

**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

**FOURTH 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 July 14, 2021. In addition, the Region respectfully moves the Board to grant a further stay of proceedings in this matter for an additional 18 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, and is located 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 extension, until March 31, 2021, to submit a brief and adjusting the other due dates for

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

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 a Clean Water Act section 401 condition to the permit that is based on the tribal water code. 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 decision on a path forward regarding the permit. 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. 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, “addressing the status of the dispute resolution process and the status of any ongoing discussions with Wulf Cattle Depot and Tribe concerning the efforts to resolve the appeal.” Order Granting Extension of Stay at 4 (July 14, 2021). Further, the Board ordered, “If the parties seek a further stay of the proceedings beyond August 16, 2021, the Region shall also file a motion requesting a further stay of the proceedings, including the basis for that motion and the length of the stay being sought.” *Id.*

Fourth Status Report

As described at length in the Third Status Report, the Region has participated in five formal government-to-government tribal consultation meetings concerning this matter since Wulf Cattle filed its initial Notice of Appeal on February 19, 2021. 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. Most of these meetings focused on the Region’s consideration of an option to withdraw four permit conditions and issue draft modified conditions for public notice and comment pursuant to 40 CFR § 124.19(j). The Petitioner has expressed support for this option. The Tribe has expressed opposition to this option. At the government-to-government consultation meeting on July 6, 2021, the Tribe asserted that given the ongoing lack of agreement between the Tribe and the Region on this option, the matter

should be subject to the dispute resolution process in the *Region 8 Policy*. In response, 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 *Region 8 Policy*, which explains that the Regional Administrator “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” on disputed matters.

On July 15, 2021, the Region 8 acting Water Division Director sent a letter to the Tribe’s Chairman inviting him to consult with the Acting Regional Administrator, the Director of AIEO, and the headquarters program office during the last week of July or first week of August. On July 28, 2021, the Region 8 Tribal Affairs Branch Chief contacted the Tribal Chairman and his staff to offer three possible meeting times on August 2 and 5. On August 3, 2021, the Chairman’s scheduler responded that the Chairman would be unable to meet on August 5, but indicated that the Chairman asked that EPA proceed to meet with Doug Crow Ghost, the Director of the Tribe’s Department of Water Resources; Allyson Two Bears, the Director of the Tribe’s Department of Environmental Regulation/EPA; and Peter Capossela, the Tribe’s outside counsel. On August 4, 2021, the Region cancelled the August 5th meeting because multiple representatives from AIEO were unavailable due to illness. Since that cancellation, the Region 8 Tribal Affairs Branch Chief has been coordinating with the relevant EPA officials and the Tribal representatives to find an available meeting time. The group has discussed options for meeting within the next two weeks, and EPA is committed to quickly finding a date and time for its high-level officials to meet with the Tribe. As of the time of this filing, the group is considering options for meeting on either Thursday, August 19, or Friday, August 20.

Unopposed Motion for Further Stay of Proceedings

As described above, the question of whether to modify the challenged NPDES permit has been referred to the Region 8 acting Regional Administrator for resolution in accordance with the process established in Section IV.E of the *Region 8 Policy*. In accordance with the policy, the Region is seeking to schedule a meeting with the acting Regional Administrator, three delegated representatives of the Tribe's Chairman, the Director of the American Indian Environmental Office and the Deputy Assistant Administrator for the Office of Water, on either Thursday, August 19, or Friday, August 20. These dates are not yet final; however, and the consultation meeting may need to be scheduled early in the following week (e.g., Monday, August 23 to Wednesday, August 25). Additionally, the acting Regional Administrator has indicated that she would like to have a day or two after this meeting to consider whatever additional information the Tribe may provide before making a final decision on the modification option. As a result, the Region believes that it will have a final decision available by no later than August 26, 2021 and will be able to provide that decision to the Board in a status report on August 27, 2021. With this timeframe in mind, the Region believes a further stay of these proceedings of 18 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

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

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 18 days after the end of the current stay, or until Friday, September 3, 2021. The Region proposes to provide a final status report to the Board on Friday, August 27, 2021, detailing the acting 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 it does not oppose this motion.

Statement of Compliance with Word Limitations

The undersigned attorney hereby certifies that the Region's Fourth 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).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Fourth 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 10th day of August, 2021:

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