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Ms. Jeannine Hale
Tribal Consultation Officer
USEPA Region 6
1445 Ross Avenue, Ste. 1200
Dallas, TX 75202-273

RE: Comments of Cherokee Nation Regarding ODAPP Application for NPDES Partial Program Authorization

Dear Ms. Hale:

The Cherokee Nation appreciates the opportunity to submits its written comments to United States Environmental Protection Agency ("USEPA") concerning the application for partial program authorization submitted by the Oklahoma Department of Agriculture, Food and Forestry (hereinafter "ODAFF"). As discussed during the teleconference on November 7, 2012, the Cherokee Nation has concerns about the proposed delegation of authority from the USEPA to the ODAFF.

The Cherokee Nation's first concern involves its legal position concerning water rights. As you are aware, the Choctaw and Chickasaw Nations are currently engaged in litigation that asserts full tribal ownership and regulatory authority over waters within their treaty boundaries under the Five Tribes water doctrine. The Cherokee Nation maintains the same legal position and asserts broad authority within waters within its territorial boundaries. Although the Five Tribes water doctrine has not yet been validated by federal court decision, it is currently undisputed that the Cherokee Nation, at a minimum, maintains governmental authority over land held in trust by the United States for the Cherokee Nation, and over individual Cherokee restricted and trust lands.

While the Nation understands and appreciates that USEPA plans to retain NPDES permitting authority over Indian country, the Nation has concerns that current draft documents do not take into consideration the unique legal history of Oklahoma tribes or sufficiently acknowledge and protect the Cherokee Nation's legal position. For example, the wording used in the draft Memorandum of Agreement ("MOA"), which is based on an old USEPA form, references "affected Indian tribes," "federally recognized Indian Country," and "discharges which affect the waters of Indian Country in Oklahoma," without defining these terms or

clarifying the context in which they are used (see Attachment 1). Additionally, there is no requirement that a substantive discussion between affected tribes, affected states, the ODAFF and the USEPA occur before ODAFF issues a discharge permit that may affect water resources across tribal and state boundaries. The addition of a requirement for an ongoing dialogue between EPA, the affected tribes and states would be beneficial in improving water quality.

The Nation believes that appropriate federal agency attorneys who are knowledgeable in Indian law and have a background in tribal water rights should review all documents that will define the extent of the USEPA's authorization of the partial NPEDES authorization requested by ODAFF, including the MOA. The Nation requests that USEPA staff work collaboratively with it to make changes necessary to clarify the ODAFF authorization documents, including the wording in the MOA and the final published federal register notice. Because this will also require involvement of the ODAFF and because it is highly unlikely that this complex issue can be satisfactorily addressed by the current December 6 deadline for USEPA approval, the Nation requests that USEPA negotiate an extension of this deadline with the ODAFF. USEPA's trust responsibility to the Cherokee Nation demands that the agency take the time necessary to ensure that the language of the authorization documents is thoughtful, accurate and protective of the Nation's natural resources.

The Nation's second concern, which is related to its broad assertion of water rights, involves the lack of effectiveness of current federal regulation over CAFOs. Many of the water bodies in the Cherokee Nation are impaired due to excess nutrients. As you are aware, the USEPA is currently undergoing the process of creating a total maximum daily load ("TMDL") for the Illinois River, which is a river identified by the State of Oklahoma as a scenic river and an outstanding water resource. The state has also identified Flint Creek, Baron Fork, and Big and Little Lees Creeks as scenic rivers, and all flow within the boundaries of the Cherokee Nation. We are particularly concerned with the large number of CAFOs in the Nation that are able to avoid obtaining an NPDES permit by self-certifying that the operation is non-discharging. The net effect is that tons of poultry litter produced by AFOs, which are large enough to be considered CAFOS under federal regulations, are allowed to dispose of that waste without the regulation typical for point source pollution. We fear that the proposed delegation of authority may further endanger the quality of Cherokee Nation waters.

The Cherokee Nation appreciates the opportunity to comment on the partial program authorization for the ODAFF. I look forward to the opportunity to continue this dialogue with USEPA as it reaches its decision on the delegation.

Sincerely,

Todd Hembree
Attorney General
Cherokee Nation

Attachment 1

Examples of Areas of Concern in MOA

A Memorandum of Agreement between the ODAFF and USPEPA Region 6, relating to the administration and enforcement of the ODAFF's AgPDES program, (hereinafter "MOA") has been proposed between ODAFF and USEPA Region 6. It specifically states under the 'Scope of Authorization' in Section II, paragraph 2 that "[t]he AgPDES program administered by the Department covers all discharges except for those beyond the Department statutory authority or territorial jurisdiction." The next paragraph in that Section states "EPA retains jurisdiction over discharges not under the jurisdictional responsibility of either the ODAFF or ODEQ."

Section III, Subsection A (5) states that it is the ODAFF's responsibility to "[e]nsure that the conditions of the draft permit comply with the applicable water quality standards of all affected states and tribes as prescribed by 40 C.F.R. § 122.44(d)(4), and provide timely notice of such draft permit and any other information requested by that state or tribe as required by 40 C.F.R. § 124.1(10)(c)."

Section III, Subsection C(5) the ODAFF and USEPA agree that "permits for discharges to federally recognized Indian Country remain under EPA NPDES jurisdiction."

Section IV, Subsection F(1) states that "EPA waives the right to review, object to, or comment on the sufficiency of draft permits and proposed permits to the extent that they are necessary to submit to EPA, and final permits for all discharges or proposed discharges covered by this MOA, except for the following categories of permits: [d]ischarges which may affect the waters of Indian Country in Oklahoma."

In two separate parts of the MOA, the ODAFF agrees to provide notice to 'affected Indian tribes" via electronic mailing list (Section III, Subsection G(4)) and agrees to provide notice by emailing at the different stages in the permitting process to 'affected Indian tribes via email (Section III, Subsection H, paragraph 1).