

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:

Wulf Cattle Depot

NPDES Permit No. SD-0034606

NPDES Appeal No. 21-01

**SIXTH STATUS REPORT AND
UNOPPOSED MOTION TO DISMISS**

The U.S. Environmental Protection Agency Region 8 files this status report in accordance with the order issued by the Environmental Appeals Board (EAB or Board) on September 1, 2021. This status report includes, as an attachment, a letter to the Clerk of the Board, Wulf Cattle Depot and the Standing Rock Sioux Tribe notifying each that the Region is withdrawing NPDES Permit No. SD-0034606 effective September 27, 2021. Because the permit underlying the above-captioned appeal has been withdrawn, the Region respectfully moves the Board to dismiss the appeal as moot.

Background

On January 28, 2021, the Region issued NPDES Permit No. SD-0034606 to Petitioner, to be effective April 1, 2021. The permitted facility is located within the exterior boundary of the Standing Rock Sioux Reservation, and is located on fee land owned by Petitioner, a non-tribal entity. Petitioner filed a Notice of Appeal and Unopposed Motion for Extension of Time to File Appeal Brief on February 19, 2021. On February 23, 2021, the EAB issued an order granting Petitioner a 30-day extension, until March 31, 2021, to submit a brief and adjusting the other due dates for submissions in the proceeding accordingly. On March 23, 2021, the Region submitted

an Unopposed Motion to Stay Proceedings, seeking a 60-day stay to allow the parties and the Standing Rock Sioux Tribe (Tribe) to discuss resolution of the appeal. On March 24, 2021, the Board granted the motion, stayed the proceedings until May 24, 2021, and required the Region to submit a status report by May 17, 2021.

On May 17, 2021, the Region submitted a Status Report and Unopposed Motion for Further Stay of Proceedings (First Status Report), seeking an additional 30-day stay to conclude its ongoing government-to-government consultation with the Tribe. On May 19, 2021, the Board granted the motion, stayed the proceedings until July 1, 2021, and directed the Region to file a status report by June 24, 2021.

On June 24, 2021, the Region submitted a Second Status Report and Motion for Further Stay of Proceedings (Second Status Report) seeking an additional 14-day stay to allow Region 8 to meet with the Tribal Council and discuss its recent motion, consider any additional input the Tribe may provide, and incorporate that information into the Region's final decision on a path forward. On June 28, 2021, the Board granted the motion, stayed the proceedings until July 15, 2021, and required the Region to submit a status report by July 12, 2021.

On July 12, 2021, the Region submitted a Third Status Report and Motion for Further Stay of Proceedings (Third Status Report) seeking an additional 32-day stay. In the motion, the Region explained that the Tribe had requested dispute resolution under the *Region 8 Policy* and explained that the additional time would allow the Region to coordinate schedules, hold the dispute resolution consultation meeting described in the policy, and obtain a final decision from the acting Regional Administrator (RA). On July 14, 2021, the Board granted the motion, stayed the proceedings until August 16, 2021, and required the Region to submit a status report by August 10, 2021.

On August 10, 2021, the Region submitted its Fourth Status Report and Unopposed Motion for Further Stay of Proceedings seeking an additional 18-day stay to allow time to schedule a dispute resolution meeting with the Tribe and several EPA principals, and to give the acting RA time to make a final decision in this matter. On August 12, 2021, the Board granted the motion, stayed the proceedings until September 3, 2021, and required the Region to submit a status report by August 27, 2021.

On August 27, 2021, the Region submitted its Fifth Status Report and Unopposed Motion for Further Stay of Proceedings seeking an additional 31-day stay to allow EPA senior leadership the time to coordinate internally, finalize a decision on the NPDES permit appeal, and address environmental justice concerns raised by the Standing Rock Sioux Chairman and Tribal Council during the dispute resolution meeting. On September 1, 2021, the Board granted the motion and stayed the proceedings until October 4, 2021. The Board ordered the Region to file a status report by September 27, 2021, “addressing the status of the dispute resolution process and other decisions the Region plans to make related to the pending appeal.” The Board ordered the Region to include with its status report any of three options for resolving the appeal, including “notification of the Region’s withdrawal of the NPDES permit pursuant to 40 C.F.R. § 124.19(j)...” Order Granting Extension of Stay at 3 (September 1, 2021). The Board also ordered the Region to “to file with the Board the final NPDES permit, along with the Statement of Basis and the Response to Comments documents issued in connection with the final permit, no later than Friday, September 10, 2021.” *Id.* at 4. The Region submitted these documents to the Board on September 3, 2021.

Sixth Status Report

As the Region described in its Fifth Status Report, Deb Thomas, acting Regional

Administrator for Region 8; Benita Best-Wong, Deputy Assistant Administrator for the Office of Water; and Jane Nishida, Principal Deputy Assistant Administrator for the Office of International and Tribal Affairs (collectively, the “EPA Principals”) met on August 19, 2021, with Standing Rock Sioux Chairman Mike Faith, the Tribal Council, and the Tribe’s outside legal counsel to discuss the Wulf Cattle Depot permit appeal. At this meeting, the Tribal Council explained that the town of McLaughlin is a community with environmental justice concerns, and described several environmental issues that impact the town and Tribal members, including groundwater depletion, groundwater contamination, possible groundwater/surface water connections, surface water degradation in Oak Creek (including possible loss of fishing and recreation uses), unpleasant odors and dust, air quality, and general ill health among Tribal members. The Tribe’s outside legal counsel suggested that EPA and the Tribe should consider engaging in some sort of third-party mediation.

