

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BLVD.
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2020-0130
NEBCO, Inc.)	
)	COMPLAINT AND
&)	CONSENT AGREEMENT/
)	FINAL ORDER
Concrete Industries, Inc.,)	
)	
Respondents.)	
)	
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

COMPLAINT

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 (“Consolidated Rules”), 40 C.F.R. Part 22.

2. Complainant, the U.S. Environmental Protection Agency Region 7 (“EPA”) and Respondents, NEBCO, Inc. and Concrete Industries, Inc., d/b/a Concrete Industries Nebraska City (“Respondents”), 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) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. This Complaint and Consent Agreement/Final Order serves as notice that the EPA has reason to believe that the Respondents have violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311, 1342, and regulations promulgated thereunder.

Parties

4. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority under Section 309(g) to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (collectively referred to as the “Complainant”).

5. Respondents are and were at all relevant times corporations under the laws of the state of Nebraska.

Statutory and Regulatory Framework

6. 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 in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.

7. 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.

8. 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 comply with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA.

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

10. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

11. 40 C.F.R. § 122.26(b)(14) defines “stormwater discharge associated with industrial activity,” as “the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw material storage areas at an industrial plant,” and includes “storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water.” Further, 40 C.F.R. § 122.26(b)(14) defines “material handling activities” to “include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product.” 40 C.F.R. § 122.26(b)(14) further provides that a storm water

discharge “does not include discharges from facilities or activities excluded from the NPDES program under this part 122.”

12. Included in the categories of facilities considered to be engaging in “industrial activity” are facilities under Standard Industrial Classifications (“SIC”) Industry Group 32. See 40 C.F.R. § 122.26(b)(14)(ii). SIC code 3273 specifically includes establishments primarily engaged in manufacturing portland cement concrete manufactured and delivered to a purchaser in a plastic and unhardened state.

13. The Nebraska Department of Environment and Energy (“NDEE”) is the state agency within the state of Nebraska that has been authorized by the EPA to administer the federal NPDES program pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and applicable implementing regulations.

14. Pursuant to Section 402(i) of the CWA, 33 U.S.C. § 1342(i), the EPA retains concurrent enforcement authority with authorized states for violations of the CWA.

EPA’s General Allegations

15. Respondents are each a “person,” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

16. At all times relevant for this action, Respondents were the owner(s) and/or operator(s) of a ready mixed concrete supply plant operating under SIC code 3273 and located at 918 East 4th Corso, Nebraska City, Nebraska 68410 (“ready-mix plant”), and a material storage area located approximately 0.5 miles south of the plant (“material storage area”), and accessed only by an interior facility road, together comprising approximately 15 acres (collectively, the “facility” or “site”).

17. The facility site is bordered to the east by the Missouri River. Stormwater, snow melt, surface drainage and runoff water leave Respondents’ facility and flow from several locations and into the Missouri River including: 1) outfall 001 on the northwest boundary of the ready-mix plant; 2) the material storage area generally south and east to an alleged unidentified outfall and approximately 430 yards into the Missouri River; or 3) the northeast portion of the material storage area approximately 80 yards down a sloped wooded area..

18. Stormwater from the site contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

19. The facility has alleged “stormwater discharges associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14), including alleged discharges from the ready-mix plant and the material storage area where stock piles of clean-out material from the truck wash pit at the ready-mix plant and recycled or crushed concrete and asphalt are stored and recycled.

20. Stormwater discharges associated with industrial activity are “point sources” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. The Missouri River is a “navigable water” as defined by Section 502(7) of the CWA, 33 U.S.C § 1362(7).

22. Stormwater runoff from industrial activity at Respondents’ above referenced facility 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).

23. Respondents’ discharge of pollutants, including discharges of stormwater 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.

24. On November 11, 2016, NDEE granted authorization to the facility under Nebraska General Permit number NER910191 for discharges of stormwater runoff to the Missouri River, subject to compliance with conditions and limitations set forth in the permit, (hereinafter “NPDES Permit”). This general permit was signed by NDEE and became effective on July 18, 2016 and expires on June 30, 2021.

25. On April 23 and 24, 2019, the EPA performed an Industrial Stormwater Inspection (“Inspection”) of Respondents’ site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate Respondents’ compliance with its NPDES Permit and the CWA.

