

U.S. EPA Region 8 NPDES Inspection Report

National Database Information	
Inspection Date: May 15, 2024	Inspection Type: Compliance Evaluation Inspection
Entry / Exit Time: 08:30 / 11:30	NPDES ID: The site was unpermitted at time of the inspection, but had previously been covered under the EPA's Construction General Permit (CGP) under NPDES ID MTR10I034, with site-specific coverage effective beginning 5/31/2022 and terminated on 1/31/2024
Major / Non-Major Facility: Non-Major	NPDES Program Sector(s): Stormwater Industrial, Stormwater Construction
NAICS Code: 212321 (Construction Sand and Gravel Mining)	Inspection ID: 202405_MTR10I034
Lead inspector and affiliation: Akash Johnson / U.S. EPA Region 8	
Inspector and affiliation: Lisa-kay Prideaux / U.S. EPA Region 8	

Site/Facility Location Information	
Site/Facility Name & Location: Barnes Gravel Pit 45.667436, -107.665306 Big Horn County, Montana	Send Report to: Craig DeBuff, Project Engineer KLE Construction LLC craigd@kleconstruction.net see mailing addresses in cover letter

Inspection/Site Contacts	
	Name(s)/Title
Site/Facility Contacts	Ruth Barnes / Property Owner (present)
U.S. Army Corps of Engineers Contacts	Colten Shimer / Regulatory Project Manager / USACE (present)
	Jeremy Anderson / Senior Project Manager / USACE (present)
Tribal Government Contacts	Marvin (Wes) Stops, Jr. / Environmental Director / Crow Tribe (not present)

Permit/Site Information	
Permit on site and available: N/A – unpermitted at time of inspection	Permit Application Date: N/A – unpermitted at time of inspection
Effective Date: N/A – unpermitted at time of inspection	Expiration Date: N/A – unpermitted at time of inspection
Latitude: 45.667436	Longitude: -107.665306
Receiving Water(s): Onsite and downgradient wetland-type areas and drainages draining towards Cottonwood Creek, Two Leggins Canal, and the Bighorn River	
Weather Conditions: During inspection: partly cloudy, no precipitation	
Inspector's source of information: Property owner, EPA personnel, USACE personnel, EPA records and databases, USACE records and databases, facility records, Google Earth Pro, Montana Cadastral, inspection observations	

Areas Evaluated During Inspection		
<u>Permit</u>	Self-Monitoring Program	Pretreatment
<u>Records</u>	Compliance Schedule	<u>Pollution Prevention</u>
<u>Facility/Site Review</u>	Laboratory	<u>Stormwater</u>
<u>Effluent/Receiving Waters</u>	<u>Operations and Maintenance</u>	Combined Sewer Overflow
Flow Measurement	Sludge Handling/Disposal	Sanitary Sewer Overflow

Report Review and Signature		
Lead Inspector and Report Writer Name/Signature/Final Date		Contact Information
AKASH JOHNSON  Digitally signed by AKASH JOHNSON Date: 2024.09.27 13:15:30 -06'00'		U.S. EPA Region 8 Denver, Colorado johnson.akash@epa.gov (303) 312-6067
Reviewer Name	Review Date	Contact Information
Lisa-kay Prideaux	August 26, 2024	U.S. EPA Region 8 Helena, Montana prideaux.lisakay@epa.gov (406) 457-5022
Management Reviewer Name/Signature/Date		Contact Information
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Inspection Narrative and Site Description

1.0 Introduction

On Wednesday, May 15, 2024, I, U.S. Environmental Protection Agency (EPA) inspector Akash Johnson, and EPA inspector Lisa-kay Prideaux (collectively, “we”), conducted a compliance evaluation inspection of the Barnes Gravel Pit (site; facility), located in Big Horn County, Montana, within the exterior boundaries of the Crow Reservation (Reservation). A letter notifying the Crow Tribe of the EPA’s inspection presence on the Reservation was sent on April 14, 2024. The inspection was coordinated with the property owner and the U.S. Army Corps of Engineers (USACE) in advance. We were joined by the property owner, Ruth Barnes, and USACE representatives Colten Shimer and Jeremy Anderson for portions of the inspection as described herein.

