

**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

**SECOND STATUS REPORT AND  
MOTION FOR FURTHER STAY OF PROCEEDINGS**

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 May 19, 2021. In addition, the Region respectfully moves the Board to grant a further stay of proceedings in this matter for an additional 14 days to allow Region 8 to consider recent input received from the Standing Rock Sioux Tribe (the “Tribe”) in its ongoing government-to-government consultation concerning this matter.

**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 on the Standing Rock Sioux Reservation. 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 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. While the Tribe has not filed a notice of appearance in this appeal pursuant to 40 CFR §124.19(b)(4), and thus is not a party to the appeal, the Region sought the input of the Tribe given that the permitted facility is located on the Tribe’s reservation and given that the Petitioner’s appeal concerns the inclusion of tribal water code requirements as a Clean Water Act section 401 condition to the permit. 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, “addressing the status of its discussions with Wulf Cattle Depot and the Standing Rock Sioux Tribe, proposing (if appropriate) a briefing schedule, and to the extent that the parties seek a stay of proceedings beyond July 1, 2021, a motion requesting a further stay.” Order Granting Extension of Stay at 2 (May 19, 2021).

### **Second Status Report**

As described in the First Status Report, based on its discussions with the Petitioner and the Tribe, the Region has been considering whether to withdraw four permit conditions and issue new draft conditions for public notice and comment pursuant to 40 CFR § 124.19(j) (the “permit withdrawal option”). On May 12, 2021, the Region verbally presented potential new draft permit conditions to some members of the Tribal leadership and representatives from the Tribe’s Department of Water Resources and Department of Environmental Regulation/EPA. At this meeting, a member of the Tribal Council expressed understanding of the Region’s proposal and appreciation for the considerations driving it. This member indicated that the full Tribal Council

should meet and discuss the permit withdrawal option. On May 14, 2021, to aid the Tribe's deliberations, the Region shared a discussion document with the Tribal Council containing the four draft permit conditions and briefly outlining their legal bases.

On May 24, 2021, the Tribe invited the Region to present the permit withdrawal option and draft permit conditions at a Tribal Council meeting the next day. On May 25, 2021, the Region joined the Tribal Council meeting virtually, described the permit withdrawal option, reviewed the draft permit conditions in the discussion document, and explained the Region's reasons for considering a permit modification. After this presentation, several Tribal Council members explained that they were unable to understand the Region's presentation due to a bad network connection, and two Tribal Council members expressed their opinion that the Region should defend the permit rather than pursuing the permit withdrawal option. The Region offered to hold an additional call with the Tribal Council or to have one-on-one meetings with individual members to discuss the information presented.

Two weeks after the Tribal Council meeting, on June 9, 2021, the Region 8 Acting Water Division Director sent an email to the Tribal Chairman and the Directors of the Department of Water Resources and Department of Environmental Regulation/EPA transmitting a copy of the draft permit conditions and draft statement of basis that the Region would issue for public notice and comment if it chooses the permit withdrawal option, as well several bullet points outlining considerations related to that approach. In the email to the Tribal Chairman, the Acting Water Division Director requested the "Tribal Council provide its input on the permit modification EPA is considering and on the overall permit appeal by Monday, June 21<sup>st</sup>", and offered the opportunity for further one-on-one or larger group conversations to continue government-to-government consultation. On June 24, 2021, counsel for the Tribe informed the Region via email

that the Tribal Council had passed a motion “TO APPROVE TO INFORM EPA REGION 8 OF THE TRIBES DESIRE TO DEFEND THE NPDES PERMIT ISSUED TO WULF CATTLE DEPOT, IN THE APPEAL BEFORE THE ENVIRONMENTAL APPEALS BOARD. (NPDES APPEAL NO. 21-01).” Tribal counsel further informed EPA that the motion means that the Tribe opposes the permit modifications that EPA is considering in the permit withdrawal option.

During the time period described above, the Region also engaged in discussions with the Petitioner. As explained in the First Status Report, the Region verbally outlined permit withdrawal option to the Petitioner in late May. On June 9, 2021, the Region sent a copy of the draft permit conditions and draft statement of basis to the Petitioner for its review. The Petitioner has expressed interest in the permit withdrawal option, and in a phone call on June 22, 2021, counsel for Petitioner indicated that it has no objections to the draft permit conditions and draft statement of basis.

### **Motion for Further Stay of Proceedings**

On June 24, 2021, counsel for the Tribe informed the Region via email that the Tribe opposes the permit modifications that the Region is considering in the permit withdrawal option. Given the timing, the Region has not had adequate opportunity to discuss this input with the Tribe, consider it and use it to inform the Region’s decision making. The Region has already reached out to the Tribal leadership to request a meeting to discuss the Tribe’s input and to seek greater detail concerning the Tribe’s opposition to the permit modification. A further stay of 14 days will allow the Region time to hold this discussion, consider any additional input the Tribe may provide, and incorporate that information into the Region’s final decision on a path forward. Moreover, this limited additional time will advance the policies established in the 2011 *EPA Policy on*

*Consultation and Coordination with Indian Tribes.*<sup>1</sup>

Petitioner will not be prejudiced by a further stay because the contested permit is already stayed during the pendency of the appeal. The Tribe will not be prejudiced by a further stay because the additional time will allow it to provide additional input to the Region and because, if it decides to enter into the appeal, the time for it to file a notice of appearance under 40 C.F.R. § 124.19(b)(4) is already stayed.

For the above reasons, the Region respectfully requests that the Board grant a further stay of all proceedings in this matter for an additional 14 days after the end of the current stay, or until July 15, 2021. The Region proposes to provide a final status report on that date detailing the outcome of its discussions with the Tribe, including any additional input the Region may receive from the Tribe, and making a recommendation to the Board as to further proceedings.

**Positions of Other Parties**

In accordance with 40 CFR § 124.19(f)(2), Region 8 counsel contacted Petitioner's attorney by phone on the afternoon of June 24, 2021, to ascertain whether Petitioner would concur with or oppose this motion. Due to the lateness of the request, Petitioner's counsel was unable to provide Petitioner's position with regards to this motion.

**Statement of Compliance with Word Limitations**

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

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<sup>1</sup> <https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes>

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Second Status Report and Motion for Further Stay of Proceedings in the matter of *In re: Wulf Cattle Depot*, NPDES Appeal No. 21-01, were served by email on the following persons, this 24<sup>th</sup> day of June, 2021:

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Date: June 24, 2021