

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7

901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

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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 4<sup>th</sup> Street )  
Manhattan, Kansas 66505, )

Respondent. )

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

Docket No. CWA-07-2009-0040

FINDINGS OF VIOLATION,  
ORDER FOR COMPLIANCE

Preliminary Statement

1. The following Findings of Violation and Order for Compliance (Order) are made and issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency (EPA) to the Regional Administrator, EPA, Region 7 and further delegated to the Director of Region 7's Water, Wetlands and Pesticides Division.

2. 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

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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).

9. 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.

10. KDHE implemented a General Permit for the discharge of storm water under the NPDES, on September 1, 2006. The permit governs storm water discharges associated with industrial activity for asphalt plants, concrete batch plants, crushing plants and construction sand and gravel facilities.

#### Factual Background

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

12. 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 4<sup>th</sup> Street, Manhattan, Kansas, 66505 (the Site) with SIC codes of 3273, 1442 and 1794.

13. 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).

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

15. 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).

16. 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.

17. 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).

18. 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.

19. Respondent applied for and was issued NPDES permit coverage under the general permit described in paragraph 10 above. KDHE issued the Respondent NPDES Permit No. I-KS38-PR02, which became effective on October 1, 2007. The permit governs storm water discharges associated with industrial activity.

20. 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**

21. The facts stated in paragraphs 11 through 20 above are herein incorporated.

22. Part A of Respondent’s NPDES permit establishes the discharge limit for pH as 6.0 to 9.0 Standard Units (“SU”).

23. The EPA inspection referenced in paragraph 20 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

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

25. The EPA inspection referenced in paragraph 20 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

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

27. The EPA inspection referenced in paragraph 20 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

28. 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**

29. The facts stated in paragraphs 11 through 20 above are herein incorporated.

30. 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.

31. The EPA inspection referenced in paragraph 20 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 the facility's discharges for all four quarters of 2004, the second quarter of 2006 and the second quarter of 2007. In addition, Respondent failed to sample for sulfate and chloride for the second, third and fourth quarters of 2005.

32. 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.

33. Part A of Respondent's NPDES permit requires the Respondent to submit DMRs to KDHE by January 28 of each year, regardless of whether there was a discharge for the entire year.

34. The EPA inspection referenced in paragraph 20 above, documented that Respondent had violated the submission requirements of Respondent's NPDES permit. A review of the Respondent's DMRs revealed that Respondent failed to submit their annual DMR for the year 2004 to KDHE, as required by Respondent's NPDES Permit.

35. Respondent's failure to submit their annual DMR to KDHE for the year 2004 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. The EPA inspection referenced in paragraph 20 above, revealed that the Respondent failed to maintain records of monitoring reports on-site for the years 2005, 2006, and 2007.

41. 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")**

42. The facts stated in paragraphs 11 through 20 above are herein incorporated.

43. 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.

44. The EPA inspection referenced in paragraph 20 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.

45. 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**

46. The facts stated in paragraphs 11 through 20 above are herein incorporated.

47. The EPA inspection referenced in paragraph 20 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.

48. 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 Perform and Document Facility Inspections**

49. The facts stated in paragraphs 11 through 20 above are herein incorporated.

50. 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.

51. 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.

52. The EPA inspection referenced in paragraph 20 above, revealed that Respondent failed to perform and document inspections of stormwater controls from 2005 to 2008, as required by Respondent's NPDES permit.

53. Respondent's failure to perform and 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.

#### Order For Compliance

54. Based on the Factual Background and Findings of Violation set forth above, and pursuant to the authority of Sections 308(a) and 309(a)(3) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a)(3), Respondent is hereby ORDERED to take the actions described in paragraphs 55 through 57.

55. Within thirty (30) days of the Effective Date, as defined in paragraph 64 herein, Respondent shall take all corrective action that is necessary to correct the deficiencies, eliminate

and prevent recurrence of the violations cited in this Order and to come into compliance with all of the applicable requirements of its Permit.

56. Within thirty (30) days of the effective date of this Order, Respondent shall submit a written report detailing the specific actions taken to correct the violations cited herein and explaining why such actions are anticipated to be sufficient to prevent recurrence of these or similar violations to EPA and the State of Kansas at the addresses listed in paragraphs 58 and 59 below.

57. In the event that Respondent believes complete correction of the violations cited herein is not possible within thirty (30) days of the effective date of this Order, Respondent shall, within those thirty (30) days, submit a comprehensive written plan for the elimination of the cited violations. Such plan shall describe in detail the specific corrective actions to be taken and why such actions are sufficient to correct the violations. The plan shall include a detailed schedule for the elimination of the violations within the shortest possible time, as well as measures to prevent these or similar violations from recurring.

#### **Submissions**

58. All documents required to be submitted to EPA by this Order, shall be submitted by mail to:

Dr. Delia Garcia  
Water Enforcement Branch  
U.S. Environmental Protection Agency - Region 7  
901 North Fifth Street  
Kansas City, Kansas 66101

59. A copy of documents required to be submitted to KDHE by this Order, shall be submitted by mail to:

Mr. Karl Muedener, Director  
Kansas Department of Health and Environment  
Bureau of Water  
1000 SW Jackson Street, Suite 420  
Topeka, Kansas 66612-1367

#### **General Provisions**

##### **Effect of Compliance with the Terms of this Order for Compliance**

60. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

61. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Section 309(b), (c), (d) or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act for any violation whatsoever.

#### **Access and Requests for Information**

62. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect Respondent's facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

#### **Severability**

63. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

#### **Effective Date**

64. The terms of this Order shall be effective and enforceable against Respondent upon the date signed by the Director, Water, Wetlands and Pesticides Division, EPA, Region 7.

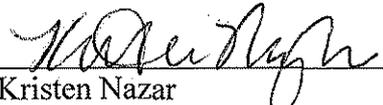
### Termination

65. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the U.S. Environmental Protection Agency. Such notice shall not be given until all of the requirements of this Order have been met.

Issued this \_\_\_\_\_ day of \_\_\_\_\_, 2009.



William A. Spratlin, Director  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency - Region 7  
901 North Fifth Street  
Kansas City, Kansas 66101



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

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Order for Compliance to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance by first class certified mail, return receipt requested, to:

Robert Eichman, Registered Agent  
Wamego Sand Company, Inc.  
d/b/a Midwest Concrete Materials Company  
701 South 4<sup>th</sup> Street  
Manhattan, Kansas 66502

And via first class mail to:

Mr. Karl Muedener, Director  
Kansas Department of Health and Environment  
Bureau of Water  
1000 SW Jackson Street, Suite 420  
Topeka, Kansas 66612-1367

3/27/09  
Date

Karl Muedener