The purpose of the inspection was to evaluate compliance with Clean Water Act (CWA) and National Pollutant Discharge Elimination System (NPDES) requirements. CWA Section 404 requirements were of interest to the USACE personnel present, but compliance with CWA Section 404 requirements was not evaluated by the EPA during the inspection and is not discussed in this report. Throughout the inspection, we took notes on our discussions and observations in bound logbooks. Photographs taken during the inspection are included in the enclosed photo log. The EPA camera used did not capture or save several photographs we intended to collect of one area of the site, discussed further in Section 4; however, this area was photographed by USACE personnel. A copy of the USACE photo log from this inspection is enclosed. The EPA has not verified any information in the USACE photo log. The USACE has not reviewed or verified any information in this report.

2.0 Site History and Mining Operations

The majority of information in this section citing Ruth Barnes was provided by Ruth Barnes during the inspection.

For the purposes of this report, the terms “site” or “facility” refer to the generally contiguous disturbed area where construction sand and gravel mining activities (mining activities) appear to have occurred, excluding a 4-acre parcel featuring a residential development south of the disturbed area (Figures 2 and 3). Based on information provided by Ruth Barnes and supported by a cursory review of information in Montana Cadastral, the site spans two parcels, both of which are owned by Ruth Barnes. Based on estimates made using the “Polygon” measurement tool in Google Earth Pro, the site appears to comprise approximately 40-acres.

As shown in Figure 1, the site was generally undeveloped prior to the commencement of KLE’s mining activities, excepting an approximately 5-acre area in the north-central portion of the site where, according to information provided by Ruth Barnes, historical sand and gravel mining activities occurred several decades prior. Historical mining activities on the property were not evaluated during the inspection.

According to Ruth Barnes, around 2020, she was approached by representatives from KLE Construction LLC (KLE), a construction contractor, inquiring about utilizing her property for mining activities to support KLE’s operations at a nearby Montana Department of Transportation (MDT) construction project comprising improvements to sections of Highway 313, and she subsequently entered into a lease agreement (discussed further in Section 5) allowing KLE use of the property for mining activities and subsequent reclamation. At the time of the inspection, reclamation of the site had not been completed, discussed further throughout this report.

Inspection Narrative and Site Description

According to Ruth Barnes, mining activities at the site began in spring 2021 and continued for around 2 years. Figure 2 shows an aerial image of the site during this timeframe (August 19, 2022). Based on information provided by Ruth Barnes, mining activities comprised typical construction sand and gravel mining and support activities, including excavating, crushing, staging, and road building. Ruth Barnes indicated she was not aware of any batch plants operating at the site. The EPA has not evaluated whether any dewatering activities may have occurred at the site.

According to information provided by Ruth Barnes, by around mid-2023, KLE ceased mining operations and left the site. At the time of the inspection (discussed further in Section 4.0), little to no reclamation of the site had been completed. Ruth Barnes indicated, based on her understanding of the lease agreement and discussions with KLE, she understood KLE would be responsible for reclaiming the site. No legal evaluation of this lease agreement or any other contract was performed by the EPA as part of this inspection. Ruth Barnes indicated, after KLE left the site, she attempted to contact them on multiple occasions to request they complete reclamation of her property, but she was not able to consistently contact KLE employees or attorneys and had not obtained any subsequent commitment or action from KLE related to reclamation of the site.

Ruth Barnes indicated, beginning January 2024, she had been allowing another construction contractor, Grizzly Construction, to purchase and haul away some of the stockpiled materials present at the site, but no additional mining, excavation, or earth disturbance had occurred since KLE's departure from the site. Figure 3 comprises an aerial image of the site after KLE's occupancy had ceased (October 21, 2023).

