

Prepared Statement of the Honorable John L. Berrey, Chairman

Quapaw Tribe of Oklahoma (O-Gah-Pah)

To the Subcommittee on Superfund, Hazardous Waste and Regulatory Oversight

Senate Committee on the Environment and Public Works

Oversight Hearing on EPA Regulations and Impacts on State, Local and Tribal Governments

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Good afternoon Chairman Rounds, Ranking Member Markey, and members of the subcommittee. My name is John Berrey and I am the Chairman of the Quapaw Tribe of Oklahoma (O-Gah-Pah, or Tribe). I very much appreciate your kind invitation to appear today to discuss the many rules and regulations issued by the U.S. Environmental Protection Agency (EPA) and the impacts of those rules and regulations on Indian tribal governments.

Background and History of the Quapaw Tribe

The Tribe is a federally recognized Indian tribe, possessing all the attributes of sovereignty associated with that status. The Tribe's government is a mature, sophisticated government which provides a variety of programs and services to its tribal members as well as to the larger non-Indian community.

In the course of strengthening its capacity, the Tribe has aggressively pursued compacts and contracts under the *Indian Self-Determination and Education Assistance Act* and *Tribal Self-Governance Act*, so that today we, and not the United States, have primary responsibility for most programs and services historically managed by the federal government.

The Tribe has also demonstrated a strategic vision and business savvy that has generated employment and better incomes for tribal members and others, and has put the Tribe on a path to real economic self-sufficiency undreamed of in years past. Our Tribe, like many others, has been actively investing in growing our economy and our revenue base. As I know you are aware, most tribes lack the ability to fund their governmental services adequately through a

traditional tax base, in part because of the legacy of the allotment of tribal lands and also because of the limitations on tribal taxation jurisdiction. As a result, our Tribe—like many or most others—relies on tribally owned and operated enterprises to generate a substitute for revenues from typical governmental taxes and fees. There is a common misperception that these enterprises are just like any other commercial businesses. But in fact, the revenues they generate are the equivalent of federal and state tax revenues, and they fund governmental operations and services. Our Tribe—again, as is the case with most tribes—needs the revenues we generate from tribal enterprises. Federal program dollars are limited, and do not begin to meet the needs of the Tribe. The impact of federal policy and regulations on the ability of these enterprises to generate governmental revenues is the subject of my comments to the subcommittee.

The Quapaw Tribe has in recent years been focused on building and diversifying the tribal economy and revenue base. The Tribe has a world-class gaming resort, which is our biggest single employer. However, we have other important enterprises operating on tribal lands, including a construction enterprise and agricultural operations. The Tribe has begun a long-term project to develop a tribally-owned beef cattle and bison herd, with the ultimate objective of developing a beef processing business to market Quapaw beef products both in the United States and abroad.

A Brief History of the Downstream People

The Tribe historically was located in the American southeast, and its traditional name, the “O-Gah-Pah” (anglicized as “Quapaw”), means the “people who went downstream” or the “Downstream People.” The Tribe’s homeland for many centuries was near the confluence of the Mississippi and Arkansas Rivers within the present-day State of Arkansas. Despite two forced removals, our Tribe’s heart remains in Arkansas. A number of our Tribe’s members live in Arkansas and the soil in that state holds the remains of our ancestors.

The Quapaw people had good government-to-government relationships with France and, briefly, with Spain, beginning long before the United States became a country. Our relationship with the United States has been difficult at times. Following the Louisiana Purchase, the United States government began pushing our people off of their land. We were forcibly removed, first, to Caddo country in present-day Louisiana, where our nation faced

many hardships, including starvation. We returned to Arkansas, but were landless, and our hardships continued. In 1833, the United States removed the Tribe to a reservation in the far northeastern corner of present-day Oklahoma and far southeastern Kansas. This remains our home.

The Quapaw Tribe's Long Road to Regaining Self-Determination

As I noted, our relationship with the United States has at times been difficult. In the 19th century, most of our people were forced to flee the reservation because of the lack of federal protection during the Civil War. As few years later, the federal policy of allotment had enormous negative impacts on our people. In the early years of the 20th century, the rich lead and zinc fields on our reservation began to be exploited, which had temporary financial benefits for some, but which left the Tribe with a continuing legacy of environmental contamination. The federal government had a major role in the management of lead and zinc mining in Quapaw country, but did not always carry out this responsibility consistent with the laws and with its trust obligations. Today, the Tar Creek Superfund Site covers a large part of the Quapaw Reservation, including a significant portion of the Tribe's Indian lands.

The Tribe itself did not benefit from the short-term wealth generated by mining, and through most of the 20th century had very little governmental revenue. I am often reminded that when our first modern tribal office building was built more than 30 years ago, the only heating was provided by a wood-burning fireplace. Our Tribe, however, has never ceased to function as a tribal government.