Since the August 19th meeting and the September 1st order from the Board, the EPA Principals and staff have considered whether to proceed with the NPDES permit appeal, whether to engage a neutral third-party mediator as requested by the Tribe, and how to address environmental justice concerns raised by the Tribe. With regards to the Tribe’s third-party mediation request, EPA has concluded that formal third-party mediation would provide a structured forum in which EPA, the Tribe and potentially Petitioner, could work with a trained mediator to facilitate information sharing and problem solving. This process could allow those involved to identify a workable path forward to address the legal and environmental concerns that have been raised by the Petitioner and Tribe in this appeal. EPA has contacted the EPA’s Conflict Prevention and Resolution Center (CPRC) and initiated discussions to identify resources and experts for the proposed mediation process. While EPA is committed to completing

mediation expeditiously, it may take some time for the Agency to obtain funding, coordinate with the Tribe, and commence mediation.

In light of these considerations, and in the interest of administrative and judicial efficiency, the Region has concluded that it would be most appropriate to engage a neutral third-party mediator and begin addressing the Tribe's environmental justice concerns outside of the Board's NPDES permit appeal process. As a result, the acting Regional Administrator has decided to withdraw the Wulf Cattle Depot NPDES Permit pursuant to 40 C.F.R. § 124.19(j). Once the third-party mediation is complete, a path forward has been identified, and the Region has developed a revised renewal permit for Wulf Cattle Depot, the Region will conduct public notice and comment on the revised renewal permit consistent with 40 C.F.R. §§ 124.6 and 124.19(j).

Unopposed Motion to Dismiss

By letter dated September 27, 2021, and filed with the Board, the Region provided a Notice of Withdrawal to the Clerk of the Board, the Petitioner and the Standing Rock Sioux Tribe indicating that it is withdrawing Permit No. SD-0034606 issued to Wulf Cattle Depot and will issue a revised renewal permit through the standard public notice and comment process in 40 C.F.R. Part 124.

Section 124.19(j) authorizes the NPDES permitting authority to withdraw a permit or portions of a permit at any time prior to 30 days after filing its response to a petition for review and upon providing notification to the Board and any interested parties. Here, Petitioner has not yet submitted a petition for review, as the appeal proceedings have been stayed as described above. Accordingly, the Region has not yet filed its response to a petition for review, and the period in which the Region may unilaterally withdraw a permit under section 124.19(j) has not

closed. As a result, the Region's September 27, 2021 letter to Board and interested parties notifying them of the withdrawal of the NPDES permit is valid. *See In Re: American Samoa Power Authority*, NPDES Appeal No. 19-07, slip. op. at 2 (EAB January 22, 2020) (holding that a Region's withdrawal of an NPDES permit comports with the requirements set forth in 40 C.F.R. § 124.19(j) when the Region withdrew the permit prior to filing its response to a petition for review).

The Region has discussed this permit appeal with EPA's Office of General Counsel and Office of Water and the Region has determined withdrawal of the entire permit is appropriate. The Region will use this opportunity to participate in third-party mediation with the Tribe, and Petitioner, and will use the results of that mediation to help guide its development of a revised draft renewal permit for the Petitioner's facility. The Region will then issue the revised draft renewal permit, along with an associated statement of basis, in accordance with the procedures established in 40 C.F.R. Part 124.

Petitioner's Notice of Appeal is now moot because the Region has withdrawn the NPDES permit underlying that Notice. Prior Board decisions support dismissing a petition as moot when a contested permit or permit provisions have been withdrawn. *See, e.g., In re: Starkist Samoa Co.*, NPDES Appeal No. 20-04 (EAB May 26, 2020) (Order Dismissing Petition for Review as Moot). Accordingly, the Region hereby respectfully requests that the EAB dismiss Petitioner's Notice of Appeal as moot.

Positions of Other Parties

In accordance with 40 CFR § 124.19(f)(2), Region 8 counsel contacted Petitioner's attorney to ascertain whether Petitioner would concur with or oppose this motion. Petitioner has indicated that it does not oppose the Region's motion to dismiss, subject to reserving all rights

with regard to Region's planned permit reissuance.

Statement of Compliance with Word Limitations

The undersigned attorney hereby certifies that the Region's Sixth Status Report and Unopposed Motion to Dismiss in NPDES Appeal No. 21-01 contains fewer than 7000 words, as required by 40 C.F.R. § 124.19(f)(5).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Sixth Status Report and Unopposed Motion to Dismiss in the matter of *In re: Wulf Cattle Depot*, NPDES Appeal No. 21-01, were served by email on the following persons, this 27th day of September, 2021:

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