS Ruling by Supreme Court

The Alliance requests that EPA defer this rulemaking until the U.S. Supreme Court rules upon the critical issue of the definition of "Waters of the United States" (WOTUS). This deferral will ensure that the Section 401 rule does not supersede and up-end implementation of state certifications based upon an outdated WOTUS definition, that will likely be clarified and better defined in the coming October 2022 term of the U.S. Supreme Court.

The CWA limits discharge of a pollutant into navigable waters, which are defined as "waters of the United States." 33 U.S.C. § 1362(7). The scope of WOTUS has been long contested. On January 24, 2022, the United States Supreme Court agreed to review a case arising from the U.S. Court of Appeals for the Ninth Circuit. The Court's decision in that case may provide greater clarity about the scope of EPA's authority under the CWA.

Moreover, The Alliance is skeptical that a certifying authority could rely on impacts to waters not designated as waters of the United States to deny or even condition a certification request, despite the EPA's proposal to the contrary; the agency's jurisdiction does not extend so far.

Action Requested. The Alliance encourages the EPA to defer finalization of this rule until the Supreme Court's upcoming WOTUS decision is issued and can be integrated into this rule.

IV. Section 401 Certifications are Uniquely Complex in Oklahoma

Thirty-nine federally recognized tribes call Oklahoma home. The Alliance appreciates and values what Indians and tribes contribute to the state's economy, culture, and diversity. The tribes are a vital part of our state. Oklahoma's non-Indians and tribal members alike share a common interest in economic prosperity. Over the course of the past three years, the Supreme Court of the United States, and lower courts in response, have determined that much of eastern and southern Oklahoma remains Indian country with roughly 2 million people, the vast majority non-Indians, living on as many as six reservations that were not disestablished at statehood in 1907. Indeed, Tulsa, the state's second largest city is now encompassed within a reservation.

Oklahoma currently is responsible for making certification decisions in much of the state;[4] that provides project proponents a single point of contact as well as transparency and predictability in the certification process. Granting Section 401 certification authority to eligible tribes in Oklahoma without the state's agreement would not be lawful. Moreover, it would create a needlessly complex regulatory pattern where the potential for a duplication of effort and conflicting certification decisions could make permitting a project of whatever kind difficult or impossible.

Revision and Action Requested. The Alliance urges EPA to reduce the jurisdictional complexity of Section 401 certification decisions by recognizing Oklahoma state agencies' roles in making such decisions as this will adhere to existing federal law (including SAFETEA), will best serve the public, and facilitate necessary development while also protecting the environment.

A. Bifurcating and Deferring Issue of Treatment in a Manner Similar to a State

Amidst an otherwise comprehensive and extensive review of proposed changes to the Section 401 rule, EPA also introduced the ancillary question of TAS into this rulemaking. This separate issue compounds the complexity of the proposed rule, potentially limits key stakeholder participation, and also could infringe upon existing federal law that governs this important issue within Oklahoma.

The EPA acknowledged there currently are no rules in which TAS is tailored to Section 401; in the past eligible tribes that received authorization to administer the Section 303(c) program also were authorized to implement a Section 401 certification. In the rulemaking, the EPA then goes on to propose a Section 401-specific set of requirements and procedures for tribes seeking TAS for purposes of making Sections 401(a)(1) and 401(d) certification decisions and to exercise their rights as a "neighboring jurisdiction." 87 Fed. Reg. at 35370.[5]

The Alliance believes it is inappropriate to interject changes with respect to TAS within what are already comprehensive and complex proposed changes to Section 401 regulations. The Section 401 regulations are complex and controversial in and of themselves without adding the ancillary issue of TAS. TAS itself has a long and complex history across multiple federal environmental regulatory programs.