26. During the Inspection, the EPA inspector reviewed Respondents’ records and obtained copies of Respondents’ documents related to the NPDES Permit, including, but not limited to, the facility’s stormwater pollution prevention plan (“SWPPP”), inspection records, and monitoring records. The EPA inspector also toured the facility, observed the alleged discharge locations, and photographed various stormwater-related areas.

27. A Notice of Potential Violation (“NOPV”) was issued by the EPA inspector at the conclusion of the Inspection.

28. A copy of the Inspection report was sent to Respondent Concrete Industries, Inc. by the EPA by letter dated June 18, 2019.

EPA’s Findings of Violation

Count 1

Unauthorized Discharges and Inadequate SWPPP

29. The facts stated above are re-alleged and incorporated herein by reference.

30. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with an NPDES permit.

31. Part 5 of Respondents' NPDES Permit requires the facility to develop and implement a SWPPP as a condition of the permit that identifies potential sources of pollution and describes and ensures the implementation of practices to reduce pollutants in storm water discharges from the facility. More specifically, Part 5.1.2 requires that the SWPPP provide a description of the nature of the industrial activities at the facility and a site map showing structural controls and stormwater outfalls, among other things. Part 5.1.3 of Respondents' NPDES Permit requires the SWPPP to document areas at the facility where industrial materials or activities are exposed to stormwater, and Part 5.1.4.1 requires the SWPPP to document the location and type of control measures and describe how the control measures address the pollutant sources identified pursuant to Part 5.1.3.

32. During the EPA Inspection, the inspector reviewed the facility's SWPPP and identified that it did not include the material storage area in the site map and did not identify activities, alleged outfalls, structural controls or other best management practices at the material storage area.

33. During the EPA Inspection, in the material storage area, the inspector observed and documented a lack of controls, evidence of the alleged stormwater runoff carrying materials from stockpiles, and storm water allegedly discharging through an alleged outfall not identified in the SWPPP.

34. At the time of the Inspection, the area northeast of the unidentified area, which is approximately 430 yards between the alleged outfall and the Missouri River, was flooded, and stormwater that the inspector observed discharging through the alleged outfall appeared to come into contact with water in the flooded area, which water was in contact with flood water from the Missouri River.

35. Based on observations and information collected from the EPA Inspection and aerial images obtained by the EPA, during significant precipitation events, EPA alleges that stormwater from the northeast portion of the material storage area discharges east to the Missouri River and stormwater from the remaining portion of the material storage area discharges south through the alleged unidentified outfall and then into the Missouri River under both flooded and non-flooded conditions.

36. Alleged unauthorized discharges and failure to identify the material storage area in the SWPPP are violations of the conditions of Respondents' NPDES permit and Sections 301(a) and/or 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 2
Failure to Implement SWPPP / Failure to Implement Adequate Controls

37. The facts stated above are re-alleged and incorporated herein by reference.

38. Part 5 of Respondents' NPDES Permit requires the SWPPP to document the selection, design, and installation of control measures, which are required by Part 2 to minimize pollutant discharges.

39. Part 2.1.2.2 of Respondents' NPDES Permit requires the facility to keep clean all exposed areas that are potential sources of pollutants by using good housekeeping measures, and Parts 2.1.2.5 and 2.1.2.6 require the facility to minimize erosion and contain and manage runoff to minimize pollutants in discharges. Part 2.1.2.3 of Respondent's NPDES Permit requires the facility to maintain all control measures in effective operating condition.

40. During the EPA Inspection, the inspector observed the following conditions, indicating that the SWPPP was not being implemented and/or appropriate controls were not being implemented and/or maintained:

- a. Inadequate controls in the material storage area;
- b. Failure to implement good housekeeping practices in the material storage area; and
- c. Inadequate controls at the ready-mix plant, including failure to prevent runoff from the site south of the fuel tank area, to contain all concrete washout and track wash waste material, and to maintain or repair a displaced gravel berm and gravel in drainageway.