Some 20 years ago, the Tribe began accelerating efforts to regain self-governance. Unfortunately, this proved to be difficult process, due to the continual resistance of the Bureau of Indian Affairs, even though we qualified under the procedures provided by Congress. Nevertheless, we finally achieved full self-governance in 2008.

As a result of all of this recent history, we were somewhat late in regaining self-governance. But since then, I believe the Quapaw Tribe has advanced as fast as or faster than almost any other tribe in the nation in the same period.

The Quapaw Tribe Today

Over the last decade, our focus has been on creating job opportunities for our people and on expanding tribal governmental services. Today, our Tribe's governmental services include:

- Health care benefits, including a burial benefit, for every member of the Quapaw Tribe;
- Social services for tribal members who need a range of assistance, from school clothing to utility aid;
- Housing services, including temporary emergency housing;
- Services to seniors, including housing, nutrition, and transportation;
- Law enforcement services, through the Quapaw Tribal Marshal;
- A full-service Fire and Emergency Medical Services Department, which has received accolades for its assistance to area emergency responders, including following the 2011 Joplin tornado;
- Tribal courts;
- Realty and trust services, which among other things manages Quapaw lands;
- An environmental regulatory department;
- A water utility;
- A full-service tribal library;
- A tribal cultural center and museum, along with a wide range of tribal cultural programs;
- Two modern day care centers, which serve both the tribal and greater communities;
- A tribal wellness center;
- Family services, including an Indian child welfare program; and
- Quapaw Counseling Services, which offers substance abuse programs and other forms of treatment.

All of these services require funding, and most would not be possible if we had to rely solely on federal program dollars. To generate governmental revenues the Tribe relies on its enterprises, which collectively make us one of the largest employers in the so-called “Tri-State” area where the state of Missouri, Kansas, and Oklahoma meet. Today, our tribal enterprises—our important and vital tax base—includes:

- Downstream Casino Resort, a five-diamond destination resort opened in 2008, and which has 374 guest rooms and luxury suites in two towers, a casino, five restaurants, a health club, an outdoor amphitheater, and The Pavilion, an indoor meeting and event facility with almost 30,000 square feet;
- The Downstream Q Store; a modern travel plaza, convenience grocery store, and liquor store located in Missouri just off Interstate 44 near the Downstream Casino Resort;
- Eagle Creek Golf Club, an 18-hole championship golf club located near the Downstream Casino Resort in Missouri;
- Quapaw Casino, which includes a gaming floor and restaurant;
- Quapaw C Store, a travel plaza and convenience grocery store;
- Quapaw Services Authority, a construction enterprise, which most recently has, under the direction of the Tribe’s Environmental Department, assisted with the remediation of lands within the Tar Creek Superfund Site business;
- Quapaw Mercantile Authority, a new tribal enterprise established to market Quapaw agricultural products, including beef and bison. Which recently opened its first retail outlet in Quapaw, Oklahoma; and
- Agricultural operations, which include: an organic greenhouse, which now fulfills most of the needs of the Downstream Casino Resort for vegetables and flowers, and which also harvest honey; and a developing canine security service.

The Tribe provided less than 50 jobs in 2002, but today has grown to become one of the largest employers in the Tri-State area, with the result that it is offering jobs to many tribal members as well as to members of the surrounding community. To sustain this tribal economy, it is necessary that the Tribe’s enterprises be in a position to function efficiently, and under a reasonable regulatory regime. For my comments, I would ask you to keep in mind, again, that

Indian tribes lack a sufficient tax base, and therefore must generate almost all of their governmental revenues through enterprises. Because of the relatively small size of tribal governments, regulations in many instances can have a much more costly impact than results for state and local governments.

EPA Rules and Regulations and their Impact on the Quapaw Tribe

As I noted, a large portion of our Tribe's land base is contaminated, at least to some degree. Indeed, the Tar Creek Superfund Site was the No. 1 Superfund Site in the nation until recently, when it was ranked as No. 2. Actual cleanup of Quapaw Indian lands began only recently, and remains a small-scale program addressed only to the outlying and least-contaminated areas. This remediation work largely has been conducted by the Tribe through cooperative agreements with the EPA and through intergovernmental agreements with the Oklahoma Department of Environmental Quality.

Because of the ongoing cleanup, we have extensive experience working with the EPA. The EPA's Superfund process is cumbersome and sometimes inefficient, as is reflected in the enormous sums of money the EPA has expended at Tar Creek over the last more than 30 years, with relatively little apparent impact. Since the Quapaw Tribe assumed the lead in the cleanup of Tar Creek, the remediation process has increased in speed and efficiency. Delegating greater authority to Indian tribes under Superfund and other federal statutes likely would have similar effects on the speed and efficiency of other environmental cleanups, resulting in reductions in expenditures of tax dollars.