[4] The EPA website suggests that the Pawnee Nation has been authorized to implement the water quality standards program which apparently implies authority to implement the Section 401 program. The website provides little additional information. https://www.epa.gov/tribal/tribes-approved-treatment-state-tas#regulatory-and-administrative-tas (last visited July 22, 2022). Certain other limited areas were excepted by the Administrator's decision pursuant to Section 10211(a) of SAFETEA.

[5] A federal agency that receives a certification request must notify EPA of that request. If EPA then determines the discharge "may affect" water quality of another state or tribe (the "neighboring state or tribe), the EPA must notify that state or tribe. If that jurisdiction determines the discharge would violate water quality requirements within its jurisdiction it can object to the certification and request that the permitting agency conduct a hearing. At that hearing the EPA must submit its own evaluation and recommendations. The permitting agency then must condition the permit or license as may be necessary to ensure compliance with water quality requirements.

The attempt to address both issues in a single rulemaking does not do justice to the complexity of TAS issues generally, or specifically within the CWA context. The Alliance believes that TAS decisions merit more careful and thorough analysis and discussion than is apparent in the proposed rule.

The Alliance is concerned that the proposed rule to address Section 401 certifications did not provide adequate notice to potential stakeholders that might otherwise be interested in the TAS issue.

Action Requested. Accordingly, The Alliance requests that this portion of the proposed rule be deferred to a rulemaking on its own where the issue can be fully analyzed and addressed, and all interested stakeholders and parties fairly noticed.

Since the complex issue of TAS has been included in the proposed rule, as a general matter, The Alliance acknowledges that Section 518(e)[6] of the CWA generally authorized the EPA to treat eligible tribes in a manner similar to states for a variety of purposes, including administering the principal CWA programs. That same provision of the CWA establishes the eligibility criteria for approval of a TAS application. 81 Fed. Reg. 30183, 30185 (May 16, 2016).[7]

Significantly, however, the proposed Section 401 rule fails to acknowledge that in each case a TAS decision requires a particularized and factual inquiry into, among other things, the EPA's authority to delegate programs to a tribe. Such a discerning inquiry would reveal that an explicit federal statutory provision, as well as other legal principles, allocate Section 401 certification authority in most of Oklahoma to the State of Oklahoma.

Revision and Action Requested. Absent bifurcating and deferring the TAS issue into a separate rulemaking, in the alternative, at a minimum, the proposed rule under Section 401 must be revised to expressly acknowledge that a TAS decision is case-specific and requires a particularized and individual factual inquiry into, among other things, the EPA's authority to delegate certain programs to a tribe. The current Section 401 rule provides the appropriate framework for such an analysis.

B. The Section 401 Rule Must Reflect the Delegation Limits Imposed in Oklahoma by SAFETEA

The State of Oklahoma is perhaps the most important example of a state with a legal structure that severely limits the general delegation rules promulgated by the EPA. Section 10211 of SAFETEA[8] simplified the TAS legal construct in Oklahoma and largely supersedes the role of Section 518 in Oklahoma.

Subsection (a) of Section 10211 provides that if the EPA Administrator has approved regulatory programs submitted by the State of Oklahoma for implementation of federal environmental programs

[6] 33 U.S.C. § 1377.
[7] As a general rule, EPA will not recognize state jurisdiction over federal regulatory programs in Indian country.
[8] Pub. L. 109-59, 199 Stat. 1144, 1937 (Aug. 10, 2005).

in non-Indian country, then upon request of the State, the Administrator shall approve the State to administer the State programs within certain areas of Indian country.

Significantly, SAFETEA does not provide the EPA Administrator discretion to consider the merits or circumstances of the State request or to impose conditions on approval; if the State's request falls within the statute's parameters, then the Administrator must grant the State's request. It is virtually a ministerial task on the Administrator's part.

On July 22, 2020, the Governor of Oklahoma duly requested approval under Section 10211(a) of SAFETEA to administer in Indian country those environmental programs that had previously been approved by the EPA for application outside Indian country.[9] In a letter to the Governor dated October 1, 2020, the Administrator acknowledged that despite its general practice with respect to Indian country, the EPA must apply the statutory mandate embodied by SAFETEA[10] and grant the Governor's request.