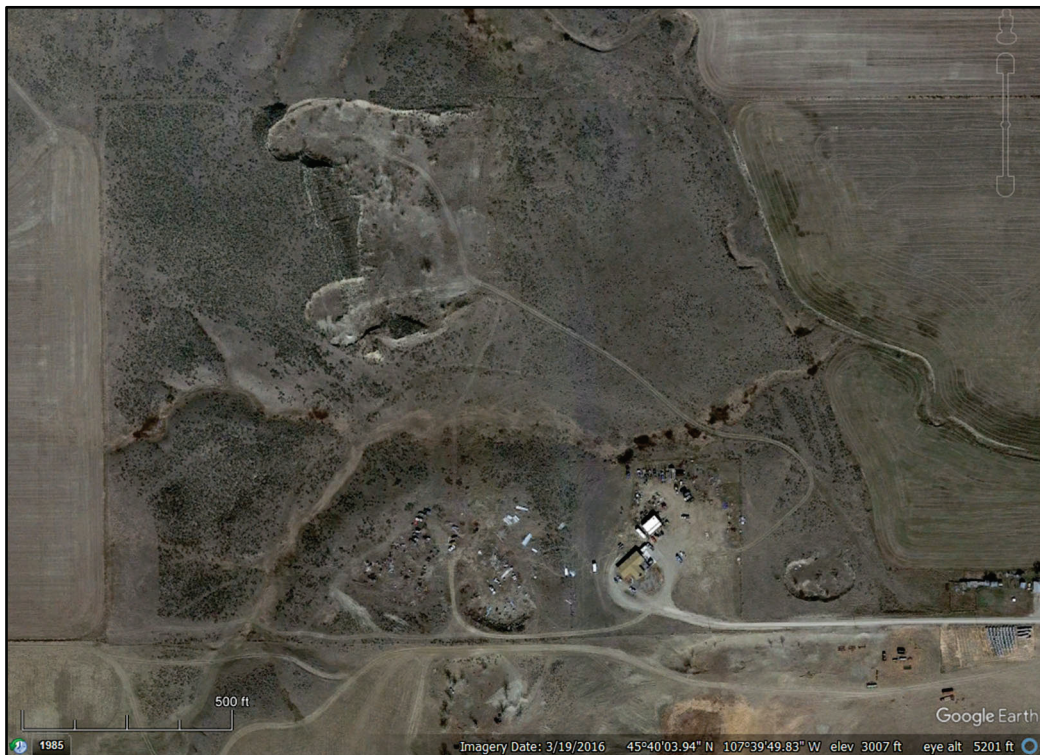


Figure 1. Aerial image of the site and surroundings, pre-mining
Imagery Date: March 19, 2016
Source: Google Earth Pro

Inspection Narrative and Site Description



Figure 2. Aerial image of the site and surroundings, presumably during mining
Imagery Date: August 19, 2022
Source: Google Earth Pro



Figure 3. Aerial image of the site and surroundings, post-mining
Imagery Date: October 21, 2023
Source: Google Earth Pro

Inspection Narrative and Site Description

3.0 Permitting History

On May 17, 2022, KLE submitted a Notice of Intent (NOI) for coverage under the EPA's NPDES Construction General Permit for Stormwater Discharges from Construction Activities (CGP). CGP coverage for the site automatically became effective on May 31, 2022 under site-specific NPDES ID MTR10I034. On January 31, 2024, KLE submitted a Notice of Termination (NOT) for site coverage under the CGP, identifying the reason for termination as, "Change of [c]ontrol over the site." CGP coverage for the site was automatically terminated upon NOT submission. The EPA is not aware of any change of control over the site corresponding with the timing of NOT submission.

The CGP may not have been an appropriate NPDES permit for discharges from the site while mining activities were occurring, discussed further in the Findings, Corrective Actions, and Recommendations Section. Excepting applicability, compliance with CGP requirements was not evaluated during the inspection.

Cursory searches of the EPA's internal Integrated Compliance Information System (ICIS) database and public Enforcement and Compliance History Online (ECHO) database performed prior to the inspection did not identify any other NPDES permits associated with the site.

During the inspection, USACE personnel indicated no CWA Section 404 permits had been obtained from the USACE for the site. As stated previously, compliance with CWA Section 404 requirements was not evaluated by the EPA during the inspection and is not discussed in this report.

4.0 Inspection Narrative and Site Description

The inspection began when we arrived onsite at approximately 08:30 AM and met with Ruth Barnes, Colten Shimer, and Jeremy Anderson. We convened near the center of the site and commenced an opening conference during which we asked questions pertaining to site history, mining activities, and NPDES permitting and compliance. Colten Shimer and Jeremy Anderson asked questions relating to CWA Section 404 requirements. Ruth Barnes shared much of the information previously discussed in Section 2 regarding site history, mining activities, and her engagement with KLE. Ruth Barnes indicated it was her understanding KLE would be responsible for obtaining and complying with any necessary permits and she was not familiar with any permits or environmental regulatory requirements potentially applicable to the site. From the central vantage point where we conducted our opening conference, Ruth Barnes identified various features of the site she indicated had been altered during KLE's mining activities. No activity was occurring at the site during our inspection and Ruth Barnes indicated site conditions during the inspection had remained generally unchanged since KLE left the site. Standing water was present in low-lying areas across the site. Ruth Barnes indicated some of the standing water was due to precipitation, but other areas of the site maintained standing water on a more long-term basis. What appeared to be frogs and/or toads were observed in various areas across the site.

