

**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

**THIRD STATUS REPORT AND
UNOPPOSED MOTION FOR FURTHER STAY OF PROCEEDINGS**

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 June 28, 2021. In addition, the Region respectfully moves the Board to grant a further stay of proceedings in this matter for an additional 32 days to allow Region 8 to complete the dispute resolution process outlined in the 1996 *EPA Region 8 Policy for Environmental Protection in Indian Country*¹ (the “*Region 8 Policy*”) as part of its ongoing government-to-government consultation with the Standing Rock Sioux Tribe (the “Tribe”) 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 within the exterior boundary of the Standing Rock Sioux Reservation on fee land owned by 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

¹ https://www.epa.gov/sites/production/files/2018-04/documents/1996_r8_indian_country_environmental_protection_policy.pdf

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. 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 fee land owned by a non-Tribal entity within the exterior boundary of the 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.

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 directed the Region to file a status report by July 12, 2021 "addressing the status of its discussions with Wulf Cattle Depot and Tribe, proposing (if appropriate) a briefing schedule, and

to the extent that the parties seek a stay of proceedings beyond July 15, 2021, a motion requesting a further stay.” Order Granting Extension of Stay at 2 (June 28, 2021).

Third Status Report

Between February 19, 2021, when Petitioner filed its Notice of Appeal, and June 24, 2021, when the Region filed its Second Status Report, the Region participated in four formal government-to-government tribal consultation meetings with the leadership of the Standing Rock Sioux Tribe. These occurred on Monday, March 8; Tuesday, March 23; Wednesday, May 12; and Tuesday May 25. In addition, the Region’s counsel held at least six phone calls with the Tribe’s attorneys discussing matters relating to the appeal. In this same timeframe, the Region held two meetings with Petitioner and its attorneys, as well as several meetings and phone calls with just Petitioner’s attorneys, to discuss the appeal, its bases, and options for resolution. Based on these meetings and phone calls with the Tribe and Petitioner, the Region has been considering whether to withdraw four permit conditions and issue draft modified conditions for public notice and comment pursuant to 40 CFR § 124.19(j). As described in the Region’s June 24, 2021 status report, the Tribe has informed the Region that it opposes modifying the challenged permit.

Since filing the Second Status Report, the Region held an additional government-to-government tribal consultation meeting (the fifth such meeting) with the Standing Rock Sioux Tribe on July 6, 2021. During this tribal consultation meeting, the Region heard a variety of opinions from the Tribal Council, but nothing to suggest that the Council no longer opposes modifying the challenged permit. The Tribe did, however, state that this matter should be subject to the dispute resolution process in the *Region 8 Policy*.

The Region has considered the Tribe’s request and reviewed the dispute resolution process in the *Region 8 Policy*. Section III of the policy establishes several principles for the

Region's interaction with Tribes, including the principle that Region 8 will seek agreement with Tribes before making decisions on certain environmental matters and, if agreement cannot be reached, either the Region or the tribal government may invoke the policy's formal dispute resolution procedures. *Region 8 Policy* at 2. These formal dispute resolution procedures are laid out in Section IV.E, which provides:

Where tribal agreement and dispute resolution are called for in this document in making EPA decisions, every reasonable effort will be made to obtain tribal agreement. Region 8 will endeavor to accommodate the tribe to the extent the law allows. In cases of continuing disagreement, the responsible [Division Director] may, to the extent permitted by law and upon tribal request, refer the issue to the Regional Administrator, who-- following consultation with the tribal chair, the Director of the American Indian Environmental Office (AIEO) and the Headquarters program office, as appropriate--will make a final decision.

Id. at 6. Among the areas in which the policy calls for tribal agreement and dispute resolution is program management. Section VI.B.2.d provides that “[i]f agreement on program management cannot be reached with the tribe, the responsible [Division Director] will invoke the dispute resolution process described in IV.E, page 5.” *Id.* at 12-13. Because the Region is considering modifying four NPDES permit conditions, including a Section 401 permit condition based on the Tribe's Water Code, the Region has concluded that the Tribe disagrees in this instance with the Region's management of the Clean Water Act Section 401 and 402 programs on the Standing Rock Sioux Reservation. Because there is continuing disagreement between the Tribe and the Region as to the modification of the Wulf Cattle Depot permit and because the Tribe indicated that it wished to pursue dispute resolution for this matter during the July 6, 2021 tribal consultation meeting, the Region 8 acting Water Division Director agreed in this instance to refer this issue to the acting Regional Administrator for resolution in accordance with the process established in Section IV.E of the policy.

Motion for Further Stay of Proceedings

As described above, the Region 8 acting Water Division Director agreed to refer the question of whether to modify the challenged NPDES permit to the Region 8 acting Regional Administrator for resolution in accordance with the process established in Section IV.E of the *Region 8 Policy*. Under the policy, the Regional Administrator will consult with “the tribal chair, the Director of the American Indian Environmental Office (AIEO) and the Headquarters program office, as appropriate” before making a final decision. *Id.* at 6. In this instance, the Headquarters program office is the Office of Water or one of its subsidiary offices that works on NPDES permitting issues (e.g., Office of Wastewater Management or Water Permits Division). The Region has begun the process of scheduling the consultation meeting. However, given the challenges in aligning the calendars of the Standing Rock Sioux Tribal Chairman and several EPA leaders, this coordination process is likely to take several weeks. Region 8 believes it will be able to conduct this process and obtain a final decision from the acting Regional Administrator on the following timeframe:

July 12 – 16	Formal invitation to consult to Tribal Chairman and internal EPA outreach.
July 19 – 23	Coordination of calendars.
July 26 – Aug 6	Consultation meeting and final decision by Regional Administrator.
Aug 9 – 10	Transmit final decision to Tribe and provide status report to Board.

With this timeframe in mind, the Region believes a further stay of these proceedings of 32 days is appropriate. This additional time will allow the Region to conduct the activities outlined above, thereby assuring that the Region conforms to the principles and procedures in the *Region 8 Policy*, as well as allowing the Region to continue to advance the policies established in the

2011 *EPA Policy on Consultation and Coordination with Indian Tribes*.²

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 participate in the dispute resolution process 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 32 days after the end of the current stay, or until August 16, 2021. The Region proposes to provide a final status report to the Board on August 10, 2021, detailing the Regional Administrator's final decision as to whether to modify the challenged NPDES permit and making a motion 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 to ascertain whether Petitioner would concur with or oppose this motion. Petitioner has indicated that while it does not oppose this motion, it believes that EPA has already satisfied its obligations to the Tribe.

Statement of Compliance with Word Limitations

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

² <https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes>

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Third Status Report and Unopposed 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 12th day of July, 2021:

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