The EPA Administrator's approval applied to all of the State of Oklahoma's existing EPA-approved regulatory programs, including, but not limited to, water quality standards and implementation plans[11] and national pollutant discharge elimination system programs[12] of the CWA implemented by a range of state agencies.[13]

Subsection (b) of Section 10211 of SAFETEA is also relevant to understanding the state's exclusive regulatory authority over most of the state. Subsection (b) specifies that EPA may extend

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[9] The state did not seek authority over certain excepted lands, including Indian allotments, lands held in trust by the United States on behalf of individual Indians or a tribe, or certain lands owned in fee by a tribe.

[10] The Administrator's letter to the Governor noted that "[to the extent EPA's prior approvals of these State programs excluded Indian country, any such exceptions are superseded for the geographic areas of Indian country covered by this approval under SAFEETEA."

[11] Section 303, 33 U.S.C. § 1313,

[12] Section 402, 33 U.S.C. § 1342.

[13] On December 22, 2021, EPA proposed to withdraw and reconsider the October 1, 2020, decision approving the Governor of the State of Oklahoma's request to extend approval of the state's EPA-approved environmental regulatory programs to certain areas of Indian country within the state of Oklahoma. *See* https://www.epa.gov/ok/proposed-withdrawal-and-reconsideration-and-supporting-information (last visited July 19, 2022). EPA acknowledged the request was made pursuant to Section 10211(a) of SAFETEA. EPA stated it sought greater consultation with affected tribe and the need to review implementation of EPA programs by the State of Oklahoma. https://www.epa.gov/system/files/documents/2021-12/notice-of-proposed-withdrawal-and-reconsideration_0.pdf (last visited July 19, 2022). In a comment letter dated January 31, 2022, the State of Oklahoma forcefully rebutted the EPA's authority to reconsider or withdraw the Administrator's earlier decision to approve the state's request to extend approval of the state's EPA-approved environmental regulatory programs into certain areas of Indian country within the state. *See* https://www.epa.gov/system/files/documents/2022-02/state-of-oklahoma-comment.pdf. The Alliance is convinced, based on an exhaustive review of the record and a careful review of the law, that the EPA lacks authority to reverse or withdraw the previous Administrator's decision. As the state's letter of January 31, 2022, observed, "an agency literally has not power to act … unless and until Congress confers power upon it," *citing Louisiana Pub. Service Comm'n v. F.C.C.*, 476 U.S. 355, 375 (1986). The state's letter also comprehensively reviews the EPA's consultation with affected tribes that preceded the agency's decision to grant the state's request to administer state programs in areas of the state that are Indian country.; no further consultation is needed.

treatment as a state status for purposes of administering environmental programs to an eligible Oklahoma tribe only if the state voluntarily enters into a cooperative agreement with the tribe for treatment of a tribe as a state and concurrently agrees to joint administration of an environmental program's requirements.[14]

EPA has been aware of this statutory provision for some time. As noted above, Section 518 of the CWA, adopted as part of the more comprehensive 1987 amendments to the CWA, authorized EPA to treat eligible tribes in a manner similar to states.

Yet in 2016, the EPA issued an interpretive rule spelling out how the agency would implement Section 518 but acknowledged that SAFETEA expressly addressed TAS in Oklahoma under EPA's statutes. 81 Fed. Reg. 30183, 30193 (May 16, 2016):

> [S]ection 10211(b) established a unique TAS requirement with respect to Indian tribes located in the State Oklahoma. Under Section 10211(b), tribes in Oklahoma seeking TAS under a statute administered by EPA for the purpose of administering an environmental regulatory program must, in addition to meeting applicable TAS requirements under the EPA statute, enter into a cooperative agreement with the state to jointly plan and administer program requirements. This requirement of SAFETEA exists apart from, and in addition to, existing TAS criteria ….

