

**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

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

U.S. Environmental Protection Agency Region 8 files this status report in accordance with the Board’s order of March 24, 2021. In addition, the Region respectfully requests that the Environmental Appeals Board grant a further stay of proceedings in this matter for an additional 30 days to allow Region 8 to conclude 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 Wulf Cattle Depot (“Petitioner”), to be effective April 1, 2021. 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. Responding to a motion filed by the Region in mid-March 2021, the Board granted a stay until May 24, 2021, “to allow time for the Region, Petitioner, and the Tribe to discuss possible paths for resolution.” Order Staying Proceedings for Sixty Days (March 24, 2021). The Board directed the Region to submit a status report by May 17, 2021, “addressing the status of

the government-to-government consultations and discussions, proposing (if appropriate) a briefing schedule, and to the extent that the parties seek a stay of proceedings beyond May 24, 2021, a motion requesting a further stay.” *Id.*

Status Report

Since filing its Unopposed Motion to Stay Proceedings, the Region has participated in two formal government-to-government consultations with the leadership of the Standing Rock Sioux Tribe. The Region also has held several discussions with Petitioner and its counsel, and several discussions with Tribal counsel and Tribal environmental program directors and staff. Additionally, the Region understands there have been meetings between the Tribe and Petitioner. Coming out of these various meetings and discussions, the Region has come to understand that a settlement that involves the Petitioner agreeing to dismiss its appeal with no changes to the NPDES permit is not possible. As a result, the Region is considering whether to withdraw certain permit conditions – conditions that raise issues that Petitioner has explained would be the likely basis for any briefs it might file – and issue new draft conditions for public notice pursuant to 40 CFR § 124.19(j).

The Region has developed potential draft permit conditions and verbally presented them to Petitioner and, in the most recent government-to-government consultation, to some members of Tribal leadership. Both Petitioner and the Tribe are now considering this possible path to resolution of the appeal. However, Tribal leadership has indicated that it would like for the full Tribal Council to meet and discuss this option, after which it would be able to provide its input on resolving the appeal through modification of the Wulf permit.

Unopposed Motion for Further Stay of Proceedings

The Tribe has represented to Region 8 that the full Tribal Council will be meeting

at approximately the end of May 2021, and that the Tribal Council would be able to use this time to review and discuss the draft conditions that the Region has developed. The Region anticipates that the Tribe would be able to provide its input on the draft permit modification option after this meeting. The Region would then need some additional time to consider the Tribe's input and, if necessary, discuss it with the Tribe. The Region will also receive feedback from Petitioner on the draft permit modification in this time period. Assuming this process takes two to three weeks, the Region anticipates that within 30 days of end of the current stay it will be able to provide the Board with a final assessment as to the likelihood of resolution and a recommendation as to further proceedings.

In this instance, a further stay will give the Standing Rock Sioux Tribe time to fully consider how the Region's actions in this appeal may affect their Reservation and other important Tribal interests, and to provide input to inform the Region's decision making. This limited additional time will advance the policies established in the 2011 *EPA Policy on Consultation and Coordination with Indian Tribes*¹, while respecting the Petitioner's interest in prompt resolution of its permit appeal.

Petitioner will not be prejudiced by a further stay because the contested permit conditions are 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 complete its review of the Region's proposal 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 30 days after the end of the current stay, or

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

until June 24, 2021. The Region proposes to provide a status report on that date detailing its assessment of the likelihood of resolving the appeal 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 to ascertain whether Petitioner would concur or oppose this motion. Petitioner's counsel represented that Wulf Cattle Depot does not oppose this motion.

Statement of Compliance with Word Limitations

The undersigned attorney hereby certifies that the Region's 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 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 17th day of May, 2021:

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