For instance, delegating program authority to tribes under the *Clean Air Act* and the *Clean Water Act* would result in actual benefits to the environment instead of increasing bureaucratic inefficiencies. As with so many federally administered programs, tribes are better equipped to address local environmental issues. But the current EPA process for obtaining "Treatment as a State" status under the CAA or CWA is very time-consuming and expensive and is rarely granted.

Since 2009, the EPA has issued more than 1,000 rules and regulations impacting state, local and tribal governments as well as the private sector. Below is a list of some of the new, or

newly tightened *environmental* regulations that have affected, or have the potential to affect, our Tribe:

1. Newly tightened Public Water Supply regulations;
2. Newly tightened Underground Storage Tank regulations;
3. New spill response (SPCC) rules;
4. New “Waters of the U.S.” rule;
5. Newly tightened air emission regulations (New Source Performance Standards);
6. Newly tightened construction storm-water regulations; and
7. New environmental due diligence requirements for Fee-to-Trust applications.

I will address a few of the impacts on our Tribe of these regulatory changes.

Environmental Site Assessments and Fee-to-Trust Applications

Many tribes, including the Quapaw Tribe, seek to consolidate their land holdings by buying land and applying to the BIA to have it taken into trust. The trust status is important for purposes of tribal jurisdiction, taxation, and other reasons, and land is taken into trust for any number of purposes including housing, energy, hospitality, grazing, ceremonies, and others.

As part of the fee-to-trust process, the BIA requires tribes to prepare “Phase I Environmental Site Assessments” (ESA). The EPA was directed by Congress to establish standards and practices for ESAs and these regulations provide that ESAs must be prepared one year before a trust acquisition. The regulations also say that specific elements of the ESA—site interviews, site visits, the record review, searches for recorded environmental cleanup liens, and others—must be conducted or updated within 180 days (six months) of the date of acquisition.

Prior to this 2005 rule, ESAs were valid for up to 12 months, twice as long as the current rule. In reviewing and considering fee-to-trust applications, the Interior Department routinely takes many months and in most cases years to make a decision on the application. With major components of the ESA expiring after 180 days, tribes are required to conduct additional

time-consuming and expensive updates, which hinder development and result in weaker tribal economies than need be the case.

With inevitable delays in Interior's review of trust applications, one solution to this problem is for EPA to eliminate the 180 day requirement for Indian trust land transactions or, at minimum, return to the 12 month threshold for potential updating elements in the ESA.

Other Rules and Regulations and Impacts on Indian Country

As the subcommittee knows, the EPA has been churning out rules and regulations governing all manner of American business and industrial activity. Just this month, the EPA issued its Final Rule for minor sources in Indian country in the oil and natural gas sectors. While we are still studying this rule, the subcommittee should be aware that this is only the latest in a long line of federal rules and regulations—such as the BLM's hydraulic fracturing rule and the BLM's flaring and venting rule—aimed at severely curtailing conventional energy development on Indian lands.

These burdensome rules are combined with the need to get federal approvals for land appraisals, leases, rights-of-way and easements, and other business agreements.

While the Quapaw Tribe is not an oil or gas producer, energy tribes across the country are being besieged by the actions of federal agencies, including the EPA. Although the worst poverty in America remains in tribal communities, some Indian tribes have made great strides in creating jobs and household incomes for their members and the surrounding communities.

For tribes that rely on revenues from timber, oil, gas coal and other natural resources, these federal rules and regulations have a stifling effect on tribal businesses, with severe impacts on the government programs and services tribes provide.

Technical Assistance and Capacity-Building

As time progresses, tribes are increasingly emphasizing the establishment of businesses that benefit their members, and are becoming more and more sensitive to the often heavy hand of

federal rules and regulations.

Some regulations are redundant and burdensome and provide little benefit to tribes, e.g. the Bureau of Land Management's hydraulic fracturing rule. Others, if tailored to the circumstances of Indian country, may provide real benefits to tribal communities. In these cases, the federal government at a minimum should work with tribes to provide technical assistance so that the tribes have the internal capacity to comply with these regulations.

Observations and Conclusions

More and more Indian tribes—including the Quapaw Tribe—are creating enterprises that generate governmental revenues and the create jobs for their members and others. This is finally providing opportunities that tribes have not historically had. However, the ever-increasing regulations that affect all businesses are having a magnified—and stifling—effect on tribal enterprises. Unlike commercial businesses in the private sector, tribal enterprises operating on tribal land must comply with a litany of federal regulations that do not apply on private land (e.g., selling Quapaw chat). Although this regime is intended to protect the land and the tribal landowners, it more often only adds an undue burden on economic development. Additionally, I believe many or most Indian tribes do not have the capacity or financial resources to comply with these additional regulations.

The EPA should take a very close look at these regulations and the burdens they are creating on Indian tribes. The EPA needs to reduce many of these regulatory burdens as they impact tribes, and also to provide tribes assistance to build capacity to comply with these regulations.

I appreciate very much the Subcommittee's willingness to consider our input on this very important issue. Gun-ney-gay (thank you).