81 Fed. Reg. 30183, 30193 (May 16, 2016).

We provide these materials to make clear that delegation of authority to tribes in Oklahoma, and potentially elsewhere, must be the subject of a careful and searching inquiry into the EPA's authority to make such a delegation.

Revision and Action Requested. At a minimum, the Section 401 rule should be revised to expressly acknowledge the delegation limits imposed by SAFETEA and that in Oklahoma, EPA lacks the authority to delegate Section 401 responsibility to tribes.

C. EPA lacks the Resources to Act as the Certifying Authority

Even if SAFETEA did not apply,[15] the underlying law likely would require EPA to act at the certifying authority on behalf of tribes that do not have "authority to give such certification." 87 Fed. Reg. at 35358. Yet as noted elsewhere, there are 39 federally recognized tribes in Oklahoma. Some tribes have judicially recognized reservations that appear to occupy significant parts of the state. Numerous rivers and streams traverse these recognized reservations and may traverse more than one recognized reservation.

[14] Such a cooperative agreement would require approval by the EPA Administrator after notice and an opportunity for public hearing.

[15] Simply to reiterate, The Alliance firmly believes SAFETEA imposed a mandatory, non-discretionary duty on the Administrator once the Governor submitted a request consistent with SAFETEA.

Also, more that 2 million people may live in these areas, and a host of activities – from oil and gas to renewable energy to electricity and road infrastructure – routinely require certification decisions in the course of a year. The EPA plainly lacks the resources to step into the state's role to issue timely certifications – in no event extending beyond a year from the date a certification request is received – for certification requests across nearly half of the state.[16]

Moreover, an EPA role as certification decisionmaker would not overcome the myriad issues described in Part V, below. Even if the EPA could allocate adequate financial resources to the task – a prospect that is unlikely – the result would be duplicative, costly, and potential inconsistent, and arbitrary and capricious, decisions.

D. The Supreme Court's Recent Decision in *Oklahoma v. Castro-Huerta*

Given the numerous complexities that relate specifically to Oklahoma, for this rulemaking, EPA must remain mindful of the U.S. Supreme Court's rulings in the last three years regarding jurisdictional issues between the state and the tribes.

While these two cases focused on criminal jurisdiction issues between Oklahoma and the tribes, the lessons from these significant decisions provide context for potential future jurisdictional questions that may arise in the civil context, such as the CWA Section 401 rulemaking and the parameters for state and tribal consultation.

Accordingly, when crafting the final rule, EPA should keep these jurisdictional issues and complexities at the forefront as they may manifest themselves in future civil jurisdictional issues.

In *McGirt v. Oklahoma*, 140 S. Ct. 659, 591 U.S. ___ (2019), the Supreme Court held that Congress had never terminated the Creek Nation's reservation in eastern Oklahoma and therefore the reservation remained Indian country. Based on the Supreme Court's reasoning in *McGirt*, Oklahoma courts subsequently held that other reservations in eastern Oklahoma had not been terminated and those reservations remained Indian country. As a result, under *McGirt* nearly 40% of Oklahoma's land mass became encompassed within Indian country, home to roughly 2 million people. The land ownership patterns are complex and not easily understood.[17]

[16] As the state has explained, the Oklahoma agencies manage 4,258 minor source air permits, 1,415 synthetic minor permits, 127 major source permits, and 44 PSD permits. They also manage oversight of 806 water supply systems, 7,313 waste water systems, provide oversight of 14,170 EPCRA Tier II facilities plus 73 solid waste disposal facilities, 5 Class I Underground Injection Wells, 1,113 Class V Underground Injection Wells, 193 RCRA small quantity generators, 18 RCRA corrective action sites, as well as numerous other permits issued under other environmental programs just within the area of the state that would be affected were the EPA to withdraw the state's request to administer those environmental programs within what is now seen as Indian country. It is inarguable that neither the tribes nor the EPA has the resources to administer or oversee even a small percentage of these facilities.