Following the opening conference, Ruth Barnes left the site. We proceeded with the site review, accompanied by Colten Shimer and Jeremy Anderson. The northern portion of the site comprised a generally-level higher elevation area. The southern portion of the site comprised a lower elevation area where two drainages (impounded offsite during KLE's mining activities) converged into a central drainage draining to the east. Around the eastern extents of the site, the central drainage converged with a drainage approaching from the northwest identified in some mapping tools as Cottonwood Creek,

Inspection Narrative and Site Description

which appears to drain generally east. Impoundment and disturbance of drainages in the southern portion of the site is discussed further in this section, below.

The eastern portion of the site comprised a generally eastern-facing slope. One access road entered the site from the southeast and continued northwest until leveling out in the north-central portion of the site. Aerial imagery suggests two other access roads entered the site in the western portion of the southern site boundary (seen in Figure 2), but these roads were not observed in-detail during the inspection.

During and immediately following the opening conference, we attempted to photograph the southwestern portion of the site. As mentioned in Section 1, after the inspection, we realized the EPA camera used did not capture or save several photographs we intended to collect of this area; however, this area was photographed by USACE personnel. A copy of the USACE photo log from this inspection is enclosed. As stated in Section 1, the EPA has not verified any information in the USACE photo log.

We did not walk through the southwestern portion of the site due to dense vegetation and uneven terrain, but we observed it from higher elevation vantage points in the northern portion of the site. Based on inspection observations, information provided by Ruth Barnes during the inspection, and aerial imagery (see Figures 1-3), it appeared the two drainages converging in the southwest portion of the site had been impounded along the western and southern property boundaries, preventing water from flowing through these drainages onto the site. Earth disturbing activities had occurred in and around the two converging drainages and the resultant central drainage draining east through the southern portion of the site. Portions of the access roads entering the site from the south appear to have been developed using cut and fill processes.

After observing the southwestern portion of the site, we walked generally clockwise around the northern and eastern portions of the site. The northern portion of the site was generally bounded along the western and northern sides by inward-facing slopes and featured scattered material stockpiles (Photographs 54-56, 58-60, and 72). Scattered refuse, including a drum labeled "Used Oil," was present in the vicinity of standing water in one area along the northern site boundary (Photograph 57). We did not evaluate the contents or fullness of this drum during the inspection.

The eastern portion of the site comprised a disturbed east-facing slope and piles of what appeared to be mined materials and disturbed earth (Photographs 61-70 and 73). A stockpile of cleared trees and brush was located in the northeast portion of the site (Photograph 67¹). Multiple erosion rills several inches to over a foot deep were present in the slope along the eastern portion of the site (Photograph 73).

Overall, the site appeared to drain generally east, towards a central drainage that would flow east offsite, converging with another drainage approaching from the northwest identified in some mapping tools as Cottonwood Creek, which appears to drain generally east. All areas of the site appeared to have been disturbed within the past several years and were generally un-stabilized. We did not observe any indication of pollutant or stormwater control measures installed or implemented in any downgradient areas of the site.

¹ Photograph 71 has been omitted from the photo log due to privacy concerns because an individual was erroneously captured in the photograph; however, Photograph 71 captured generally the same area shown in Photograph 67.

Inspection Narrative and Site Description

We concluded the site review and left the site, parting ways with Colten Shimer and Jeremy Anderson. We then drove to Ruth Barnes's nearby residence to conduct a closing conference with her, where we asked follow-up questions and reviewed preliminary inspection findings. We then parted ways with Ruth Barnes.

After the closing conference, we drove back to the southeast site entrance and observed a pile of what appeared to be concrete drainage piping in the southeast corner of the site near the southeast access road (Photograph 74). We then drove to observe the drainage identified in some mapping tools as Cottonwood Creek draining east from the site as it crossed under the north-south oriented Keehler Road (road name unconfirmed) east of the site. No water was flowing through the drainage as it crossed under Keehler Road (Photographs 75 and 76). The inspection concluded when we left the area around 11:30 AM.

5.0 Post-Inspection Activities and Conclusion

After the inspection, Ruth Barnes emailed me a copy of a lease agreement between her and KLE. As stated previously, no legal evaluation of this lease agreement or any other contract was performed by the EPA as part of this inspection.

After the inspection, I attempted to contact several KLE representatives identified on CGP NOI and NOT but I was not able to reach anyone claiming to have knowledge of the site or to be currently working for KLE.

