

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

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901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

Wamego Sand Company, Inc., d/b/a)
Midwest Concrete Materials Company)
701 South 4th Street)
Manhattan, Kansas 66505)

Respondent)

Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))

Docket No. CWA-07-2009-0104

CONSENT AGREEMENT/
FINAL ORDER

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and Wamego Sand Company, Inc., d/b/a Midwest Concrete Materials Company (Respondent) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

ALLEGATIONS

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22.

2. This Consent Agreement and Final Order (CAFO) serves as notice that EPA has reason to believe that Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. § 1311 and § 1342, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is

vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7(Complainant).

4. Respondent is Wamego Sand Company, Inc., d/b/a Midwest Concrete Materials Co., a corporation incorporated under the laws of Kansas and authorized to conduct business in the State of Kansas.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, inter alia, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section.

6. The CWA prohibits the discharge of "pollutants" from a "point source" into a "navigable water" of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

7. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of stormwater. Section 402(p) of the CWA, requires, in part, that a discharge of stormwater associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA.

8. Pursuant to Section 402(p) of the CWA, EPA promulgated regulations setting forth the NPDES permit requirements for stormwater discharges at 40 C.F.R. § 122.26.

9. 40 C.F.R. § 122.26(a)(1)(ii) and 122.26(c) requires dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

10. 40 C.F.R. § 122.26(b)(14)(ii) defines "stormwater discharge associated with industrial activity", in part, as facilities classified as Standard Industrial Classification 32 (Stone, Clay, Glass, and Concrete Products).

11. The Kansas Department of Health and Environment (KDHE) is the state agency with the authority to administer the federal NPDES program in Kansas pursuant to Section 402 of the CWA. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

12. KDHE implemented a General Permit for the discharge of stormwater under the NPDES, on September 1, 2006. The permit governs stormwater discharges associated with

industrial activity for asphalt plants, concrete batch plants, crushing plants and construction sand and gravel facilities.

Factual Background

13. Respondent is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. At all times relevant to this action, Respondent was the owner and/or operator of a facility known as Midwest Concrete Materials Company, located at 701 South 4th Street, Manhattan, Kansas, 66505 (the Facility) with SIC codes of 3273, 1442 and 1794.

15. Stormwater, snow melt, surface drainage and runoff water leaves Respondent's facility and flows into an unnamed tributary of the Kansas River. The runoff and drainage from Respondent's facility is "stormwater" as defined by 40 C.F.R. § 122.26(b)(13).

16. Stormwater contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

17. The Site has "stormwater discharges associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14)(x), and is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

18. Respondent discharged pollutants into a tributary of the Kansas River. The Kansas River is a "navigable water" as defined by CWA Section 502, 33 U.S.C. § 1362.

19. Stormwater runoff from Respondent's industrial activity results in the addition of pollutants from a point source to navigable waters, and thus is the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

20. Respondent's discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(ii), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

21. Respondent applied for and was issued NPDES permit coverage under the general permit described in Paragraph 12 above. KDHE issued the Respondent NPDES Permit No. KSG110127, which became effective on October 1, 2007. The permit governs stormwater discharges associated with industrial activity.

22. On June 26, 2008, EPA performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the management of stormwater at the site in accordance with the CWA.

Findings of Violation

Count 1

Failure to Comply with Effluent Limitations

23. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

24. Part A of Respondent's NPDES permit establishes the discharge limit for pH as 6.0 to 9.0 Standard Units ("SU").

25. The EPA inspection referenced in Paragraph 22 above, documented that Respondent had violated the effluent limitations of Respondent's NPDES permit. A review of the Respondent's Discharge Monitoring Reports (DMRs) revealed that Respondent's discharge exceeded the effluent limitation for pH as follows:

<u>Date</u>	<u>pH Limit</u>	<u>Reported pH Value</u>
February 2005	6.0 to 9.0 SU	11.4 SU
June 2005	6.0 to 9.0 SU	12.4 SU
September 2005	6.0 to 9.0 SU	12.4 SU
December 2005	6.0 to 9.0 SU	12.3 SU
March 2006	6.0 to 9.0 SU	12.4 SU
August 2006	6.0 to 9.0 SU	12.3 SU
November 2006	6.0 to 9.0 SU	12.2 SU
December 2006	6.0 to 9.0 SU	12.3 SU
February 2007	6.0 to 9.0 SU	12.1 SU
July 2007	6.0 to 9.0 SU	12.0 SU
September 2007	6.0 to 9.0 SU	12.0 SU
December 2007	6.0 to 9.0 SU	12.3 SU
March 2008	6.0 to 9.0 SU	12.4 SU
June 2008	6.0 to 9.0 SU	12.3 SU
October 2008	6.0 to 9.0 SU	9.5 SU