[17] The complexity of land ownership patterns in Oklahoma is reflected in the difficulty of conducting title opinions in that state. D. Faith Orlowski & R. Burke, OKLAHOMA INDIAN TITLES, 29 Tulsa L. J. 361 (1993).

The *McGirt* decision had manifold consequences for the state of Oklahoma. Uncertainties about the scope and range of state and tribal civil and criminal jurisdiction within Indian country have risen to the forefront.

Historically, the federal courts have first looked to whether Congress has spoken to the issue. In this instance, Congress has spoken: SAFTEA lodges principal implementation responsibility for federal environmental programs in the hands of the state. In the absence of express Congressional direction, courts proceed cautiously in sanctioning tribal regulation of non-members or non-Indian fee lands. Absent an explicit delegation from Congress,[18] a tribe would have to demonstrate retained, inherent authority either to (a) "regulate through taxation, licensing, or other means the activities of nonmembers who enter into consensual relationships with the tribe or its members, or (b) to "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v United States*, 450 U.S. 544, 565-66, 101 S. Ct, 1245 (1981).

The Court's most recent decision in June 2022 in *Oklahoma v. Castro-Huerta,* 142 S. Ct. 2486, 597 U.S. ___, 2022 U.S. Lexis 3222, (2022) may introduce an additional layer of uncertainty in the question of tribal regulation (and EPA regulation in the absence of authorized tribes) of non-Indians and non-Indian fee lands. *Castro-Huerta* suggests the Court recognizes the jurisdictional uncertainties that resulted from the *McGirt* decision and may be prepared to provide greater clarity over the interplay between state and tribal jurisdiction. In *Castro-Huerta*, the principal question was whether the federal government has exclusive jurisdiction in a case where a non-Indian commits a crime against an Indian, or whether the state and the federal government share jurisdiction. The majority held that the state and the federal government share concurrent jurisdiction. It appears the majority was concerned that the practical question of whether the *McGirt* decision might further exacerbate the challenges of pursuing justice for crimes committed in Indian country.

As such, the Court's decision displays a high level of pragmatism that may well be repeated in disputes over civil jurisdiction in cases where those regulated are not tribal members. In addition, in reaching its result the Court cited to previous decisions that emphasized that a state generally is "entitled to the sovereignty and jurisdiction over all territory within her limits." *Castro-Huerta*, *citing Lessee of Pollard v. Hagan*, 3 How. 212, 228 (1845). The Court's decision in *Castro-Huerta* suggests the Court will step in when it appears jurisdictional disputes could work an injustice.

V. The Practical Effects of Granting TAS to Tribes in Oklahoma would be Significant

The practical, on-the-ground impacts of granting eligible Oklahoma tribes TAS to make Section 401 certifications raises multiple practical issues that lend support to treating the State of Oklahoma as the appropriate regulatory authority.

To reiterate, a substantial portion of the state's landmass and over 2 million people could be significantly affected by a decision to grant TAS to eligible Oklahoma tribes. Moreover, granting Section

[18] The Oklahoma situation raises the novel question of the scope of an express delegation where a tribe's regulatory edict would affect largely non-Indian populations and non-Indian fee lands.

401 authority to tribes could unnecessarily complicate and delay Section 401 certifications, adversely impacting a broad range of industries.

Currently, there is essentially one point of contact in Oklahoma for any entity seeking a Section 401 certification.[19] The state has an established and well-understood process for reviewing requests for certification. Entities seeking certification can look to the state's long record of certification decisions to gain a clear insight into how the state treats such applications. That provides predictability and certainty for regulated entities.

Delay, uncertainty, and expense could also be the result if one or even several jurisdictions asserted serial authority to conduct Section 401 certification reviews. A similar result could occur if neighboring jurisdictions were to claim that a proposed discharge could affect their water resources.[20] In either circumstance it is easy to imagine an outcome where different jurisdictions reach very different, and conflicting, outcomes as the result of Section 401 reviews.