41. Respondents' failure to implement the SWPPP and/or implement adequate stormwater management controls is a violation of the conditions of Respondents' NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 3

Failure to Adequately Perform and Document Routine Facility Inspections

42. The facts stated above are re-alleged and incorporated herein by reference.

43. Part 4.1.1 of Respondents' NPDES Permit requires Respondent(s) to conduct routine facility inspections of all areas of the facility where industrial materials or activities are exposed to stormwater and of all stormwater control measures at least quarterly. Part 4.1.2 of Respondents' NPDES Permit requires Respondent(s) to document the findings of each routine facility inspection, including, but not limited to, any control measures needing maintenance or repairs, any failed control measures that need replacement, any incidents of noncompliance observed, and any control measures needed to comply with the permit requirements.

44. A review of inspection reports provided by the facility during the EPA Inspection identified that not all potential sources of pollutants, control measures, outfalls, and/or evidence of unauthorized releases or discharges were inspected, and if they were, the observations documented were inaccurate, resulting in a failure to take corrective action in accordance with Part 3 of Respondents' NPDES Permit.

45. Respondents' failure to adequately perform and document routine facility inspections is a violation of the conditions of Respondents' NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Count 4
Failure to Perform and Adequately Perform and Document Quarterly Visual Assessments

46. The facts stated above are re-alleged and incorporated herein by reference.

47. Part 4.2.1 of Respondents' NPDES Permit requires Respondent(s) to collect a stormwater sample from each outfall and conduct a visual assessment of each sample once each quarter (i.e. "Quarterly Visual Assessments"). Parts 4.2.1 and 4.2.2 provide that if it is not possible to collect the sample within the first 30 minutes of discharge, the sample must be collected as soon as practicable after the first 30 minutes of discharge and you must document why it was not possible to take samples within the first 30 minutes. Part 4.3 of Respondents' NPDES Permit requires at least one quarterly visual assessment to capture snowmelt discharge.

48. Parts 4.2.1 and 4.2.2 of Respondents' NPDES Permit require Quarterly Visual Assessment documentation to include the results of visual inspection such as color and probable sources of any observed stormwater contamination, and that corrective action be taken in accordance with Part 3 of the NPDES Permit.

49. Part 5.4 of Respondents' NPDES Permit requires that permittees keep all inspection reports, including Quarterly Visual Assessments, together with the SWPPP to demonstrate full compliance with the conditions of the permit. Part 7.3 of Respondents' NPDES Permit requires that permittees keep documentation pursuant to Part 5.4 for at least 3 years following coverage under the permit.

50. A review of records during the EPA Inspection identified that the Quarterly Visual Assessments were not kept together with the SWPPP.

51. A review of three Quarterly Visual Assessment records provided during the EPA Inspection revealed that samples were not taken at all alleged outfalls, not collected within the first 30 minutes of discharge nor was a reason given for why it was not feasible to do so and did not include at least one quarterly visual assessment to capture snowmelt discharge. In addition, where the Quarterly Visual Assessment did note discoloration of the discharge sample, the record lacked any explanation of probable sources of contamination or documentation of corrective action.

52. Besides the Quarterly Visual Assessment records provided, Respondents failed to conduct and/or document or keep any Quarterly Visual Assessments for the entire calendar year of 2016, the first, third, and fourth quarters of 2017, first and fourth quarters of 2018, and first quarter of 2019.

53. Respondents' failure to perform, adequately perform, document and/or keep Quarterly Visual Assessments is a violation of the conditions of Respondents' NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

**Count 5
Failure to Perform Benchmark Monitoring**

54. The facts stated above are re-alleged and incorporated herein by reference.

55. Parts 6.2.1 and 8.E.4 of Respondents' NPDES Permit require concrete facilities to collect and analyze quarterly stormwater samples for benchmarks including monitoring for Total Suspended Solids (TSS) and Total Iron.

56. Respondents failed to perform benchmark monitoring for the entire calendar year of 2016, the first and fourth quarters of 2017, and the first and fourth quarters of 2018.

57. Respondents' failure to perform benchmark monitoring is a violation of the conditions of Respondents' NPDES Permit, and as such, is a violation of Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Penalty

58. As alleged by the EPA above, and pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted pursuant to 40 C.F.R. § 19.4, for violations that occurred after November 2, 2015, where penalties are assessed on or after January 13, 2020, Respondents are liable for civil penalties of up to \$22,320 per day for each day during which the violation continues, up to a maximum of \$278,995.