Findings, requested corrective actions, and recommendations identified pursuant to the inspection are identified in the section below.

Findings, Corrective Actions, and Recommendations

Finding 1:

During the period when KLE apparently exerted operational control over the site (presumably beginning in 2020 or 2021 and concluding in 2022 or 2023), the site may have discharged stormwater containing pollutants associated with industrial activities, notably, construction sand and gravel mining, to waters of the United States, without proper NPDES permit authorization.

The site was covered under the EPA's CGP between May 31, 2022 and January 31, 2024; however, the CGP may not have been the most appropriate NPDES permit for site discharges during these times. Rather, the EPA's Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP), Sector J: Mineral Mining and Dressing, (Sub-sector J1: SIC Code 1442 – Construction Sand and Gravel; NAICS Code 212321 – Construction Sand and Gravel Mining) may have been a more appropriate NPDES permit for these discharges.

On January 31, 2024, KLE submitted a Notice of Termination (NOT) for site coverage under the CGP, identifying the reason for termination as, "Change of [c]ontrol over the site." CGP coverage for the site was automatically terminated upon NOT submission. The EPA is not aware of any change of control over the site corresponding with the timing of NOT submission.

Findings, Corrective Actions, and Recommendations

Statutory Requirements:

In order to restore and maintain the integrity of the nation's waters, section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person into waters of the United States, unless authorized by certain other provisions of the CWA, including section 402 of the CWA, 33 U.S.C. § 1342.

Section 402 of the CWA, 33 U.S.C. § 1342, establishes the NPDES program, under which the EPA, and states with authorization from the EPA, may permit discharges of pollutants into navigable waters, subject to specific terms and conditions.

Regulatory Requirements:

40 C.F.R. § 122.26 outlines NPDES permit applicability for discharges of stormwater, including discharges associated with industrial activity, which includes mining and construction.

NPDES Permitting Requirements:

Part 1.1.2.3 of the MSGP indicates stormwater discharges associated with construction activity disturbing one acre or more, or that are part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more, can be covered under the MSGP if such discharges are "in conjunction with mining activities or certain oil and gas extraction activities as specified in Sectors G, H, I, and J of this permit."

The Fact Sheet for the MSGP states, "The 2021 MSGP does not apply to stormwater discharges associated with construction activity, defined in 40 CFR 122.26(b)(14)(x) and (b)(15), which acknowledges the distinction between construction and other types of stormwater discharges associated with industrial activity. *An exception to this is for construction associated with mining activities* [emphasis added], where operators in Sectors G, H and J are able to cover earth-disturbing activities in the MSGP in lieu of obtaining separate coverage under the [CGP] (EPA included the salient earth disturbance-related requirements for the mining sectors in Part 8 [of the MSGP]). However, for mining-related construction that disturbs less than one acre in size, such discharges are covered by the regular MSGP (i.e., the requirements that are not expressly for earth-disturbances). The mining-related construction exception provides a more streamlined approach for mining operators preferring to be covered by one permit, instead of two."

Information on the EPA's MSGP can be found online here: <https://www.epa.gov/npdes/stormwater-discharges-industrial-activities-epas-2021-msgp>

General information on the NPDES permitting program can be found online here: <https://www.epa.gov/npdes/npdes-permit-basics>

Corrective Action 1:

Provide a description of the change in control over the site that prompted KLE to submit a NOT for the CGP on January 31, 2024.

Findings, Corrective Actions, and Recommendations
Corrective Action 2: Evaluate whether the site should have been or should still be covered under the MSGP or any other potentially applicable NPDES permits resulting from KLE’s activities at the site. In a response to the EPA, provide a narrative explaining the outcome of this evaluation and any steps KLE has taken or is taking to ensure compliance with applicable CWA and NPDES requirements.
Recommendation: Confer with USACE representatives familiar with CWA Section 404 requirements on whether such requirements may be applicable to KLE’s activities at the site. The USACE Regulatory Office in Billings, Montana may be reached via phone at (406) 657-5910. Additional information is available at: https://www.nwo.usace.army.mil/Missions/Regulatory-Program/Montana/
Recommendation: Safely evaluate the contents of the drum labeled as “Used Oil” present along the northern site boundary (Photograph 57). Minimize the potential for pollutants to impact surface water, soils, and groundwater in the vicinity of the site. If appropriate, safely dispose of or relocate this drum.