26. Part A of Respondent's NPDES permit establishes a discharge limit for TSS of 100 mg/L.

27. The EPA inspection referenced in Paragraph 22 above, documented that Respondent had violated the effluent limit violations of Respondent's NPDES permit. A review of the Respondent's DMRs revealed that Respondent's discharge exceeded the effluent limitation for TSS as follows:

<u>Date</u>	<u>Limit</u>	<u>Reported Value</u>
November 2006	100 mg/L	664 mg/L
December 2006	100 mg/L	185 mg/L
December 2007	100 mg/L	131 mg/L
June 2008	100 mg/L	181 mg/L

28. Part A of Respondent's NPDES permit establishes the discharge limit for Oil and Grease (O/G) of 15 mg/L.

29. The EPA inspection referenced in Paragraph 22 above, documented that Respondent had violated the effluent limit violations of Respondent's NPDES permit. A review of the Respondent's DMRs revealed that Respondent's discharge exceeded the effluent limitation for O/G as follows:

<u>Date</u>	<u>Limit</u>	<u>Reported Value</u>
July 2007	15 mg/L	15.5 mg/L

30. Respondent's discharge of pH, TSS and O/G in excess of the permit limit is a violation of the terms and conditions of the Respondent's NPDES permit, and as such is a violation of Sections 301(a) and 402 of the CWA, 22 U.S.C. § 1311(a) and § 1342, and implementing regulations.

Count 2

Failure to Comply with Sampling, Reporting and Recordkeeping Requirements

31. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

32. Part A of Respondent's NPDES Permit states that if a discharge occurs at any time during any monitoring period, the Respondent shall sample and test the discharge according to the requirements in the table of Part A of Respondent's NPDES permit.

33. The EPA inspection referenced in Paragraph 22 above, documented that Respondent had violated the sampling requirements of Respondent's NPDES permit. A review of the Respondent's DMRs revealed that Respondent failed to sample for sulfate and chloride for the second, third and fourth quarters of 2005.

34. Respondent's failure to sample discharges quarterly for all parameters is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and implementing regulations.

35. Part C, Section 7 of the Respondent's NPDES Permit requires the facility to submit a written notification to KDHE within five days of becoming aware of any noncompliance with the

daily maximum discharge limits listed in the permit.

36. EPA's review of the documentation submitted to KDHE revealed that Respondent failed to notify KDHE of pH, TSS and O/G permit exceedances within five days of becoming aware of the noncompliance from 2005 to 2008.

37. Respondent's failure to notify KDHE of permit exceedances within five days of becoming aware of noncompliance is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and implementing regulations.

38. Part C, Section 5 of Respondent's NPDES permit requires that the records and information resulting from monitoring required by Respondent's permit be retained for a minimum of three years.

39. The EPA inspection referenced in Paragraph 22 above, revealed that the Respondent failed to maintain records of monitoring reports on-site for the years 2005, 2006, and 2007.

40. Respondent's failure to maintain records of monitoring reports for a minimum of three years is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and implementing regulations.

Count 3

Failure to Amend Stormwater Pollution Prevention Plan ("SWPPP")

41. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

42. Part B, Section 9 of Respondent's NPDES Permit states that Respondent's SWPPP shall be re-evaluated and modified if inspection or monitoring of stormwater discharges indicates that the SWPPP appears to be ineffective in eliminating or significantly minimizing the discharge of pollutants from the facility.

43. The EPA inspection referenced in Paragraph 22 above, revealed that pollutants were being discharged from Respondent's facility. Respondent's SWPPP had not been amended to eliminate or significantly minimize pollutants from leaving the facility.

44. Respondent's failure to amend the requirements of Respondent's SWPPP is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and implementing regulations.

Count 4

Failure to Implement Stormwater Pollution Prevention Plan

45. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

46. The EPA inspection referenced in Paragraph 22 above, revealed that the Respondent failed to document employee training from 2005 to 2008, as required by Respondent's SWPPP. In addition, Respondent failed to send out the annual reminder to employees on spill prevention from 2005 to 2008, as required by Respondent's SWPPP.

47. Respondent's failure to implement the requirements of Respondent's SWPPP is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and implementing regulations.

Count 5

Failure to Document Facility Inspections

48. The facts stated in Paragraphs 13 through 22 above are herein incorporated.

49. Part B, 10 of Respondent's NPDES Permit requires Respondent to inspect the facility's system of stormwater controls on a quarterly basis and within 24 hours after any rainfall event of 2 inches or more or other event which could reasonably be expected to affect the integrity of the controls.