It also is possible, even likely, that if multiple jurisdictions asserted serial review authority the allowable time for review could stretch well beyond the statutory limit of one year. Project proponents could encounter multi-year delays in securing approvals.

Moreover, if the EPA continues to decline to weigh in on whether reviewing agencies can require the project proponent to withdraw and resubmit a request for certification, the process could be even further delayed. Other commenters have pointed out that some states have used such tactics to effectively veto projects the reviewing agency disapproved of.

If Oklahoma is not the only certifying authority or if EPA revokes approval of Oklahoma's environmental program in tribal lands under SAFETEA, then any oil and natural gas project applicant requiring a federal permit for discharges into waters of the United States may:

- Encounter a patchwork of tribal and state certifying authorities for oil and natural gas projects across Oklahoma that could significantly delay or stop projects,
- Lead to costly and burdensome requirements on applicants by the various certifying tribal authorities for projects that construct in multiple tribal jurisdictions,
- Impact Oklahoma's ability to access interstate commerce for crude oil and natural gas products.

It is important to note that in 2021 Oklahoma was the nation's fifth-largest producer of marketed natural gas and the sixth-largest producer of crude oil. (Overall, the state consumed only one-third of the energy it produced.) As of January 2021, Oklahoma had five operable petroleum refineries with a combined daily processing capacity of almost 522,000 barrels per calendar day. That is nearly 3% of the

[19] The Alliance acknowledges that the Pawnee Nation has received authority to administer the Section 303(c) water quality standards program and Section 401 certification programs. With that exception, the vast majority of the state now is subject to the state's environmental regulatory authority including Section 401 certifications.

[20] Such a situation is entirely plausible in northeastern Oklahoma where rivers and streams transect multiple jurisdictions.

total U.S. crude oil refining capacity[21] at a time when domestic refining capacity is constrained. Current events have dramatically demonstrated that oil and gas resources will continue to play an integral role in the nation's economy, contribute to the balance of payments, and support our national security.

Serial certification decisions also could significantly impact new pipelines in/out of Cushing, Oklahoma, which is home to approximately 14% of the nation's commercial crude oil storage capacity. The benchmark price in the domestic spot market for U.S. crude oil known as West Texas Intermediate (WTI) is set at Cushing[22]; a disruption of deliveries to and from that storage facility would send ripples through world oil prices.

VI. Conclusion

Based on its review and analysis of the proposed rule, The Alliance calls into question whether the proposed changes will provide a "more efficient, effective, and predictable certifying authority-driven certification process" consistent with water quality protection. As explained in the comments submitted by The Alliance in conjunction with other organizations, The Alliance is concerned that the proposed changes will have the opposite effect and therefore urges the EPA to retain the existing Section 401 rule. That rule provides a fair, efficient, and legally supportable certification process.

With specific respect to Oklahoma, The Alliance strongly believes that it is inappropriate to address tribal authorities in this proposed rule but to the extent the EPA intends to address tribal authority in the proposed rule the EPA must explicitly acknowledge that with modest exceptions the State of Oklahoma retains exclusive certifying authority. Congress has spoken clearly and explicitly on that subject and left no room for delegation of authority to eligible tribes in Oklahoma absent a cooperative agreement with the State of Oklahoma.

The Alliance appreciates this opportunity to provide comments to the EPA on this very important issue. If you have questions about these comments, please contact Brook Simmons at 405-601-2112.

Thank you for your consideration of these comments.

Respectfully,

Brook A. Simmons
President

[21] https://www.eia.gov/petroleum/refinerycapacity/archive/2021/table1.pdf (last visited July 22, 2022).

[22] https://www.eia.gov/todayinenergy/detail.php?id=20472(last visited July 22, 2022).

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