

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

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In re:)	
Wulf Cattle Depot)	NPDES Appeal No. 21-01
)	
NPDES Permit No. SD-0034606)	
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)	

FIFTH ORDER GRANTING EXTENSION OF STAY

This matter involves the appeal of a National Pollutant Discharge Elimination System (“NPDES”) permit issued by the U.S. Environmental Protection Agency (“EPA”) Region 8 (“Region”) to Petitioner Wulf Cattle Depot for a Concentrated Animal Feeding Operation facility located in the town of McLaughlin, South Dakota, within the exterior boundary of the Standing Rock Sioux Reservation. Wulf Cattle Depot filed its notice of appeal on February 19, 2021, together with an unopposed motion for extension of time to file a brief in support. *See* Wulf Cattle Depot, Notice of Appeal (Feb. 19, 2021). At the Region’s request, and in response to ongoing efforts by the parties and the Standing Rock Sioux Tribe (“Tribe”) to resolve various issues raised in this appeal, the Board issued an initial order staying the proceedings and four subsequent orders extending the stay. *See* Order Staying Proceedings for Sixty Days (Mar. 24, 2021); Order Granting Extension of Stay (May 19, 2021); Order Granting Further Extension of Stay (June 28, 2021); Third Order Granting Extension of Stay (July 14, 2021); Fourth Order Granting Extension of Stay (Aug. 12, 2021). This order constitutes the fifth extension.

The Region has informed the Board that, in an effort resolve issues raised by the Tribe in

connection with the NPDES permit, EPA and the Tribe are engaged in dispute resolution pursuant to the process established in Section IV.E (“Procedures for Elevation of Issues and Dispute Resolution”) of the *EPA Region 8 Policy for Environmental Protection in Indian Country* (“*Region 8 Policy*”).¹ EPA Region 8, Third Status Report and Unopposed Motion for Further Stay of Proceedings (July 12, 2021). In its Fifth Status Report, its most recent, the Region reports that senior leadership from EPA and from the Tribe met virtually on August 19, 2021, pursuant to the *Region 8 Policy*. EPA Region 8, Fifth Status Report and Unopposed Motion for Further Stay of Proceedings 3-4 (Aug. 27, 2021) (“Fifth Status Report”). According to the Region, Tribal leadership expressed concerns at that meeting about environmental justice issues within the town of McLaughlin and “offered their thoughts on the permit appeal and environmental issues in the McLaughlin area more generally.” *Id.* at 4. Among the environmental issues raised by the Tribe were “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” in the town of McLaughlin as well as “surface water quality problems” in the downstream town of Wakpala. *Id.* at 4-5. The Tribe suggested that “EPA should engage a mediator with expertise in tribal jurisdiction * * * to render a neutral opinion on the legal risks of the permit appeal.” *Id.* at 4.

¹ The *EPA Region 8 Policy for Environmental Protection in Indian Country* is available at: https://www.epa.gov/sites/production/files/2018-04/documents/1996_r8_indian_country_environmental_protection_policy.pdf.

The Region reports that the EPA principals who participated in the August 19 dispute resolution meeting “are committed to issuing a final decision * * * including whether to engage in third-party mediation, and recognize the importance of the environmental justice concerns the Tribe has raised.” *Id.* at 5-6. The Region represents that due to the complexity of the issues involved and the need to brief several new decisionmakers, “internal coordination is ongoing and may take several weeks to complete.” *Id.* To allow sufficient time for this process to take place, the Region has requested a further stay of proceedings for thirty-one days, until October 4, 2021, with a status report to the Board due by September 27, 2021. *Id.* at 6-7. In support, the Region states that extension of the stay will allow the Agency to complete the coordination that is required, make a decision as to how they plan to proceed with the NPDES permit appeal, and “chart a path forward for responding to the concerns raised by the Tribal Leadership.” *Id.* at 6.

The Region represents that Petitioner Wulf Cattle Depot does not oppose the motion for extension of the stay, but that Petitioner’s “preference” is that the Region withdraw the challenged NPDES permit in order to allow time to address concerns raised by Petitioner and by the Tribe. *Id.* at 7. The Region notes that this is one of the options being considered. *Id.*

The Board recognizes this is a complex matter but further observes that this case has been pending for over six months. Based on the Region’s representations in its Fifth Status Report, the Board **GRANTS** the Region’s motion and further stays this matter until **Monday, October 4, 2021**. The Board requests that the Region file a status report by **Monday, 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 status report shall include one of the following:

- (1) notification of the Region’s withdrawal of the NPDES permit pursuant to 40 C.F.R. § 124.19(j);

(2) a motion for further stay of proceedings, including the basis for the motion and the length of the stay being sought together with an explanation as to why the Board should grant the further stay and should not remand the permit to the Region for further

consideration of next steps; or

(3) a proposed briefing schedule for the appeal, developed in consultation with Petitioner Wulf Cattle Depot.

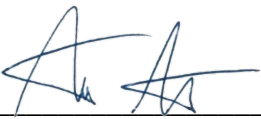
See 40 C.F.R. § 124.19(f)(6) & (n).

In addition, the notice of appeal in this matter was filed with the Board on February 19, 2021, and Petitioner has yet to file its brief in support of appeal. Thus, to assist the Board in its consideration of the appropriate next steps, we order the Region 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**. *See id.* § 124.19(n).

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: September 1, 2021

By: 

Aaron P. Avila
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I certify that copies of the foregoing **FIFTH ORDER GRANTING EXTENSION OF STAY** in the matter of *Wulf Cattle Depot*, NPDES Appeal No. 21-01, were sent to the following persons by electronic mail:

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Dated: Sep 01, 2021



Emilio Cortes
Clerk of the Board