CONSENT AGREEMENT

59. Respondents and the EPA agree to the terms of this Consent Agreement/Final Order.

60. Respondents admit the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agree not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement/Final Order.

61. Respondents neither admit nor deny the factual allegations and legal conclusions asserted by the EPA in this Complaint and Consent Agreement/Final Order.

62. Respondents waive their right to contest any issue of fact or law set forth above, and their right to appeal this Consent Agreement/Final Order.

63. Respondents and Complainant agree to conciliate the matters set forth in this

Consent Agreement/Final Order 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.

64. The undersigned representatives of Respondents certify that they are fully authorized to enter the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondents to it.

65. Respondents understand and agree that this Consent Agreement/Final Order shall apply to and be binding upon Respondents and Respondents' agents, successors and/or assigns. Respondents shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondents with respect to matters included herein comply with the terms of this Consent Agreement/Final Order.

66. Respondents certify by the signing of this Consent Agreement/Final Order that the facility is in current compliance with its NPDES Permit and Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and applicable regulations.

Penalty Payment

67. Respondents agree that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondents shall pay a civil penalty of **Eighty Thousand Dollars (\$80,000)** pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to be paid in full no later than 30 days after the effective date of this Consent Agreement/Final Order as set forth below.

68. Respondents shall pay the penalty identified above by certified or cashier's check made payable to "Treasurer, United States of America," with a transmittal that identifies the case name, facility address, and docket number CWA-07-2020-0130 to:

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

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

69. Respondents shall simultaneously send copies of the transmittal letter and the check, as directed above, to the following:

Lisa Haugen
Regional Hearing Clerk
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219

and

Shane McCoin
Office of Regional Counsel
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219.

70. Respondents agree that no portion of the civil penalty or interest paid by Respondents pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by Respondents as a deduction for federal, state, or local income tax purposes.

71. Interest on any late payment will be assessed at the annual interest 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 or interest.

Effect of Settlement and Reservation of Rights

72. Respondents' payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and Consent Agreement/Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

73. The effect of settlement described above is conditional upon the accuracy of the Respondents' representations to the EPA, as memorialized in this Consent Agreement/Final Order.

74. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondents' obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

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

76. With respect to matters not addressed in this Consent Agreement/Final Order, the EPA reserves the right to take any enforcement action pursuant to the CWA and its implementing regulations, or any other available legal authority, including without limitation, the right to seek injunctive relief, penalties and damages.

General Provisions

77. The Parties acknowledge that this Consent Agreement/Final Order is subject to the 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.

78. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after signature by the authorized regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

79. The state of Nebraska has been provided an opportunity to consult with Complainant regarding this matter in accordance with the requirements of 40 C.F.R. § 22.38(b) and Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

80. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

81. Respondents and Complainant agree that this Consent Agreement/Final Order may be signed in part and counterpart.

For the Complainant, United States Environmental Protection Agency Region 7:

Date

David Cozad
Director
Enforcement and Compliance Assurance Division

Date

Shane E. C. McCain
Office of Regional Counsel

For the Respondent, NEBCO, Inc.:

Robert E. Caldwell
Signature

3-17-20
Date

Robert E. Caldwell
Name

SVP/CAO
Title

For the Respondent, Concrete Industries, Inc.:

Robert A. Nordquist
Signature

3/17/2019
Date

Robert A. Nordquist
Name

President
Title

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 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, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondents are ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date

Karina Borromeo
Regional Judicial Officer

IN THE MATTER OF
NEBCO, Inc. and Concrete Industries, Inc.
Docket No. CWA-07-2020-0130

CERTIFICATE OF SERVICE

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

Copy via email to Respondent:

Shannon Doering, Registered Agent, at shannond@nebcoinc.com

Copy via email to representatives for the Complainant:

Shane McCain, EPA Region 7 Office of Regional Counsel at mccoin.shane@epa.gov

Angela Acord, EPA Region 7 Enforcement and Compliance Assurance Division at
acord.angela@epa.gov

Copy via email to Nebraska Department of Environment and Energy:

Steve Goans, NDEE Water Management Division at steve.goans@nebraska.gov

Dated: _____

Lisa Haugen
Hearing Clerk, Region 7