50. Part B, 10 of Respondent's NPDES Permit requires Respondent to complete an information report for each inspection which shall include: the inspection date; inspection personnel, scope of the inspection, major observations, and revisions needed in the SWPPP. The report shall be maintained on site as part of SWPPP for inspection by EPA or KDHE personnel.

51. The EPA inspection referenced in Paragraph 22 above, revealed that Respondent failed to document inspections of stormwater controls from June 2005 to June 2008, as required by Respondent's NPDES permit.

52. Respondent's failure to document facility inspections and retain such documentation in accordance with permit requirements is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p), and implementing regulations.

CONSENT AGREEMENT

53. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order assessing an administrative penalty against the Respondent for the violations cited above, in the amount of \$95,000.

54. Respondent and EPA agree to the terms of this CAFO and Respondent agrees to comply with the terms of the Final Order portion of this CAFO.

55. Respondent admits the jurisdictional allegations of this CAFO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CAFO.

56. Respondent neither admits nor denies the factual allegations and legal conclusions asserted by EPA in the Factual Background and Findings of Violation sections set forth above.

57. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal the Final Order portion of this CAFO.

58. Respondent and Complainant agree to conciliate the matters set forth in this CAFO without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.

59. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

60. Nothing contained in the Final Order portion of this CAFO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

61. This CAFO addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

62. Respondent certifies by the signing of this CAFO that to the best of its knowledge, Respondent's facility is in compliance with all requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

63. The effect of settlement described in Paragraph 61 above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 62 above, of this CAFO.

64. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty of \$95,000 as set forth in Paragraph 1 of the Final Order.

65. Respondent understands that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

FINAL ORDER

Payment Procedures

Pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and according to terms of this CAFO, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Ninety-Five Thousand Dollars (\$95,000) to be paid in full no later than 30 days after the effective date of this CAFO.

2. Pursuant to 40 C.F.R. § 13.18, failure to make any payment according to the above schedule will automatically accelerate the debt which will become due and owing in full, immediately. Interest on any late payment will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs and interest.

3. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

This payment shall reference docket number CWA-07-2009-0104.

Copies of the check shall be mailed to:

Kristen Nazar
Assistant Regional Counsel
U.S. Environmental Protection Agency – Region 7
901 North 5th Street
Kansas City, Kansas 66101

and to

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

4. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CAFO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Parties Bound

5. This Final Order portion of this CAFO shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this CAFO.

General Provisions

6. Notwithstanding any other provision of this CAFO, EPA reserves the right to enforce the terms of the Final Order portion of this CAFO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

7. Complainant reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this CAFO.

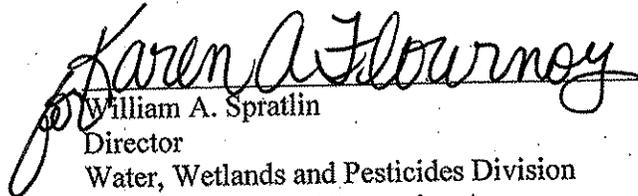
8. This Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

9. Respondent and Complainant shall bear their respective costs and attorney's fees.

10. The headings in this CAFO are for convenience of reference only and shall not affect interpretation of this CAFO.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

9/28/09
Date



William A. Spratlin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region 7

9/28/2009
Date

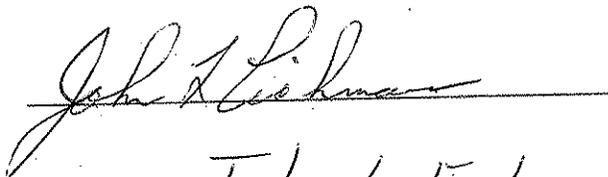


Kristen Nazar
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7

RESPONDENT:
WAMEGO SAND COMPANY, INC., d/b/a
MIDWEST CONCRETE MATERIALS COMPANY

8/17/09

Date



Name (Print) John L. Eichman

Title President

IT IS SO ORDERED. This Final Order shall become effective immediately.



Robert Patrick
Regional Judicial Officer

September 28, 2009
Date

IN THE MATTER OF Wamego Sand Company, Inc., d/b/a Midwest Concrete Materials
Company, Respondent
Docket No. CWA-07-2009-0104

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement/ Final Order
was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Kristen Nazar
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

John L. Eichman, President
Wamego Sand Company, Inc.
D/b/a Midwest Concrete Materials Company
701 South 4th Street
Manhattan, Kansas 66505

Dated: 9/28/09



Kathy Robinson
Hearing Clerk, Region 7