

**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

**FIFTH 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 August 12, 2021. In addition, the Region respectfully moves the Board to grant a further stay of proceedings in this matter for an additional 31 days to allow EPA senior leadership the time to coordinate internally, finalize a decision on the NPDES permit appeal, and develop a response to environmental justice concerns raised by the Standing Rock Sioux Chairman and Tribal Council during a government-to-government consultation on August 19, 2021.

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 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 final decision on a path forward. 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.

On August 10, 2021, the Region submitted its Fourth Status Report and Unopposed Motion for Further Stay of Proceedings seeking an additional 18-day stay due to allow time to schedule a dispute resolution meeting with the acting Regional Administrator, the Tribe, the Director of the American Indian Environmental Office and the Deputy Assistant Administrator for the Office of Water, as well as to give the acting RA time to make a final decision in this matter. On August 12, 2021, the Board granted the motion, stayed the proceedings until September 3, 2021, and required the Region to submit a status report by August 27, 2021, “addressing the status of the dispute resolution process and proposing, if appropriate, a briefing schedule for the appeal.” Order Granting Extension of Stay at 4 (August 12, 2021). Further, the Board ordered, “If the parties seek a further stay of proceedings beyond September 3, 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.*

Fifth Status Report

At the time the Region filed its Fourth Status Report, the Region was working with the relevant EPA Headquarters offices and Tribal representatives to schedule the dispute resolution meeting, with a focus on either Thursday, August 19, or Friday, August 20. Shortly after the Board granted the fourth extension of time, the EPA and the Tribe established Thursday, August 19, as the meeting date.

The EPA and the Tribe convened in a virtual Microsoft Teams meeting for the August 19

dispute resolution. EPA was represented by Deb Thomas, acting Regional Administrator for Region 8; Benita Best-Wong, Deputy Assistant Administrator for the Office of Water; and Jane Nishida, Principal Deputy Assistant Administrator for the Office of International and Tribal Affairs (collectively, the “EPA Principals”). Though the *Region 8 Policy* calls for the participation of the Director of the American Indian Environmental Office (AIEO), the Director was unavailable due to a scheduling conflict. Because AIEO is situated within the Office of International and Tribal Affairs (OITA), EPA concluded that the participation of the current head of OITA fulfilled the intent and spirit of the *Region 8 Policy*. The lead participants from the Tribe included Chairman Mike Faith and several members of the Tribal Council (collectively, the “Tribal Leadership”). The EPA Principals and Tribal Leadership were joined by their respective counsels and representatives of the Region 8 Water Division.

The August 19 meeting opened with introductions of the EPA Principals and Tribal Leadership. The Region presented a summary of the appeal timeline, issues and the EPA’s legal considerations. The acting Regional Administrator then turned the meeting over to the Tribal Leadership, requesting their thoughts, feedback and any additional information they wished EPA to consider. The Tribe’s outside counsel provided opening remarks on the permit appeal and suggested that EPA should engage a mediator with expertise in tribal jurisdiction, such as a law professor, to render a neutral opinion on the legal risks of the permit appeal. The Tribal Leadership then offered their thoughts on the permit appeal and environmental issues in the McLaughlin area more generally. The Tribal Leadership noted that the town of McLaughlin is within the exterior boundary of the Reservation, has many Tribal members, and that it is a community with environmental justice concerns. The Tribal Leadership described several environmental issues that impact the town of McLaughlin and Tribal members, including

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. The Tribal Leadership also mentioned surface water quality problems in the town of Wakpala, which is situated downstream along Oak Creek about 18 miles southeast of McLaughlin. The meeting concluded with the acting Regional Administrator recognizing the importance of environmental justice concerns and committing to making a final decision on how to proceed with the NPDES permit appeal, as described in the *Region 8 Policy*.

Since the August 19th meeting, the EPA Principals have been engaged in discussions in how to proceed with the NPDES permit appeal, including whether to engage a neutral third-party mediator as requested, and how to address environmental justice concerns raised by the Tribe. Because the issues the Tribe has raised are complex and implicate several environmental media and statutes, there are several offices within the Agency that need to be involved to ensure these issues are fully considered. This internal coordination is ongoing and may take several weeks to complete before the acting Regional Administrator will be prepared to issue a final decision on how to proceed with this permit appeal and the Agency will be prepared to address the environmental justice concerns that have been raised.

Motion for Further Stay of Proceedings

As described above, the Tribe has requested third-party mediation concerning the NPDES permit appeal and has raised environmental justice concerns implicating groundwater, surface water, air, and general public health. The EPA Principals that participated in the August 19 dispute resolution meeting are committed to issuing a final decision on the NPDES permit appeal, including whether to engage in third-party mediation, and recognize the importance of

the environmental justice concerns the Tribe has raised. In order to fully consider all of these issues, the EPA Principals and their staff are coordinating with the relevant offices, including the Office of General Counsel, the Office of Air and Radiation, and the Office of Research and Development. This coordination effort will require bringing several new decisionmakers up to speed on the issues the Tribe has raised, identifying resources available to potentially address the Tribe's environmental justice concerns, and developing response to the Tribal Leadership. As a result, it will likely take several weeks before the acting Regional Administrator is prepared to make a final decision on how to proceed with the NPDES permit appeal or the EPA Principals and their counterparts are prepared to respond to the Tribal Leadership. Based on this timing, the Region believes that an additional stay of 31 days is appropriate. This additional time will allow the Region to complete the coordination described above, make a final decision on the NPDES permit appeal, and chart a path forward for responding to the concerns raised by the Tribal Leadership. In doing so, the Region will ensure that it conforms to the principles and procedures in the *Region 8 Policy* and continues to advance the policies established in the 2011 *EPA Policy on Consultation and Coordination with Indian Tribes*.¹

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 the Agency to respond to the concerns it has raised 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 31 days after the end of the

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

current stay, or until Monday, October 4, 2021. The Region proposes to provide a status report to the Board on Monday, September 27, 2021, detailing the acting Regional Administrator's final decision as to how to proceed with this NPDES permit appeal, describing the Agency's proposed course of action for responding to the Tribe's environmental justice concerns, 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 disputes the existence and relevance of the Tribe's environmental concerns to issuance of a NPDES permit under the Clean Water Act. While Petitioner further indicated that it does not oppose the EPA's request for stay, its preference is simply that EPA withdraw NPDES Permit No. SD-0034606 (one of the two alternatives being considered by EPA) in order to allow EPA enough time to address the concerns of Petitioner and the Tribe.

Statement of Compliance with Word Limitations

The undersigned attorney hereby certifies that the Region's Fifth 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,

[Paul Logan for Everett Volk]

Everett Volk
Senior Assistant Regional Counsel
EPA Region 8
1595 Wynkoop St.

Mail Code: 8ORC-LC-M
Denver, CO 80202
303-312-7290
volk.everett@epa.gov

Of Counsel:

Alec Mullee, Attorney-Advisor
Water Law Office, Office of General Counsel
U.S. Environmental Protection Agency
Washington, DC 20004

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Fifth 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 27th day of August, 2021:

Scott G. Knudson
Andrew S. Dossdall
Taft Stettinius & Hollister LLP
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
sknudson@taftlaw.com
adosdall@taftlaw.com

[Paul Logan for Everett Volk]

Everett Volk
Senior Assistant Regional Counsel
EPA Region 8

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